HAS CONGRESS SOUNDED A RETREAT FROM THE HAIG-SIMONS DEFINITION OF INCOME FOR FEDERAL TAX PURPOSES BY CHANGING THE TAX RULES FOR SPOUSAL SUPPORT?

Richard J. Wood[*]

I. ABSTRACT

The Tax Cuts and Jobs Act of 2017 (TCJA) repealed Internal Revenue Code (I.R.C. or the Code) sections allowing deductions for amounts paid by former spouses for spousal support. Concomitantly, it repealed requirements that recipients of spousal support include those amounts in their taxable incomes. This approach misallocates income under the long-accepted policy known as the Haig-Simons definition of income. This article identifies the specific dislocation between Haig-Simons and the repeal of those tax provisions and explores competing tax policies that might account for the change in congressional intent.

II. INTRODUCTION

Prior to the Tax Cuts and Jobs Act of 2017 (TCJA), Internal Revenue Code (I.R.C. or the Code) §§ 71 and 215 provided that payors of spousal support, also known as alimony, may deduct the amounts paid from

---

[*]Professor of Law, Capital University Law School. This article is dedicated to Professor Jacqueline Orlando, Director of the Capital University Law Library and Professor of Legal Research and Writing. Professor Orlando passed away suddenly on April 8, 2020. She was instrumental in furthering my research and helped me refine my thinking for this article in very helpful ways.

their adjusted gross income (AGI), and recipients of spousal support may include amounts received as spousal support in their gross income.[1] The legislative history accompanying the repeal of I.R.C. §§ 71 and 215 in the TCJA states that "the intent of the provision is to follow the rule of the United States Supreme Court's holding in *Gould v. Gould*, in which the Court held that such payments are not income to the recipient."[2] The *Gould* decision was handed down in 1917. By returning the tax treatment of alimony to its historic 1917 roots, Congress appears to retreat from the widely agreed upon definition of income known as the Haig-Simons definition of income.

The repeal of sections 71 and 215, and the conforming repeal of sections 61(a)(8) and 62(a)(10), illustrate a retreat from the Haig-Simons definition of income because the repeal of those sections requires a taxpayer to include amounts that do not meet the Haig-Simons test in the taxpayer's income.[3] A change in the foundational principle of the definition of income provides an opportunity to review the reasons for such a change in the interesting area of spousal support.

This article first explains the importance of the Haig-Simons definition of income. Next, the article explores the possible tax policy reasons for the repeal of I.R.C. §§ 71 and 215. The first reason for the repeal of sections 71 and 215 is the explicit explanation given in the legislative history that Congress favors the treatment of spousal support required after the decision in *Gould*.[4] Next, the article considers the tax policy objectives of simplicity and fairness to analyze whether either of those policies would support the repeal of I.R.C. §§ 71 and 215. Finally, the article considers the *Overview of the Definition of Income Used by the Staff of the Joint Committee on Taxation in Distributional Analysis* by the Joint Committee on Taxation.[5] The Joint Committee writes that Haig-Simons is difficult to implement and should be replaced with what it calls "expanded income" for purposes of distributional analysis.[6] Perhaps its utility could be broader.

III. HAIG-SIMONS AND SUPREME COURT JURISPRUDENCE ON INCOME

The quest for a principled definition of income for the purpose of levying an income tax goes at least as far back as 1776 in Adam Smith's *The Wealth of Nations* in which he said:

---

1. I.R.C. §§ 71, 215 (1986); see I.R.C. §§ 61(a)(8), 62(a)(10) (1986), for the statutes prior to repeal in the Tax Cuts and Jobs Act of 2017.

2. H.R. REP. NO. 115-466, at 277 (2017) (Conf. Rep.).

3. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97 § 11051. (repealed 2017) (repealing deductions for alimony payments).

4. Gould v. Gould, 245 U.S. 151, 154 (1917).

5. JOINT COMMITTEE ON TAXATION, JCX-15-12, OVERVIEW OF THE DEFINITION OF INCOME USED BY THE STAFF OF THE JOINT COMMITTEE ON TAXATION IN DISTRIBUTIONAL ANALYSIS (2012).

6. *Id*. at 1.

> The private revenue of individuals, it has been shewn [sic] in the first book of this inquiry, arises ultimately from three different sources: Rent, Profit, and Wages. Every tax must be paid from some or one or other of these three different sorts of revenue, or from all of them indifferently.[7]

In 1938 Henry Calvert Simons, an economist at the University of Chicago and one of the founders of the Chicago School of economics,[8] published a definition of income for income tax purposes that has since become the standard measure of income for tax policy purposes.[9] Simons was interested in what he called the "equitable apportionment of tax burdens."[10] He believed that income taxes were "peculiarly equitable" but presented a problem of defining income.[11] Building on the work of Robert M. Haig,[12] Simons wrote *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy*[13] in which he defined income as:

> Personal income may be defined as the algebraic sum of (I) the market value of rights exercised in consumption and (II) the change in the value of the store of property rights between the beginning and end of the period in question. In other words, it is merely the result obtained by adding consumption during the period to "wealth" at the end of the period and then subtracting "wealth" at the beginning. The *sine qua non* of income is *gain*, as our courts have recognized in their more lucid moments – and gain to someone during a specified time interval. Moreover, this gain may be measured and defined most easily by positing a dual objective or purpose, consumption, and accumulation, each of which may be estimated in a common unit by appeal to market prices.[14]

---

7. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 255 (Cannan ed., London: Methuen 1904) (1776).

8. *Henry Calvert Simons, 1889-1946*, THE HISTORY OF ECONOMIC THOUGHT, https://www.hetwebsite.net/het/profiles/hcsimons.htm (last visited Mar. 9, 2021) ("Henry C. Simons represents, to many, the early days of '"Monetarism"' at Chicago - and thus is the true progenitor of what is what is commonly considered the Chicago School.").

9. MICHAEL J. GRAETZ & DEBORAH H. SHENK, FEDERAL INCOME TAXATION, PRINCIPLES AND POLICIES 97 (6th ed. 2009); *See also*, PPL Corp. v. Comm'r., 135 T.C. 304, 339 n.31 (2011) ("The Simons refinement has come to be known as the Haig-Simons definition of income and is widely accepted by lawyers and economists.").

10. HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY, 41 (1938). ("The development of income taxes may be viewed as a response to insistent and articulate demand for a more equitable apportionment of tax burdens").

