Marital Dissolution Planning
and
Crowdfunding

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Marital Dissolution Planning Post TCJA

By: Sidney Kess, CPA, J.D., LL.M.

The IRS reports that nearly 600,000 taxpayers claimed an alimony deduction on their 2015 returns (the most recent year for statistics) (https://www.irs.gov/pub/irs-soi/soi-a-inpd-id1703.pdf). The Tax Cuts and Jobs Act of 2017 (TCJA) (P.L. 115-97) made important changes in the tax rules for alimony. These changes have a ripple effect throughout the tax law, impacting a number of other provisions. Here are the basic rules for alimony and their impact on other tax provisions in light of TCJA.

Alimony

Currently, payments that meet the definition of "alimony" under Code Sec. 71 are deductible by the payer and includible in gross income by the recipient. There are no dollar limits on these amounts. These rules continue to apply to payments under divorce or separation agreements executed before January 1, 2019.

However, alimony will not be deductible, or includible in the recipient's gross income, for any divorce or separation instrument executed after December 31, 2018, as well as those executed earlier but modified after 2018 expressly providing that the repeal of qualified alimony and separate maintenance rules apply. In effect, those with post-2018 divorces will see alimony treated the same as child support (i.e., nondeductible by the payer and nontaxable to the recipient).

Clearly, this tax law change will impact negotiations for alimony payments for new marital dissolutions. Those considering modifications of existing arrangements have leeway in their course of action. They can continue to apply the old rules unless they agree to have the new rules apply by expressly referencing the TCJA deduction repeal. Reasons to consider opting for TCJA treatment include changes in the income levels of the payer and/or recipient. For example, the payer may be in a lower bracket and won't benefit greatly from a deduction, or the recipient may be in a higher bracket and prefer tax-free income.

Any modifications should take the "recapture rule" into account. This rule requires the payer to recapture (i.e., report as income) some amounts previously deducted. The rule is triggered when alimony paid in the third year of the first three-year period is more than $15,000 less than in the second year or if the alimony paid in the second and third years decreases significantly from the amount paid in the first year. This rule has not been changed by the TCJA.

It should also be noted that post-2018 decrees and agreements do not have to conform to the definition of alimony. Whereas deductible alimony payments under pre-2019 decrees and agreements must be in cash, payments to a spouse or former spouse under post-2018 decrees and agreements need not be in cash. It would seem, for example, that a transfer from a qualified retirement plan pursuant to a qualified domestic relations order (QDRO) may be used to make a lump-sum alimony payment by the payer. In the same vein, perhaps stock or realty could be used to satisfy a lump-sum alimony payment. And it would not matter whether payments end on the death of the recipient.

Child Support
The tax treatment of child support has not been changed by the TCJA. Payments are not deductible by the payer or taxable to the recipient (Code Sec. 71(c)).

Dependency exemptions. The dependency exemption applies for 2017 returns. The custodial parent can waive the dependency exemption to allow the noncustodial parent—often the person providing the child support—to claim the exemption. This waiver is made on Form 8332, *Release/Revocation of Release of Claim to Exemption for Child By Custodial Parent.*

The TCJA suspends the dependency exemptions for 2018 through 2025. Despite this suspension, the concept of a dependent remains viable through these years for various tax provisions (e.g., child tax credit) and should not be overlooked.

Existing divorce agreements likely have factored in the tax benefit for dependency exemptions, as well as the tax rates that the payer is subject to. In other words, one parent may have agreed to pay a certain amount with the understanding that he/she could claim an exemption for the child. For example, in 2017, the $4,050 exemption amount saves a parent in the top tax bracket more than $1,600 in taxes. If the parties renegotiate agreements after 2018 to make changes in child support, it is important to note the impact of the language on alimony (i.e., whether the parties opt for pre-2019 treatment for alimony).

Child tax credit. For purposes of the child tax credit (Code Sec. 24), which was greatly expanded, a taxpayer can claim a credit for a:

• *Qualifying child*. The child (the taxpayer's child, sibling, or descendant) must be under age 17 by the end of the year and not provide more than half of his/her support. Usually the child must live with the taxpayer for more than half the year but there is an exception in the case of divorce. The credit is up to $2,000; up to $1,400 can be refundable.

• *Qualifying dependent*. This can be a qualifying relative of any age as long as he/she would qualify as a dependent under the old dependency rules (Code Sec. 152(b)) (e.g., a taxpayer's child who is over age 17). The nonrefundable credit is up to $500.

