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September 19, 2007

Ms. Linda Stiff
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments Concerning Proposed Regulations Under Section 152(e) of the Internal Revenue Code

Dear Acting Commissioner Stiff:

Enclosed are comments on proposed regulations under section 152(e) of the Internal Revenue Code. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Stanley L. Blend
Chair, Section of Taxation

Enclosure

cc: Donald L. Korb, Chief Counsel, Internal Revenue Service
Eric Solomon, Assistant Secretary (Tax Policy), Department of the Treasury
Karen Gilbreath Sowell, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
Michael J. Desmond, Tax Legislative Counsel, Department of the Treasury

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COMMENTS CONCERNING PROPOSED REGULATIONS UNDER SECTION 152(e) OF THE INTERNAL REVENUE CODE

The following comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation (“Section”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, the Comments should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Bryan T. Camp of the Section’s Committee on Individual and Family Taxation and William P. Nelson of the Section’s Committee on Low Income Taxpayers. Substantive contributions were made by Elizabeth A. Hay and Susan Morgenstern of the Committee on Low Income Taxpayers. The Comments were reviewed by Joseph Barry Schimmel, Chair of the Low Income Taxpayers Committee, Fred F. Murray, of the Section’s Committee on Government Submissions, and Sharon Stern Gerstman, Council Director for the Committee on Individual and Family Taxation and the Low Income Taxpayers Committee.

Although members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the Federal income tax principles addressed by these Comments, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: September 19, 2007

EXECUTIVE SUMMARY

These Comments are submitted in response to the request for comments contained in the preamble to the proposed regulations (the “Proposed Regulations”) under Regulation section 1.152-4 as published in the Federal Register on May 2, 2007.¹ The Proposed Regulations reflect amendments made by the Working Families Tax Relief Act of 2004 and the Gulf Opportunity Zone Act of 2005, and provide guidance on issues that have arisen in the administration of section 152(e).²

Section 152(e) provides a special rule for claiming a child as a dependent for Federal income tax purposes in the case of parents who are divorced, separated, or live apart at all times during the last six months of the calendar year. In such situations the Code provides that if (a) the child receives over one-half of the child’s support from the child’s parents, (b) the child is in the custody of one or both parents for more than one-half of the calendar year, and (c) the custodial parent signs a written release that the noncustodial parent attaches to his or her tax return, then the child is deemed to be the qualifying child or qualifying relative of the noncustodial parent for purposes of the dependent exemption under section 151(c) and the child tax credit under section 24. The Proposed Regulations chiefly interpret and clarify the third statutory requirement.

We agree with many of the decisions made in the Proposed Regulations and, in addition, we recommend that the Regulations, when finalized:

1. change the “nights” test from an irrebuttable presumption to a rebuttable presumption;
2. make explicit that a custodial parent may claim a dependent deduction for a child as a “Qualifying Relative” notwithstanding that the custodial parent alone does not provide more than 50% of that child’s support;
3. permit taxpayers to attach an accurate copy of the written declaration to their tax return and not require the original;
4. address the issue of whether a separation agreement can serve as a written declaration;
5. clarify Example 2;

¹ 72 Fed. Reg. 24192 (May 2, 2007).

² Unless otherwise expressly stated herein, all references to sections are to sections of the Internal Revenue Code of 1986, as amended (the “Code”), and all references to regulations are to the Treasury Regulations promulgated under the Code.

6. permit a revocation, when so designated, to be effective as early as the tax year in which it is properly mailed or delivered to the noncustodial parent; and
7. allow a custodial parent the benefit of a “mailbox rule” to prove notification of a revocation.

COMMENTS

DEFINITION OF CUSTODIAL PARENT

The Code defines a custodial parent to be “the parent having custody for the greater portion of the calendar year.”³ A noncustodial parent is “the parent who is not the custodial parent.”⁴ The Code does not, however, define the term “custody.” Arguably, custody refers to the parent with whom the child resides, as this reading would comport with the general requirement that a “qualifying child” must have “the same principal place of abode as the taxpayer for more than one-half of such taxable year,”⁵ and the tie-breaker rule that allocates a “qualifying child” claimed by both parents on separate returns to “the parent with whom the child resided for the longest period of time during the taxable year.”⁶

In situations involving a child who resides at times with one parent and at times with the other parent, especially when a portion of a day is spent in the home of one parent and the remainder of the day is spent in the home of the other parent, it can be difficult to determine how much time is spent in the custody of each parent. The Proposed Regulations attempt to resolve this problem in all cases by defining the custodial parent as “the parent with whom the child resides for a greater number of nights during the tax year.”⁷ This “nights” rule thus creates an irrebutable presumption.

The Preamble to the Proposed Regulations specifically requested comments on alternative methods of allocating nights when a child resides with neither parent. We support the Proposed Regulation’s approach to treating nights where the child does not stay with either parent, as illustrated by Example 3. The test is based on an inquiry on which parent controlled where the child spent the night. Not allowing such nights to be counted as nights spent with the parent who gave permission would create perverse incentives on the part of the parent who would “lose” those nights.

We support the need for a bright-line rule. When commenting on the Tax Technical Corrections Act of 2005,⁸ we supported a bright-line rule to require a written waiver signed by the custodial parent to prove that the custodial parent had released the exemption to the

³ Section 152(e)(4)(A).

⁴ Section 152(e)(4)(B).