11. *Id.*

12. *See* ROBERT MURRAY HAIG, THE FEDERAL INCOME TAX 7 (Robert Murray Haig ed., 1921) (discussing the definition of income).

13. SIMONS, *supra* note 10.

14. *Id.* at 50.

The first element of the Haig-Simons definition of income is consumption. Simons offers that:

> Consumption as a quantity denotes the value of rights exercised in a certain way (in the destruction of economic goods); accumulation denotes the change in ownership of valuable rights as between the beginning and end of a period. . . . The measurement of income implies allocation of consumption and accumulation to specific periods.[15]

Simons recognized that consumption, as he defined it, could be confused with expenses incurred in the production of income.

> At the outset there appears the necessity of distinguishing between consumption and expenses, and here one finds inescapable the unwelcome criterion of intention. A thoroughly precise and objective distinction is inconceivable. Given items will represent business expenses in one instance, and merely consumption in another, and often the motives will be quite mixed. A commercial artist buys paints and brushes to use in making his living. Another person may buy the same articles as playthings for his children, or to cultivate a hobby of his own.[16]

By putting to rest any confusion concerning the difference between consumption and expenses incurred to earn income, what remains is further refined by Simons to be any inflow of satisfactions.[17] As discussed below, this distinction will result in the move of deductions for payment of alimony from itemized deductions under I.R.C. § 63 to deductions used in arriving at AGI under I.R.C. § 62.

The second element of the Haig-Simons definition of income is "the change in the value of the store of property rights between the beginning and end of the period in question."[18] Another way of expressing this element is to see it as savings. In other words, the savings of an individual over a given period is included as income under Haig-Simons for that period. Simons rejects the notion that savings are merely postponed consumption.[19] Simons viewed savings as a measure

---

15. *Id.* at 49-50.

16. *Id.* at 54.

17. *Id.* at 85 ("He [Seligman] begins by defining income as satisfactions. . . . On the next page, 'Income denotes any inflow of satisfactions which can be parted with for money.' So far income would seem to be consumption.").

18. *Id.* at 50.

19. *Id*. at 96 ("To assume that all economic behavior is motivated by desire for consumption of goods, present and future, is to introduce a teleology which is both useless and false.").

of income rather than as a consequence of income. "Income is not saved or spent; it is rather a measure of saving and consumption together."[20] Comparing wealth at the beginning of a given period against wealth at the end of the period are therefore the two components of income under Haig-Simons.

The Haig-Simons definition of income is consistent with the Supreme Court's jurisprudence of income as it has evolved over time. In 1955, the United States Supreme Court in *Commissioner v. Glenshaw Glass Company*, interpreting the predecessor to the current I.R.C. § 61, defined income for federal taxation purposes as, "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[21] The first *Glenshaw Glass* element of "undeniable accession to wealth" is the analog of the Haig-Simons definition. The difference is that while Haig-Simons breaks wealth into two elements, *Glenshaw Glass* conflates that analysis into a single phrase. The remaining two elements of *Glenshaw Glass* add features that refine the economic definition of income for purposes of efficient administration.[22]

The realization feature of *Glenshaw Glass* reflects two administrative concerns. As Professor Chirelstein has observed, the first concern is for a readily available source of funds to pay a tax on an increase in wealth, and the second is to eliminate the need for annual property appraisals.[23] In other words, realization provides a fund for the payment of tax and simultaneously provides a measure of income not dependent on valuation opinions.

Similarly, the *Glenshaw Glass* requirement that the taxpayer have complete dominion over the accession to wealth furthers administrability because it seeks to identify the correct taxpayer among those who might possibly be credited with income.

The third element of *Glenshaw Glass* "complete dominion over accession to wealth" is relevant to the decision to repeal I.R.C. §§ 71 and 215 because it addresses the question of which taxpayer, as between payor and payee, should pay tax on the alimony. In *Glenshaw Glass*, there were no other taxpayers which could have been credited with the income derived by Glenshaw Glass from the settlement of litigation.

---

20. *Id.* at 98.

21. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

22. MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 69 (12th ed. 2012) ("It is important to remind oneself at the outset that realization is strictly an administrative rule and not a constitutional, much less an economic requirement of 'income.'").

23. Id. at 80 ("Our tax system does not reach mere changes in property value, and apart from recurring proposals to treat gifts and bequests as realization events, few commentators would suggest that the realization requirement should be materially altered. The difficulty of making annual property appraisals may be the chief reason for this attitude of acceptance; the absence of ready cash to pay the tax on property appreciation and the consequent "forced liquidation" of assets to meet tax obligations is another.").

Accordingly, the case itself does not appear to offer any definitions of the term "complete dominion."

In *C.I.R. v. Indianapolis Power & Light Co.*, the Court was asked whether deposits from customers of a utility company were income of the utility under *Glenshaw Glass*.[24] The Court reasoned that whether a taxpayer enjoys "complete dominion" over a given sum is whether the taxpayer "has some guarantee that he will be allowed to keep the money."[25] That view reconciles I.R.C. §§ 71 and 215 with I.R.C. §§ 61 and 62, which were also repealed in 2017, and the Haig-Simons definition of income.[26]

The Sixteenth Amendment to the United States Constitution provides that "[t]he Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[27] That language, along with a list of examples, was imported directly into I.R.C. § 61(a):

> §61. Gross income defined
> (a) General definition. - Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
> (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
> (2) Gross income derived from business;
> (3) Gains derived from dealings in property;
> (4) Interest;
> (5) Rents;
> (6) Royalties;
> (7) Dividends;
> (8) Annuities;
> (9) Income from life insurance and endowment contracts;
> (10) Pensions;
> (11) Income from discharge of indebtedness;
> (12) Distributive share of partnership gross income;
> (13) Income in respect of a decedent; and
> (14) Income from an interest in an estate or trust.[28]

I.R.C § 61(a) has been long thought to reflect the Haig-Simons definition of gross income.[29] Any change in section 61(a) that was inconsistent with the Haig-Simons definition of gross income would disrupt the foundations of tax policy because it would signal that the

---

24. C.I.R v. Indianapolis Power & Light Co., 493 U.S. 203 (1990).
25. *Id.* at 210.
26. See I.R.C. § 61, § 62 (1986).
27. U.S. CONST. amend. XVI..
28. I.R.C. § 61(a) (1986).
29. *See, e.g.*, ALAN GUNN & LARRY D. WARD, CASES, TEXT AND PROBLEMS ON FEDERAL INCOME TAXATION 45 (6TH ED. 2006) ("The Haig-Simons. . . definition of income, which many economists use as a starting point in discussing tax-policy issues. . .").

generally accepted definition of gross income used by economists would be different from the definition of gross income used by tax policy analysts. Prior to the TCJA, I.R.C. § 61(a)(8) provided that gross income included "[a]limony and separate maintenance payments."[30]

The changes in I.R.C. sections dealing with spousal support appear to signal a new congressional disapproval of, not only the Haig-Simons definition of income, but also the *Glenshaw Glass* definition of income. Accordingly, the legislative history of those sections may provide a better understanding of prior congressional intent on the subject and thereby shed light on current congressional views.