Education. Another change by the TCJA is the ability to use up to $10,000 annually from a 529 plan to pay for elementary and secondary school. Those with agreements requiring a parent to pay out of pocket for these costs may need to be revisited.

IRAs
IRAs continue to be an asset that can be addressed in a marital dissolution. The rules have not been changed by the TCJA. Courts may direct the account owner to transfer some or all of the funds to the spouse or former spouse. The transfer is not taxable to the account owner if it's made pursuant to a court order and done by directly transferring a fixed dollar amount or percentage of the account to the spouse's IRA or by setting up a new IRA to which these funds are transferred. If there's a court order but the account owner transfers funds to his/her checking account and then writes a check to the spouse, the account owner is taxable (*see Kirkpatrick,* TC Memo 2018-20).

A recipient of taxable alimony can count it as income for purposes of making an IRA contribution. Thus, a nonworking individual receiving alimony in 2018 can base an IRA contribution on alimony payments. In 2019, those receiving alimony under a divorce or agreement finalized before 2019 can continue to treat the taxable alimony as compensation for purposes of IRA contributions.

However, for those who receive nontaxable alimony starting in 2019, the opportunity to make IRA contributions based on alimony payments no longer exists.

Conclusion

It will be busy for matrimonial attorneys with clients who want to finalize agreements before 2019 as well as for those who may want to delay the process. There is much to consider for these individuals and their families…and taxes should be an important factor is reaching a marital dissolution.

Executive Editor Sidney Kess is CPA-attorney, speaker and author of hundreds of tax books. The AICPA established the Sidney Kess Award for Excellence in Continuing Education in his honor, best-known for lecturing to over 700,000 practitioners on tax. Kess is senior consultant for Citrin Cooperman, consulting editor to CCH and Of Counsel to Kostelanetz & Fink.

Is Crowdfunding Easy Money or Tax Trap for the Unwary

By: Kathleen M. Lach

It has become fairly common these days for individuals and businesses to raise funds for various purposes through a mechanism referred to now as "crowdfunding." Whether for a charitable cause such as a medical need or to raise funds for a start-up business, social media has made it easy to reach a broad range of people in order to request money for a cause.

To initiate a crowdfunding effort, the individual or entity generally enlists the assistance of an established platform, such as Kickstarter or GoFundMe. During the set-up process, the fund raiser will in most cases be asked to complete tax forms which will be provided to the IRS, such as a W-9 or W-8. At the conclusion of this effort, Form 1099-K will be issued from the payment processor to the platform, if certain thresholds are met, and a Form 1099-K may be issued to the fund raiser, if certain thresholds are met. At the end of the day, your client will come to you with the Form 1099-K and ask you why he received it, and now, how does this impact his tax obligations.

A determination on whether funds raised during this effort are taxable turns, of course, on the purpose of the effort. If the funds are raised in connection with a business start-up, or to determine the feasibility of a business venture, there may be tax consequences, depending on what consideration is given for the contribution. If the funds are contributed for a charitable cause, taxability depends on the amount of the contribution, and to whom the funds were given. In certain circumstances, funds may be contributed directly to a certified charitable organization on behalf of an individual, which may result in a contribution deduction for the donor, and no impact on the individual.

There is little IRS guidance available specifically on the issue of taxability of funds received though crowdfunding. The IRS did issue Information Letter 2016-36 (IL) in response to a taxpayer's request for guidance in the business contribution arena. The IL generically refers to the general tax law principles of IRC §61: "Gross income includes all income from whatever source derived." It goes on to say:

"In general, money received without an offsetting liability (such as a repayment obligation), that is neither a capital contribution to an entity in exchange for a capital interest in the entity nor a gift, is includible in income. The facts and circumstances of a particular situation must be considered to determine whether the money received in that situation is income. What that means is that crowdfunding revenues generally are includible in income if they are not 1) loans that must be repaid, 2) capital contributed to an entity in exchange for an equity interest in the entity, or 3) gifts made out of detached generosity and without any "quid pro quo." However, a voluntary transfer without a "quid pro quo" is not necessarily a gift for federal income tax purposes. In addition, crowdfunding revenues must generally be included in income to the extent they are received for services rendered or are gains from the sale of property."

