

## Guidance in Connection with the Repeal of Section 682

Notice 2018-37

### SECTION 1. OVERVIEW

This notice announces that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to issue regulations providing clarification of the application of the effective date provisions concerning the repeal of § 682 of the Internal Revenue Code (Code) enacted on December 22, 2017, by “An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018,” P.L. 115-97 (Act). This notice also requests comments on whether guidance is needed with respect to the application of §§ 672(e)(1)(A), 674(d), and 677 of the Code to trusts for the benefit of a spouse following a divorce or separation.

### SECTION 2. BACKGROUND

Section 71 of the Code as in effect prior to the Act provides rules regarding the tax treatment of alimony and separate maintenance payments, with § 71(a) providing that gross income includes amounts received as alimony or separate maintenance

payments. Along with certain restrictions, § 71(b)(1) defines the term “alimony or separate maintenance payment” to mean any payment in cash if such payment is received by (or on behalf of) a spouse under a divorce or separation instrument. Section 71(b)(2) defines the term “divorce or separation instrument” to mean (A) a decree of divorce or separate maintenance or a written instrument incident to such a decree, (B) a written separation agreement, or (C) a decree (not described in former § 71(b)(2)(A)) requiring a spouse to make payments for the support and maintenance of the other spouse.

Section 682 of the Code as in effect prior to the Act provides rules regarding the tax treatment of the income of certain trusts payable to a former spouse who was divorced or legally separated. Section 682(a) provides that there shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance (or who is separated from her husband under a written separation agreement) the amount of the income of any trust which such wife is entitled to receive and which, except for former § 682, would be includible in the gross income of her husband, and such amount shall not, despite any other provision of subtitle A of the Code, be includible in the gross income of such husband. Section 682(a), however, does not apply to any trust income payable under the terms of such decree or agreement or the trust instrument for the support of the husband’s minor children.

Section 682(b) provides that, for purposes of computing the taxable income of the trust and the taxable income of a wife to whom § 682(a) applies, such wife shall be

considered as the beneficiary specified in part I of subchapter J of chapter 1 of the Code.

Section 7701(a)(17) as in effect prior to the Act provides that, as used in § 682, if the husband and wife therein referred to are divorced, wherever appropriate to the meaning of former § 682, the term “wife” shall be read “former wife” and the term “husband” shall be read “former husband;” and, if the payments described in former § 682 are made by or on behalf of the wife or former wife to the husband or former husband instead of vice versa, wherever appropriate to the meaning of former § 682, the term “husband” shall be read “wife” and the term “wife” shall be read “husband.”

Section 11051(b)(1)(B) and (C) of the Act prospectively repeal §§ 71 and 682, and § 11051(b)(4)(A) makes conforming amendments to § 7701(a)(17). Section 11051(c) of the Act provides that the amendments made by § 11051 shall apply to: (1) any divorce or separation instrument (as defined in former § 71(b)(2)) 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 such section apply to such modification.

### SECTION 3. TRUSTS TO WHICH SECTION 682 CONTINUES TO APPLY

The regulations will provide that § 682, as in effect prior to December 22, 2017, will continue to apply with regard to trust income payable to a former spouse who was divorced or legally separated under a divorce or separation instrument (as defined in § 71(b)(2)) executed on or before December 31, 2018, unless such instrument is

modified after that date and the modification provides that the changes made by § 11051 of the Act apply to the modification.

#### SECTION 4. REQUEST FOR COMMENTS

Section 672(e)(1)(A) of the Code provides that the grantor of a trust shall be treated as holding any power or interest in such trust held by any individual who was the spouse of the grantor at the time of the creation of such power or interest.

Section 674(a) of the Code provides, in general, that the grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party (as defined in § 672(b)), or both, without the approval or consent of any adverse party (as defined in § 672(a)). However, § 674(d) provides that § 674(a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor or spouse living with the grantor, to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries, whether or not the conditions of § 674(b)(6) or (7) are satisfied, if such power is limited by a reasonably definite external standard which is set forth in the trust instrument.

Section 677(a) of the Code provides that the grantor of a trust shall be treated as the owner of any portion of a trust, whether or not the grantor is treated as such owner under § 674, whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be distributed to the grantor or the grantor's spouse, or held or accumulated for future distribution to the

grantor or the grantor's spouse.

The Treasury Department and IRS request comments on whether guidance is needed regarding the application of §§ 672(e)(1)(A), 674(d), and 677 following a divorce or separation in light of the repeal of former § 682.

Written comments may be submitted by July 11, 2018 to Internal Revenue Service, CC:PA:LPD:PR (Notice 2018-37), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044, or electronically to [Notice.Comments@irs.counsel.treas.gov](mailto:Notice.Comments@irs.counsel.treas.gov) (please include "Notice 2018-37" in the subject line). Alternatively, comments may be hand delivered between the hours of 8:00 a.m. and 4:00 p.m. Monday to Friday to CC:PA:LPD:PR (Notice 2018-37), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, D.C. Comments will be available for public inspection and copying.

## SECTION 5. CONTACT INFORMATION

The principal author of this notice is Jennifer N. Keeney of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Jennifer N. Keeney at (202) 317-6850 (not a toll-free call).