IV. LEGISLATIVE HISTORY OF SPOUSAL SUPPORT: I.R.C. §§ 71 AND 215 AND GOULD

Prior to the TCJA, the I.R.C required the recipients of spousal support payments to include those payments in income, and permitted the payor of those payments to deduct those amounts from income.[31] Former I.R.C. § 71 provided that "[g]ross income includes amounts received as alimony or separate maintenance payments."[32] Former I.R.C. § 215 provided, "[i]n the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year."[33] Prior to the TCJA, I.R.C. § 61(a) contained paragraph 8 which provided that, "[e]xcept as otherwise provided in this subtitle, gross income means income from whatever source derived, including (but not limited to) the following: … (8) Alimony and separate maintenance payments;"[34] I.R.C. § 62(a)(10) provided that "[f]or purposes of this subtitle, the term 'adjusted gross income' means, in the case of an individual, gross income, minus the following deductions: '(10) Alimony.'"[35] Those four sections of the Code effectively reversed the effect of the United States Supreme Court's ruling in *Gould v. Gould*.[36] Given the prominence of the *Gould* decision in the legislative record concerning the tax treatment of spousal support, it may be wise to explore the facts and the logic of the Court's analysis in the case.

The holding in *Gould* has been central to the alimony treatment as income to the payor or the payee since 1917. The Conference Report to accompany the TCJA offers only one explanation for the repeal of I.R.C. §§ 71 and 215, "Thus, the intent of the provision is to follow the rule of the United States Supreme Court's holding in *Gould v. Gould*, in which the

30. I.R.C. § 61(a)(8) (1986).
31. Tax Cuts and Jobs Act, Pub. L. No. 115-97 §11051 (2017).
32. I.R.C. §71(a) (1986).
33. § 215 (1986).
34. § 61 (1986).
35. § 61(a)(10) (1986).
36. Gould v. Gould, 245 U.S. at 154.

Court held that such payments are not income to the recipient."[37] A close look at the facts leading up to the Gould decision might help in determining what congressional conferees meant by that explanation of the change.

The affidavit of Mr. Owen N. Brown, an associate of Martin W. Littleton, who was Mr. Howard Gould's attorney in the matter of his divorce from Katherine Clemmons Gould provides the following:

> That on the 22nd day of September, 1909, a final decree was entered in this action, …That the alimony of $3,000 per month awarded to the plaintiff by said decree has been paid to the plaintiff in accordance with the terms of said decree, except the deductions, hereinafter referred to, made under the provisions of the Federal [sic] income tax law of 1913. That after the enactment of said income tax law in October, 1913, the question was presented as to whether said alimony was taxable income to Katherine Gould; and, if so, whether Howard Gould was required by said law to deduct and withhold the amount of the income tax thereon.[38]

A letter from Mrs. Gould's counsel, Mr. Baldwin, seemingly acknowledges and agrees with Mr. Gould's view that alimony paid by Mr. Gould should be counted as income to Mrs. Gould.

> I acknowledge receipt of yours of April 20, . . . and note that you have deducted the income tax for the months of January, February, March, and April.
>
> I filed for Mrs. Gould an income tax return, in which I accounted for income exactly as she received it. In making the return I did not state that any of the tax had been withheld at the source. Consequently, I shall receive a bill from the Government upon the whole amount, and as I do not want to pay the tax twice, please do not deduct anything for the months of November and December.[39]

It appears that both Mr. and Mrs. Gould agreed that the alimony payments were income to Mrs. Gould, but that Mr. Gould should not have withheld the tax from his payment to Mrs. Gould. Mr. Gould sought the advice of the Commissioner of Internal Revenue as to whether alimony paid by Mr. Gould was income to Mrs. Gould. The Deputy Commissioner of Internal Revenue Mr. L.F. Speer, responded as follows:

---

37. H.R. REP. NO. 115-466, at 277 (2017) (Conf. Rep.).

38. Affidavit of Owen N. Brown in Support of Motion at 3-4, *Gould*, 245 U.S. 151 (1917) (No. 702).

39. *Id.* at 5.

"In reply, you are advised that this office holds that alimony paid under final decree, or under a decree of separation, is fixed and determinable annual income."[40] Sometime later Mrs. Gould reconsidered her position. In Respondent's Brief before the New York Supreme Court, Appellate Division – First Department she argues that alimony is neither income nor gains and therefore beyond the reach of the taxing statute.

> Income is defined as the gain which proceeds from property, labor, or business. Gains is defined as the gain made by the sale of produce or manufactures after deducting the value of labor, materials, rents and all expenses together with interest of the capital employed (Bouvier's Las Dictionary). The commercial aspect of these two words is evident, and while "gains" usually means profit, it is in its broadest sense construed as meaning anything opposed to loss; but neither of these words can in any way embrace what is understood as alimony.[41]

The case reached the New York Supreme Court Appellate Division – First Department where the issue was stated as "[t]he question presented by this appeal is whether or not alimony awarded by the terms of the final decree in a separation action is 'gains profits and income' within the meaning of the provisions of the Federal [sic] income tax law of 1913."[42]

In *Gould* the United States Supreme Court was asked to determine whether monthly support payments received by the former Mrs. Gould were "income within the intendment of the Act of Congress approved October 3, 1913, 38 Stat. 114, 166, . . . and were subject as such to the tax provided therein."[43] The Court applied the definition of income used in the predecessor of today's I.R.C. § 61, and framed the issue as follows:

> The question presented is whether such monthly payments during the years 1913 and 1914 constituted parts of Mrs. Gould's income within the intendment of the act of Congress approved October 3, 1913 (38 Stat. 114, 166), and were subject as such to the tax prescribed therein. The court below answered in the negative, and we think it reached the proper conclusion.
>
> Pertinent portions of the act follow:
>
> 'SECTION II, A. Subdivision 1. That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every

---

40. *Id*. at 7.
41. Respondent's Brief at 5, *Gould*, 207 N.Y.S. 4, (No. 32888).
42. Appellant's Brief at 3, *Gould*, 207 N.Y.S. 4, (No. 6778).
43. Gould v. Gould, 245 U.S. 151, 152 (1917).

> citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided.
>
> B. That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, business, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from, but not the value of, property acquired by gift, bequest, devise, or descent.'[44]

Without much analysis, the Court held that "[t]he net income of the divorced husband subject to taxation was not decreased by payment of alimony under the court's order, and, on the other hand, the sum received by the wife on account thereof cannot be regarded as income arising or accruing to her within the enactment."[45]

Each of the enumerated items of income described in the law as it existed in 1917 represented income derived from economic activity. In 1913, the Court in *Stratton's Independence, Ltd. v. Howbert*, said that, "'income' may be defined as the gain derived from capital, from labor, or from both combined, and here we have combined operations of capital and labor."[46]

After the *Gould* decision the Court in *Eisner v. Macomber* was asked to determine whether a stock dividend paid to shareholders of the Standard Oil Company of California was income for purposes of the Internal Revenue Code.[47] The Court cited *Stratton's Independence, Ltd. v. Howbert* with approval and said:

> Here, we have the essential matter: not a gain accruing to capital; not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed* from the capital, however invested or employed, and *coming in*, being "derived" - that is, *received* or *drawn* by the recipient (the taxpayer) for

---

44. *Id*. at 152–53.

45. *Id*. at 154.

46. Stratton's Indep., Ltd. v. Howbert, 231 U.S. 399, 415 (1913). *See also* Doyle v Mitchell Bros., 247 U.S. 179, 185 (1918).

47. Eisner v. Macomber, 252 U.S. 189, 200–01. (1920).

> his *separate* use, benefit and disposal - *that* is income derived from property. Nothing else answers the description.[48] (emphasis in the original)

It is no surprise then that the *Gould* Court focused on economic gain from capital or labor rather than the accessions to wealth test as described above in the 1955 case of *Glenshaw Glass.*

The *Gould* Court seems to have viewed the list of sources of income contained in the statute as excluding income from spousal support received by Mrs. Gould because it was not derived from economic activity of the type described in *Stratton's Independence, Ltd. v. Howbert*. Conversely the spousal support paid by Mr. Gould was derived by him from such economic activity and therefore within the statutory definition of the time.

The Haig-Simons definition of income was unknown to the *Gould* Court so it is unsurprising that the Court would not use it to analyze questions of income. Today, Congress may be presumed to know and understand Haig-Simons. The Conference Committee Report for the TCJA states that, "Thus, the intent of the provision is to follow the rule of the United States Supreme Court's holding in *Gould v. Gould*, in which the Court held that such payments are not income to the recipient."[49] This implicitly endorses the definition of income in the law as applied by the *Gould* Court.

The legislative history of the origins of I.R.C. §§ 71 and 215 starts in 1942. In that year federal surtaxes and victory taxes were instituted to pay for the military mobilization required by the Second World War.[50] Congress became concerned that requiring payors of alimony to include the amount of alimony payments in their taxable income, even though those amounts were now in the possession of the former spouse, might create a circumstance where the payor of alimony had insufficient funds left to pay taxes. The Ways and Means Committee Report contains the following explanation:

> The existing law does not tax alimony payments to the wife who receives them, nor does it allow the husband to take any deduction on account of the alimony payments made by him. He is fully taxable on his entire net income even though a large portion of his income goes to his wife as alimony or as separate maintenance payments. The increase in surtax rates would intensify the hardship and in many cases the husband would not

---

48. *Id.* at 207.
49. H.R. REP. NO. 115-466, at 277 (2017) (Conf. Rep.).
50. Revenue Act of 1942, Pub. L. No. 753, Ch. 619, 56 Stat. 798.

> have sufficient income left after paying the alimony to meet his income tax obligation.
>
> The bill would correct this situation by taxing alimony and separate maintenance payments to the wife receiving them, and by relieving the husband from tax upon that portion of such payments which constitutes income to him under present law.[51]

Simons published his seminal work on the definition of income in 1938, four years prior to the Revenue Bill of 1942.[52] The focus of the Ways and Means Committee Report seems to be on taxpayers' ability to pay taxes. For example, a taxpayer with taxable income of $1 million might have an obligation to pay one or more former spouses a large portion of the taxpayer's income. The payor would be liable for tax on the full $1 million of income calculated prior to the transfer of alimony to former spouses. If the taxpayer were obligated to pay one former spouse one-third of the taxpayer's income and another one-third to a different former spouse, and if the effective tax rate were greater than thirty-three percent, the taxpayer would have no income left after taxes and alimony on which to live. In 1942, the marginal rate of federal income tax on income in the highest tax bracket was eighty-eight percent.[53] This analysis also fails to account for state and local taxes which would exasperate the problem. While this might be an extreme example it illustrates the problem addressed in the Committee Report and is easily resolved by the Haig-Simons definition of income. Under Haig-Simons, the above described taxpayer, who is a payor of alimony, would pay tax on one-third of the total revenue received by the taxpayer because the two-thirds paid to former spouses would be excluded from income. Prior to the changes made by TCJA, the taxpayer would deduct the alimony paid under I.R.C. § 62 and the recipients of the alimony would include the amounts under I.R.C. § 61.

The payor of alimony neither consumes the amounts paid to a former spouse nor saves those amounts. Another way to look at consumption under Haig-Simons is to think of it as an inflow of satisfactions.[54] Payment of alimony is not an inflow of satisfactions for the payor and therefore cannot be consumption. Payment of alimony reduces, rather than increases, the "store of property rights" of the taxpayer and cannot be viewed as savings.[55]

---

51. H.R. REP. NO. 2333 at 46 (1942).

52. SIMONS, *supra* note 10, at 50.

53. Mark W. Cochran, *Back to the Future, Marriage and Divorce Under the 2017 Tax Act*, 51 ST. MARY'S L. J. 1, 27 at 28 (2019) ("With the onset of World War II, Congress raised the highest marginal rate for 1942 to 88% for incomes in excess of $200,000. . . .").

54. SIMONS, *supra* note 10, at 85 (citing Edwin R.A. Seligman, "Are Stock Dividends Income?" 9 AM. ECON. REV., 517, 527 (1919)).