So generally, if the funds raised are for a charitable purpose such as a medical need, funeral, or other personal need of an individual or family, there are no tax consequences if the individual

"gifts" are below the IRS threshold for the gift tax annual exclusion. In these cases, the contributor expects nothing in return for his contribution.

If funds raised, for example, are for a start-up business, and the contributor receives an equity interest in the enterprise, the funds may be treated as a capital contribution. If the contributor receives something in exchange for the funds, there will likely be income tax consequences, as well as state sales tax consequences for the fund raiser. These situations most commonly arise in connection with test marketing a product through a crowdfunding platform.

The issuance of Form 1099-K as a result of the type of revenue generating activity discussed above is governed by IRC §6050W, "Returns relating to payments made in settlement of payment card and third party network transactions." A Form 1099-K must be filed under the following circumstances: "A payment settlement entity (PSE) must file Form 1099-K for payments made in settlement of reportable payment transactions for each calendar year. A PSE makes a payment in settlement of a reportable payment transaction, that is, any payment card or third party network transaction, if the PSE submits the instruction to transfer funds to the account of the participating payee to settle the reportable payment transaction." *irs.gov*.

It is apparent that there are a myriad of scenarios surrounding crowdfunding activities, and the potential tax implications of these activities. This note only scratches the surface of the various ways people are trying to raise money on-line through the use of social media, using different platforms that make it easy to do so. It may be advantageous to add as a best practice, at a minimum to any business client questionnaire, whether they engage in on-line crowdfunding. It is important to secure the specific facts surrounding the activity to use as a guide as you determine any tax consequences of such activity, how to handle your client's Form 1099-R, and also in advising clients who are contemplating fund raising of this type. This issue is of growing importance in the area of taxability of on-line transactions, and we will look for more guidance from the IRS, as well as state tax agencies for sales tax implications, on handling these transactions in the months to come.

Kathleen M. Lach is a Partner in the Tax and Litigation Departments of Arnstein & Lehr LLP. She represents clients before a variety of different tax authorities, including the Internal Revenue Service, the Illinois Department of Revenue, and the Illinois Department of Employment Security.

Tax Court Upholds Strict Adherence to Requirements for IRS Penalty Assessments as Result of Graev

By: Kathleen M. Lach

A recent decision issued by the U.S. Tax Court in Graev v. Commissioner [1] could prove pivotal in cases where a practitioner has requested abatement of penalties for their client. While not yet applicable in every case for every penalty, the Court's admonishment to the IRS that it must prove that it strictly adhered to statutory requirements for penalty assertion must be noted, and taken into consideration in all of your penalty challenges with the IRS.

Internal Revenue Code section 6751(b)(1)states: "No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate." The exceptions to this provision only include penalties assessed under IRS sections 6651, 6654, or 6655, or automatically calculated through electronic means. [2] The exceptions relate primarily to late filing and late payment or federal tax deposit penalties, and estimated tax penalties, which are again, purely computational. A penalty is only considered to be "automatically calculated through electronic means" if no IRS human employee makes an independent judgment with respect to the applicability of the penalty. [3]

In 1955, there were approximately 14 penalty provisions in the Internal Revenue Code. There are now more than ten times that number. [4] All options for penalty relief must be considered when requesting abatement for your client in any penalty situation.

In Graev, where the Court considered the appropriateness of accuracy related penalties under IRC §6662, it took a closer look at the requirements for imposition of the penalty, including written managerial approval, for the proposed assessment (in this deficiency case). The Court followed the Second Circuit in Chai v. Commissioner [5] which held that: "section 6751(b)(1) requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency (or files an answer or amended answer) asserting such penalty…" and that "compliance with § 6751(b) is part of the Commissioner's burden of production and proof in a deficiency case in which a penalty is asserted."

Following Graev, the Tax Court in Ford v. Commissioner held: "We do not …sustain the section 6662(a) accuracy-related penalties relating to negligence for the years in issue. Respondent failed to present any evidence that the penalties were personally approved (in writing) by the immediate supervisor of the individual making such determination." [6] The Court did not uphold the proposed accuracy related penalty against the taxpayer.

While Graev takes a winding path down the road of strict adherence to the letter of the law contained in section 6751, [7] it lays down an important framework in reviewing penalty assessments and requests for abatement. When making your request for abatement of a penalty other than a computational penalty, discussed above, a demand for the managerial approval letter should be requested in every case. The approval must be in writing.