55. *See* SIMONS, *supra* note 10, at 49-50.

Applying Haig-Simons to the *Gould* case, the alimony paid by Mr. Gould to his former wife as spousal support was not consumed by him.[56] Neither was it saved by him. Accordingly, repeal of I.R.C. §§ 71 and 215 represents a retreat from the Haig-Simons test for income.

The Tax Reform Act of 1984 refined the definition of alimony to make it more objective than under previous law.[57] "The committee bill attempts to define alimony in a way that would conform to general notions of what type of payments constitute alimony as distinguished from property settlement and to prevent the deduction of large, one-time lump-sum property settlements."[58] The Supplemental Report of the Ways and Means Committee confirms the ongoing congressional intent to reverse the holding in *Gould.*

Prior to 1942, there was no statutory provision explicitly dealing with alimony payments. In 1917 the Supreme Court held that, under the provisions of the Income Act of 1913, alimony paid to a divorced wife was not taxable income. From 1917 to 1942 the result in the *Gould* case remained unchanged and alimony was neither includible in the recipient's income nor deductible by the payor.

When tax rates were increased significantly in 1942, Congress recognized that the higher tax rates would intensify the hardship of payment of alimony out of after-tax income. Therefore, Congress enacted provisions in the Revenue Act of 1942 to require that certain alimony payments be included in the recipient spouse's income, and to permit the payor spouse to deduct those payments as an itemized deduction. The Tax Reform Act of 1976 permitted alimony to be deductible in arriving at AGI so that a taxpayer who does not itemize may nevertheless deduct alimony.[59]

By including alimony as a deduction in arriving at AGI, the Tax Relief Act of 1976 assigned a higher level of tax importance to the deduction for alimony than it had as an itemized deduction. AGI is a benchmark used many places in the Code to compare taxpayers' ability to pay,[60] and create mechanisms for increasing taxes on high income taxpayers without changing the rates applicable to all taxpayers found in I.R.C. § 1.[61] It serves to identify taxpayers with high economic income

---

56. It might be possible to view spousal support as fulfilling a moral or legal obligation of Mr. Gould, but Congress did not advance this theory in repealing §§ 71 and 215. The Court in *Gould* does advance this theory as will be discussed below.

57. H.R. REP. NO. 98-432, pt. 2, at 1495 (1984).

58. *Id.*

59. *Id.* at 1494.

60. RICHARD J. WOOD, FAMILY TAX LAW, 7 (2d. 2011). ("The primary role of AGI is to provide a standard which can be used to measure the relative earnings of every American taxpayer.").

61. I.R.C. § 1 (1986). *See,* e.g., §§ 67, 151(d)(3), 469(i)(3).

as distinguished from taxpayers with low economic income.[62] It represents a rough test for amounts that are realistically available to pay taxes before deductions based on individual preference represented in itemized deductions. I.R.C. § 62 defines AGI by listed deductions, authorized elsewhere in the Code, that are taken into account in reaching AGI.[63] For example, section 62(a)(1) permits taxpayers to deduct the costs incurred in earning income from a trade or business.[64] The remaining subsections similarly allow deductions for amounts that are generally expenses of earning income, and therefore not within the Haig-Simons definition of income as amounts consumable or savable by the taxpayer. As described above, Simons also recognized expenses as fundamentally different from consumption and therefore excluded from the Haig-Simons definition of income.

The legislative history of I.R.C. §§ 71 and 215 started with congressional disapproval of the holding in *Gould*. In 2017, the story of those sections ends with congressional reversal leading to an endorsement of the holding in *Gould*. The rationale of *Gould* cannot be reconciled with the Haig-Simons definition of income. There must be other tax policies that, while not expressly given for the reversal of congressional tax policy in the TCJA, can nevertheless account for the repeal of I.R.C. §§ 71 and 215.

V. SPOUSAL SUPPORT AND THE TAX POLICY OF SIMPLIFICATION

The tax rules addressing divorce are among the most complex in the Code. Section 71(f) known as the "anti-front-loading rules" is a good illustration of that complexity.[65] The U.S. House of Representative's Ways and Means Committee's Supplemental Report on the Tax Reform Act of 1984 states that subsection (f) was added to section 71 "[i]n order to prevent a one-time property settlement from being disguised as alimony."[66] Section 71(f), and the rules associated with distinguishing spousal support from child support found in Treasury Regulation § 1.71-1T, made application of section 71 very complicated.

The above described rule for resolving the problem of distinguishing spousal support from disguised property settlements is an example of the many problems that accompany the tax aspects of adult family relationships. Those problems include defining relationships that are cognizable for tax purposes, premarital

---

62. MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 224 (12th ed. 2012) ("Adjusted gross income serves as the base-point for determining certain of the personal deductions – in particular, those that are phased out for higher income taxpayers…").

63. I.R.C. § 62(a) ("For purposes of this subtitle,… the term 'adjusted gross income' means, in the case of an individual, gross income minus the following deductions. . . ").

64. § 62(a)(1).

65. *See* § 71(f) (1986).

66. H.R. REP. NO 98-432, at 1496 (1984) (Conf. Rep.).

agreements, tax rates that fairly treat married and non-married couples alike, tax issues concerning children and education, and dissolution of the marriage.[67] The rules governing dissolution of a marriage and spousal support are among the most complex in the Code.[68]

Important tax problems arise with respect to transfers of money or property between former spouses incident to divorce. In addition to the problem associated with distinguishing property settlements from spousal support, another problem stems from the denial of deductibility for personal expenses required by I.R.C. § 262.[69] Under I.R.C. § 262, amounts paid for child support cannot be deducted by the payor of those amounts. Section 71 was constructed to vindicate that tax policy by explicitly excluding child support from inclusion in amounts designated as spousal support.[70] Taxpayers who were able to disguise property distributions, or child support as spousal support, could reduce the total taxes paid by the two former spouses by allocating income under section 71 to the spouse receiving the payments when that spouse, even after receiving spousal support payments, had lower taxable income.[71] Thus, if a payment meant to compensate the recipient spouse for a distribution of marital property to the other payor spouse could be disguised as spousal support, the two spouses could agree on such a strategy and split the tax savings. The strategy would result in higher payments to the recipient spouse financed by the tax savings to the payor spouse.[72]

To prevent taxpayers from gaming I.R.C. §§ 71 and 215 as described above, those sections must necessarily be complex. It is an understatement to say that the regulations that accompany those sections are even more complex.[73] Many taxpayers have tried to use the complex provisions of the Code and regulations to their advantage and have litigated their disputes over the tax consequences of alimony in United States Tax Court.[74] By repealing I.R.C. §§ 71 and 215, and thereby eliminating their concomitant regulations, Congress has, in one move, greatly simplified the tax treatment of spousal support under the Code.

---

67. *See* WOOD, *supra* note 60.

68. *Id.* at 319 ("The demise of a marriage sends shock waves throughout a family. The number of issues requiring attention is enormous.").

69. I.R.C. § 262(a) ("Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.").

70. § 71(c)(1) ("Subsection (a) shall not apply to that part of any payment which the terms of the divorce or separation instrument fix … as a sum which is payable for the support of children of the payor spouse.").

71. *See* WOOD *supra* note 60, at 341-344 (Explaining how allocating income to the taxpayer with lower income will result in low rates applied to more of the former couple's income thereby reducing their total tax burden. The savings can then be split between the former spouses.).

72. *See*, ANNE BRYSON BAUER, *How Can We Do It? How the Tax Cuts and Jobs Act Perpetuates Implicit Gender Bias in the Code,* 43 HARV. J. L. & GENDER 1, 10-21 (2020).

73. *See*, Treas. Reg. §§ 1.71, 1.215-1.

74. A review of only the reported decisions of the United States Tax Court reveals there were 8,119 cases in which alimony was an issue.

Simplification of the American income tax system is a desirable goal and may have provided the reason for Congress to repeal I.R.C. §§ 71 and 215. There is evidence that tax simplification is an ongoing congressional concern regarded as beneficial by many.[75] Simplification is desirable for two reasons: simple rules are easier to comply with than are complex rules and simple rules provide fewer opportunities for tax avoidance. Therefore, simplification of the Code is a proposition with which very few would disagree.[76] Repeal of I.R.C. §§ 71 and 215 would simplify the Code by eliminating the complexity needed to distinguish child support from spousal support, and property distributions from spousal support. Unfortunately, the legislative history of the TCJA does not support the proposition that I.R.C. §§ 71 and 215 were repealed for that express reason. The legislative history of the TCJA merely recites congressional intent to return to the rule of *Gould*. We are left with an undeniable simplification of the Code without an express statement that simplification was the goal of that legislation.

Might we infer that Congress intended to simplify the Code by the repealing sections 71 and 215? There is no direct evidence on the record to support that inference. However, the effect of the repeal of I.R.C. §§ 71 and 215 undeniably simplifies tax aspects of divorce. It seems to me that an intent to simplify the Code was at least as important as the stated reason for adopting the *Gould* standard for treatment of alimony and may reasonably be viewed as being an implied reason for the repeal of I.R.C. §§ 71 and 215.

VI. SPOUSAL SUPPORT AND THE TAX POLICY OF FAIRNESS

In addition to simplification, another principle of tax policy that might be behind the repeal of I.R.C. §§ 71 and 215 is fairness. Spousal support earned by one spouse and paid to the other, now former spouse, is undeniably income to either the payor or the payee.[77] If taxing the payor, rather than the former practice of taxing the payee of alimony, meets generally accepted tax fairness policy standards, then Congress may be viewed as implicitly intending to improve the fairness of the Code.

The literature on tax fairness discusses two structural methods for analyzing the fairness of federal tax questions: equity measured along vertical and horizontal axis. Equity measured horizontally and vertically

---

75. Michael A. Andrews, *Tax Simplification*, 47 SMU L. REV. 37, 37 (1994) ("The Tax Code is too complex; on this point, most people would agree.").

76. William G. Gale, *Tax Simplification: Issues and Options,* BROOKINGS (Sept. 10, 2001), https://www.brookings.edu/articles/tax-simplification-issues-and-options-2/ (The notion that taxes should be simpler is one of the very few propositions in tax policy that generates almost universal agreement).

77. If the payor spouse has no income and pays spousal support from savings, then under current law neither spouse has income.

can be succinctly stated as requiring similarly situated taxpayers to be treated alike and that differently situated taxpayers be treated differently.[78]

The first task in analyzing fairness in the context of spousal support would be to identify the characteristics that identify similarly situated taxpayers. Taxpayers who pay spousal support are similar to all other taxpayers who pay spousal support and taxpayers who receive spousal support are similar to all other taxpayers who receive spousal support. There are no material differences within the classes of payors or payees of spousal support. To meet the tax fairness norm of what has been called systemic horizontal equity, individuals in each class must be treated alike. In other words, horizontal tax equity requires that all payors of spousal support receive the same tax treatment as all other payors of spousal support. The same would be true for all payees of spousal support.

The tax policy of systemic horizontal equity is satisfied because the repeal of I.R.C. § 215 denies all payors of spousal support any deduction for the amount paid. Systemic horizontal equity concerns are also satisfied for payees of spousal support because the repeal of section 71 returns the Code to its interpretation under *Gould*. In other words, all taxpayers who receive spousal support may exclude those amounts from their income.

The foregoing is an analysis of what I have called systemic horizontal equity.[79] Another aspect of horizontal equity is what I have called substantive horizontal equity. "Substantive horizontal equity asks about all of the above described issues in the context of comparing various taxpayers' ability to pay in the forms of income, wealth, and consumption."[80]

Substantive horizontal equity has a negative component in that taxpayers with different abilities to pay should not be treated alike. For example, Taxpayer A, who receives $50,000 in spousal support payments, after the repeal of I.R.C. § 215, will not include that amount in their reported income. If Taxpayer A has no other income, then Taxpayer A would pay no tax. On the other hand, Taxpayer B, who earns $50,000 in wages from labor, will report that amount as income. Taxpayer B will pay tax on $50,000. Accordingly, taxpayers with identical economic incomes will have quite different tax outcomes. Similarly, the payor of spousal support, after the TCJA, will report greater income than otherwise economically identical taxpayers.

---

78. Richard J. Wood, *Supreme Court Jurisprudence of Tax Fairness,* 36 SETON HALL L. REV. 421, 424 (2006).

79. *Id*. at 427 (explaining that the second form of horizontal equity analysis, termed systemic horizontal equity, does not evaluate the economic status of taxpayers but instead evaluates the consistency, certainty and regularity of application of the law).

80. *Id*. at 427–28.