In considering requests for penalty abatement, this requirement is similar to the first time abatement provision in Internal Revenue Manual (IRM) 20.1.1.3.3.2.1. Relief is automatic if certain requirements are met: your client has filed, or filed a valid extension for, all required returns currently due, and has paid, or arranged to pay, any tax currently due. Additionally, there is a three-year look-back period for any prior penalties. If prior penalties have been assessed within that three-year period, there is no relief under this IRM section.

This is different of course from the reasonable cause provisions in the section 20 of the IRM. Determinations in reasonable cause requests become much more discretionary, and recently have become increasingly difficult to obtain, even where circumstances closely fit the requirements. The manual provides relief in cases where "death, serious illness, or unavoidable absence" occurs involving the taxpayer or an immediate family member. **8**

This would seem like a fairly straightforward analysis in most cases, but it is not since the IRM section goes on to leave much to the discretion of the reviewing IRS employee in terms of considering why the delay in filing or payment occurred, when it occurred, how the event prevented compliance, etc. All of these considerations may be viewed differently depending on the reviewing employee. If that employee recently experienced a personal loss similar to that of the requesting taxpayer, it is conceivable that employee would be more sympathetic to that taxpayer. Different considerations such as how the event impacted the taxpayer's ability to conduct business, or earn income, also affect the outcome of penalty determinations. Again, reasonable cause analyses are not "automatic" and are reviewed differently than those relief provisions discussed above.

In any event, the discretionary aspect of "reasonable cause" makes it critical that, when you are preparing requests for penalty abatement for your client, you routinely take into consideration automatic abatement provisions. This includes first time abatement, and the recently emphasized written managerial approval requirement discussed in Graev, and followed in the Ford case.

1 149 T.C. No. 23 (Dec. 20, 2017)
2 IRC §6751(b)(2)
3 IRM 20.1.1.2.3(5)
4 IRM 20.1.1.1.1(1)
5 851 F.3d 190, 221 (2d Cir. 2017), aff'g in part, rev'g in part T.C. Memo. 2015-42.
6 Ford v. Commissioner, T.C. Memo. 2018-8, January 25, 2018
7 In Graev, the Court opines on whether a new penalty may be proposed within an already pending Tax Court deficiency case by IRS counsel, and whether the approval process in such a situation meets the requirements of section 6751. In that case, the Court determined the approval requirements were met.
8 IRM 20.1.1.3.2.2.1

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Small Businesses and Related-Party Transactions
October 1
By: Joseph A. Wiener, J.D., LL.M. for The Tax Advisor

A recent Tax Court case highlights pitfalls frequently encountered by small businesses that engage in related-party transactions without appropriate planning. Povolny Group, Inc., T.C. Memo. 2018-37, an engaging opinion by Judge Mark V. Holmes, provides a helpful case-study of the following four issues:

1. Whether an entity's repayment of the debt of its sister entity constitutes a fresh loan between the entities, or a contribution to the second entity's capital;

2. Whether a contribution of capital constitutes a constructive dividend to the common shareholder;

Go to the link listed below for the rest of the article…
https://www.thetaxadviser.com/newsletters/2018/oct/small-businesses-related-party-transactions.html?utm_source=mnl:cpald&utm_medium=email&utm_campaign=05Oct2018

You Can Still Deduct a Client's Meal, IRS Says
October 3
By: Laura Davison and Lynnley Browning for Bloomberg

The IRS is giving businesses a tax break they thought they had lost in the tax overhaul last year -- write-offs for wining and dining clients.

The agency said Wednesday companies can still deduct 50% of meals while entertaining clients and customers, clearing up confusion about whether tax law changes last year had completely eliminated that benefit.

The IRS is giving businesses a tax break they thought they had lost in the tax overhaul last year -- write-offs for wining and dining clients. The agency said Wednesday companies can still deduct 50% of meals while entertaining clients and customers, clearing up confusion about whether tax law changes last year had completely eliminated that benefit.

Go to the link listed below for the rest of the article…
https://www.bloomberg.com/news/articles/2018-10-03/you-can-still-deduct-a-client-s-meal-on-a-night-out-irs-says

CPE Quiz

1. According to an IRS report, how many taxpayers claimed an alimony deduction on their 2015 returns?

A. 600,000

B. 500,000

C. 60,000

D. 560,000

2. What is the dollar limit for the payer's deduction limit on alimony payments for divorces after December 2018?

A. 12,000

B. 18,000

C. 24,000

D. It is not deductable

3. In a divorce, the custodial parent can waive the dependency exemption to allow the noncustodial parent—often the person providing the child support—to claim the exemption. This waiver is made on Form _______.