Professor Alice G. Abreu has demonstrated that, after the repeal of I.R.C. §§ 71 and 215, taxpayers with different abilities to pay may well have identical adjusted taxable incomes.

> Moreover, by eliminating the deduction for alimony, the TCJA undermines horizontal equity in an additional way. Eliminating the deduction for alimony requires eliminating the correlative inclusion of alimony in the recipient's income, and the TCJA does just that. But excluding alimony from income will produce a situation in which taxpayers with wildly disparate ability to pay, as measured by economic income, will appear to have equivalent ability to pay, as measured by taxable income. This will occur because the receipt of the alimony, which necessarily increases a taxpayer's ability to pay as measured by economic income, will be ignored in the determination of the tax base—alimony will not be treated as income. Therefore, an individual who receives $40,000 of alimony *in addition* to $40,000 of wages will look to the tax system precisely like one who receives *only* $40,000 of wages, even though the first individual has $80,000 of economic income and therefore has twice as much ability to pay as the first.[81]

The TCJA appears to be contrary to traditional principles of tax fairness. Might it nevertheless be consistent with the fairness aspects of the Haig-Simons definition of income?

The repeal of I.R.C. §§ 71 and 215 is not only contrary to the Haig-Simons definition of income but it also reduces substantive horizontal equity by taxing income no longer in the possession of the taxpayer. Sums of money no longer in possession of the taxpayer cannot be consumed by the taxpayer. If the payor is compared to the payee, it is the payee who consumes spousal support. Accordingly, under the tax policy of substantive horizontal equity, the recipient/consumer of spousal support should bear the tax burden of that support.

The foregoing was a pure tax policy analysis under widely accepted notions of tax fairness. However, if Congress believes that payees of spousal support are more likely to have lower incomes than payors of spousal support, then one way to recognize the payor's need for tax relief would be to repeal I.R.C. §§ 71 and 215. In this way the higher income taxpayer, who is presumably the payor, would pay taxes on spousal support payments made to the former spouse rather than the Code imposing tax liability on the lower income payee.[82] Professor Linda Sugin has remarked that "recipients of alimony are necessarily poorer

---

81. Alice G. Abreu, *Tax 2018: Requiem for Ability to Pay*, 51 LOY. L.A. L. REV. 61, 68–69 (2018).

82. *See generally* Bauer, *supra* note 71 (providing an excellent analysis of the how the repeal of I.R.C. sections 71 and 215 perpetuates implicit gender bias).

than those who pay it . . . ."[83] However, Professor Sugin also notes that the rules in place prior to the TCJA allowed the separating couple to reduce their tax burden and share in the tax savings.[84]

The possibility that fairness might have been an implied reason for repeal of I.R.C. §§ 71 and 215 seems unlikely for two reasons. The first reason is that there is no indication in any congressional hearings, or other legislative history of the TCJA, of a belief that recipients of spousal support are intended to benefit from the repeal of I.R.C. §§ 71 and 215 because of their comparative economic hardship. While this may be true, there is no legislative evidence to support it as a reason for the decision to repeal sections 71 and 215. The second reason for skepticism is that the progressivity of I.R.C. § 1 addresses comparative incomes of spousal support payors and payees.[85] Under I.R.C. § 1, the tax imposed on taxpayers increases with higher levels of income. Accordingly, the comparative incomes of payors and payees of spousal support are accounted for without resorting to elimination of I.R.C. §§ 71 and 215.

Simons did not address the question of the proper treatment of spousal support for federal income tax purposes, but he did say that "[t]he appropriate general conception of income, for purposes of personal taxation, may be defined as the algebraic sum of the individual's consumption expense and accumulation during the accounting period."[86] Accordingly, for both the modern definition of tax fairness and the Simons definition of income, taxation should fall on the individual who consumes or saves a given sum of wealth. In the case of spousal support, that would seem to be the recipient of support.

Simons did not directly address the question of spousal support; however, he did express an opinion about transfers between individuals unrelated to economic exchanges of value in the form of gifts. "All gifts, inheritances, and bequests should be treated as part of the recipient's taxable income for the year in which they are received . . . ."[87] Consistent with the view that income tax follows consumption and savings, Simons believed that gifts should be taxable to the recipient who consumes or saves the gift.

But for legislative grace, the American tax system would include gifts in the income of the recipient. I.R.C. § 102 provides that "[g]ross income does not include the value of property acquired by gift, bequest, devise or inheritance."[88] The tax treatment of spousal support goes one

---

83. Linda Sugin, *The Social Meaning of the Tax Cuts and Jobs Act*, 128 YALE L. J. F. 403, 412 (2018).
84. *Id*.
85. *See*, I.R.C. § 1.
86. SIMONS, *supra* note 10, at 206.
87. *Id*. at 211.
88. I.R.C. § 102.

step further than the treatment of gifts by allowing deduction by the payor. This more closely resembles the position taken by Simons because the payee—not the payor—is the person consuming the spousal support.

VII. SPOUSAL SUPPORT AND THE TAX POLICY OF EXPANDED INCOME

The *Overview of the Definition of Income Used by the Staff of the Joint Committee on Taxation in Distributional Analysis* (*Overview*) introduces the concept of "expanded income" used by the staff of the Joint Committee for some limited purposes.[89] The *Overview* was published on February 8, 2012, so it predates the TCJA by five years. As discussed above, the legislative record for the repeal of sections 71 and 215 is slim and does not explain why the change was made. It is conceivable, however, that Congress was aware of the *Overview* and intended to implement its policies in the TCJA, including the repeal of I.R.C. §§ 71 and 215.

The IRS gathers tremendous amounts of data about the American economy. It synthesizes the data and prepares reports through the Statistics Of Income program (SOI).[90] One of the areas of the economy addressed in the SOI is the distribution of income across the American economy.

The SOI division prepares several distributional analysis tables. In most of the SOI's distribution tables, tax returns are distributed according to AGI. AGI includes all sources of taxable money income, reduced by adjustments such as contributions to certain retirement accounts and alimony paid. However, as discussed below, AGI, a tax return concept, does not lend itself to comprehensive distributional analyses, because it does not fully reflect the taxpayer's command over economic resources, and, therefore, it creates an incomplete picture of economic well-being.[91]

The *Overview* introduces a new concept to address the shortcomings of AGI in distributional analysis, which the Joint Committee on Taxations calls "expanded income."[92]

When preparing distributional analysis, the Joint Committee staff uses an income concept meant to measure economic income, not just taxable income, since economic income is a conceptually appropriate measure of economic well-being. Economic income includes the annual

---

89. JOINT COMM. ON TAX'N, JCX-15-12, OVERVIEW OF THE DEFINITION OF INCOME USED BY THE STAFF OF THE JOINT COMM. ON TAX'N IN DISTRIBUTIONAL ANALYSIS 1 (2012).

90. IRS, *SOI Tax Stats – Statistics of Income*, (Mar. 2, 2021) https://www.irs.gov/statistics/soi-tax-stats-statistics-of-income.

91. JOINT COMM. ON TAX'N, JCX-15-12, OVERVIEW OF THE DEFINITION OF INCOME USED BY THE STAFF OF THE JOINT COMM. ON TAX'N IN DISTRIBUTIONAL ANALYSIS (2012) at 2.

92. *Id*.

flow of all resources at the command of an individual and represents an individual's total well-being.[93]

The staff of the Joint Committee notes that "[e]conomists generally agree that, a Haig-Simons definition of income is the best measure of economic well-being."[94] Expanded income reflects the Haig-Simons definition of income because it starts with AGI and adds items not included in AGI but are what Simons would have called "inflows of satisfaction."[95] The items added back into AGI are: "tax exempt interest, workers' compensation, nontaxable Social Security benefits, excluded income of U.S. citizens living abroad, value of Medicare benefits in excess of premiums paid, minimum tax preferences, employer contributions for health plans and life insurance, and employers' share of payroll taxes."[96] In short, "[e]xpanded income tries to capture the most practical measurable elements of Haig-Simons income."[97]

The staff of the Joint Committee start their analysis of expanded income with all the items described in AGI under I.R.C. § 62. In 2012, when the *Overview* was written, the AGI of a recipient of income would have included amounts received as spousal support under section 61.[98] Concomitantly, the payor of alimony would not have included those amounts in AGI under section 62.[99] Expanded income as described in the *Overview,* under the pre-TCJA version of the I.R.C., would have included spousal support in the hands of the recipient but not the payor. The repeal of sections 71 and 215, and the amendments of sections 61 and 62 to reconcile their provisions with the repeal of sections 71 and 215, would be contrary to the view of income reflected in the *Overview.*

The *Overview* is designed to reflect the economic well-being of taxpayers more accurately than AGI. That is why, starting from AGI, expanded income adds back amounts available for consumption by taxpayers. Amounts paid by taxpayers as spousal support are not available for consumption by taxpayers who pay those amounts. Those amounts are, of course, available for consumption or savings by the recipients of spousal support. That is why the *Overview* does not include those amounts in the hands of the payor. By repealing sections 71 and

---

93. *Id*.

94. *Id*. at 3.

95. SIMONS, *supra* note 10, at 85 ("[Seligman] begins by defining income as satisfactions . . . On the next page 'Income denotes any inflow of satisfactions which can be parted with for money.' So far income would seem to be consumption.").

96. Joint Comm. on Tax'n, JCX-15-12, OVERVIEW OF THE DEFINITION OF INCOME USED BY THE STAFF OF THE JOINT COMMITTEE ON TAXATION IN DISTRIBUTIONAL ANALYSES, (2012), at 2.

97. *Id*. at 3.

98. I.R.C. § 61(a), (a)(8) (1986) ("Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: … (8) Alimony and separate maintenance payments.").

99. § 62(a)(10) ("For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following: (10) Alimony – the deduction allowed by section 215.").

215 and reconciling other provisions of the Code to be consistent with that repeal, the TCJA is not adopting the new definition of income in the *Overview*, rather, it is frustrating it.

The repeal of I.R.C. §§ 71 and 215 is not consistent with the definition of expanded income in the *Overview*. The new expanded income approach to defining income may not, therefore, be an implied policy rationale behind the repeal of those sections.

VIII. CONCLUSION

Haig-Simons stands for the proposition that "[t]he *sine qua non* of income is *gain*. . . ."[100] Without a consistent agreed upon definition of gain, a system of income taxation risks losing its function as a tax on income and becomes tax on wealth producing activities of the type described in *Gould* and *Eisner v. Macomber*. The decisions in those cases relied on a definition of income that was confined to distributions from business activities. Modern analysis from economists such as Henry Simons provided a better definition of income. The Haig-Simons definition of income has been the generally agreed upon definition of income for federal tax purposes for a long time. Departure from that definition might be warranted if good and sufficient policy reasons could be identified for the departure.

The repeal of I.R.C. §§ 71 and 215 represent a departure from the Haig-Simons definition of income. The legislative history does not reveal a tax policy reason for that departure. The tax policies vertical, systemic horizontal equity and substantive horizontal equity cannot be viewed as implied reasons for the repeal of those sections. The repeal of sections 71 and 215 are contrary to the concept of expanded income. However, the repeal of I.R.C. §§ 71 and 215 are consistent with the tax policy of simplification.

Eliminating the complex rules of I.R.C. §§ 71 and 215 undeniably makes the tax rules addressing spousal support easier to comply with and easier to administer. The price for this simplification seems to be substantive horizontal equity. Substantive horizontal equity is reduced by taxing the payor of spousal support on income no longer consumable or savable by the payor. In the absence of any express reason for the repeal of the tax rules on alimony as they existed prior to the TCJA, it is reasonable to conclude that Congress has, in one area of tax policy, elevated simplicity over other tax policy concerns. There are many areas in the Code which suffer from complexity. The rules concerning tax favored income from capital gains is one obvious example. Perhaps Congress will act in the future to simplify the Code in those areas as well. If so, perhaps the congressional record will be more explicit about

100. SIMONS, *supra* note 10, at 50.

congressional intent. And perhaps the simplification can be accomplished without diminishing substantive horizontal equity.

This article started with the question, has Congress sounded a retreat from the Haig-Simons definition of income for federal tax purposes by changing the tax rules for spousal support? The answer is a qualified yes. The repeal of I.R.C. §§ 71 and 215, along with the conforming amendments to sections 61 and 62, evince a tax policy contrary to the Haig-Simons definition of income. However, it may be that the tax policy favoring simplicity was viewed by Congress as more important than consistency of the definition of income in the limited context of spousal support. We can only await further developments to see whether other sections of the Code will be amended in ways that undermine the Haig-Simons definition of income. If so, we will know that the change in tax rules for spousal support found in the TCJA was the first sounding of retreat from the Haig-Simons definition of income for federal tax purposes.