A. 8822

B. 8332

C. 8917

D. 2555

4. Another change by the Tax Cuts and Jobs Act is the ability to use up to ______ annually from a 529 plan to pay for elementary and secondary school.

A. $5,290

B. $1,000

C. $529

D. $10,000

5. When is the transaction taxable?
A. Courts may direct the account owner to transfer some or all of the funds to the spouse or former spouse.
B. If a transfer to the account owner is made pursuant to a court order and done by directly transferring a fixed dollar amount or percentage of the account to the spouse's IRA.
C. If there's a court order but the account owner transfers funds to his/her checking account an then writes a check to the spouse.
D. Bye setting up a new IRA to which funds are transferred.

6. Cowdfunding revenues generally are includible in income if they are:
A. Loans must be repaid.
B. Received for services rendered or are gains from the sale of property.
C. Capital contributed to an entity in exchange for an equity interest in the entity.
D. Gifts made out of detached generosity and without any "quid pro quo."

7. Which of the following potential crowdfunding efforts have no tax consequences as long as the value is below the IRS threshold for the gift tax annual exclusion?
A. Funeral
B. New product funding
C. Equity interest purchase
D. All of the above

8. A payment settlement entity (PSE) must file Form ________ for payments made in settlement of reportable payment transactions for each calendar year. A PSE makes a payment in settlement of a reportable payment transaction, that is, any payment card or third party network transaction, if the PSE submits the instruction to transfer funds to the account of the participating payee to settle the reportable payment transaction.
A. 1099-B
B. 1099-K
C. 1099-Q
D. 1099-R

9. It may be advantageous to add as a best practice, at a minimum to any business client questionnaire, whether they engage in on-line crowdfunding. It is important to secure the specific facts surrounding the activity to use as a guide as you determine any tax consequences of such activity, how to handle your client's Form _______, and also in advising clients who are contemplating fund raising of this type.

A. 1099-B

B. 1099-K

C. 1099-Q

D. 1099-R

10. What is a recent decision issued by the U.S. Tax Court that could prove pivotal in cases where a practitioner has requested abatement of penalties for their client?

A. *Meruelo v. Commissioner*

B. *Conner v. Commissioner*

C. *Simonsen v. Commissioner*

D. Graev v. Commissioner

11. What Tax Court case held, "We do not …sustain the section 6662(a) accuracy-related penalties relating to negligence for the years in issue. Respondent failed to present any evidence that the penalties were personally approved (in writing) by the immediate supervisor of the individual making such determination.

A. *Conner v. Commissioner*

B. Chai v. Commissioner

C. Ford v. Commissioner

D. *Meruelo v. Commissioner*

12. When making your request for abatement of a penalty other than a computational penalty, ______________ should be requested in every case.

A. an amended 1099-Q

B. a demand for the managerial approval letter

C. records of savings plan(s) contributions

D. Both A and C

13. In considering requests for penalty abatement, this requirement is similar to the first time abatement provision in Internal Revenue Manual (IRM) 20.1.1.3.3.2.1. Relief is automatic if ___________.

A. the tax payer has filed

B. the tax payer has filed a valid extension

C. all required returns currently due

D. All of the above

14. The opinion of Judge Mark V. Holmes for a recent Tax Court case highlights pitfalls frequently encountered by small businesses that engage in related-party transactions without appropriate planning. It provides a helpful case study for:

A. Whether an entity is identified as part of its subsidiaries or as an individual.

B. Whether a contribution of capital constitutes a constructive dividend to the common shareholder.

C. Whether an entity's repayment of the debt of its sister entity constitutes a fresh loan between the entities, or a contribution to the second entity's capital.

D. Both B and C

15. The IRS recently said that companies can deduct _______ of meals while entertaining clients and customers.

A. 45%

B. 50%

C. 55%

D. 60%

Question Responses

Marital Dissolution Planning

and

Crowdfunding

1. _____
2. _____
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14. _____
15. _____

Payment Information

Name: ____

Company/Firm: ____

Street address: ____

City/state/zip: ____

Email (required): ____

Phone: ____

Card:

Visa MasterCard American Express Discover

Card number: ____

Expiration date: ___________________________

Signature:____