⁵ Section 152(c)(1)(B).

⁶ Section 152(c)(4)(B)(i).

⁷ Prop. Reg. § 1.152-4(c)(1), 72 Fed. Reg. 24,194 (2007).

⁸ ABA Section of Taxation, *Comments on Tax Technical Corrections Act of 2005*, Sept. 2005, available at <http://www.abanet.org/tax/pubpolicy/2005/050901ttca.pdf>.

noncustodial parent. However, we are concerned that the “nights” rule may be unfair and inappropriate in some circumstances. For example, suppose that a parent cares for a child every day in her own home. However, because that parent works the night shift on weekdays, she sends the child to the other parent’s home to sleep five nights a week. Under the Proposed Regulations, the parent who provides the child with a place to sleep would be the custodial parent and the parent who provides daily care would be the noncustodial parent. This result seems not only unfair to the parent who provides daily care, but also at odds with the Code’s definition of a custodial parent as one with whom the child lives for the greater portion of the year.

The “nights” rule should allow for the complexities of the modern family and should not penalize non-traditional family arrangements. Accordingly, we recommend that the Regulations, when finalized, make the rule a rebuttable presumption and allow taxpayers who cannot meet the “nights” test the opportunity to prove that they are nonetheless the custodial parent within the meaning of the statute. We do not believe this will embroil either the Service or the Tax Court in *additional* custody determinations over and above factual determinations called for by the “nights” test itself. In both cases, parents must stand ready to prove where the child slept. Litigious parents will need to keep logs or other records of where the child spent the night during the year and once the greater number of nights is proved, it will be only the extraordinary situation that will overcome the resulting presumption.

REQUIREMENTS FOR RELEASE OF THE RIGHT TO CLAIM A CHILD

Section 152(e)(1) states a general rule regarding what must happen before a non-custodial parent can claim a dependent exemption. The main rule is that a custodial parent can release the dependent exemption to the noncustodial parent. Importantly, this is true “notwithstanding subsection ... (d)(1)(C)” (the support requirement for Qualifying Relative) so long as the child receives over one-half of his or her support from both parents combined. Implicit in section 152(e)(1) is the assumption that the custodial parent is entitled to the exemption in the first place. If not, there is nothing to release. However, read literally, the “notwithstanding subsection... (d)(1)(C)” applies *ONLY* to the ability of the noncustodial parent who has received a release to claim the exemption, because that is subject of the general rule in section 152(e)(1). The wording of section 152(e)(1) thus contains a gap that creates potentially asymmetrical treatment of taxpayers. We recommend the Regulations, when finalized, fill this gap, which is best illustrated by the following example:

A and B are divorced parents of Child; A is the custodial parent of Child. Child is 20 years old, earns less than the exemption amount and is not a student within the meaning of section 152(f)(2). Each parent provides less than one-half the support of Child during the calendar year but together provide more than one-half of the Child’s support. Under prior law, parent A would be entitled to the dependent exemption. Under current law, neither parent is entitled to claim Child as a Qualifying Relative because they each fail the support requirement of section 152(d)(1)(C). However, if A signs a written release, section 152(e)(1) provides that B can claim the Child as a dependent “notwithstanding... subsection (d)(1)(C).”

In our view, it is not logical to say that the parents in this example could allocate the dependent exemption to B if A cannot claim it also “notwithstanding...subsection (d)(1)(C).” But because the general rule in section 152(e)(1) applies only to the noncustodial parent, it is silent about whether the *custodial* parent is also able to disregard the support requirement in subsection (d)(1)(C). Accordingly, we recommend that the Regulations, when finalized, clarify that section 152(e)(1) permits both the custodial and noncustodial parent to disregard the support requirement in section 152(d)(1)(C) if the child receives over one-half of the child’s support from both parents combined.

State courts often attempt to allocate dependent exemptions in divorce and custody orders.⁹ As a result, a taxpayer who is entitled under Federal tax law to claim a child as a dependent may be subject to a conflicting state court or family court order. The National Taxpayer Advocate has recognized this problem and recommended that Congress amend the Code to specify that a dependent exemption may only be released voluntarily by the custodial parent, and that the federal rules for assignment of the dependent exemption cannot be overridden by state courts or government entities.¹⁰

We support the language in Proposed Regulation subsection (d)(1)(i) that “A court order or decree may not serve as the written declaration.” While Treasury and the Service unfortunately are unable to completely resolve the above dilemma faced by taxpayers, the Proposed Regulations do attempt to clarify that Federal tax law trumps a state domestic relations order in allocating a dependent exemption between the parents. Because the Service should not have to determine whether a noncustodial parent has met a support obligation, it is appropriate to require an unconditional written declaration by a custodial parent to validly release the dependent exemption.

We are concerned that the Proposed Regulations do not address the effect of a separation agreement. On the one hand, perhaps separation agreements ought to be effective as a written declaration because they are more nearly like a consensual release than are court orders and do not raise the same concerns. On the other hand, they are not stand-alone documents like a Form 8332 or similar one-issue document that simply works a release of the dependent exemption. Separation agreements are often complex documents and, more importantly, quite often interact with divorce decrees or are governed by specific state laws not applicable to other side-agreements by the parties. Thus, while a separation agreement may not, on its face, contain conditions relating to the release of the dependent exemption, the divorce decree which incorporates it (or state law) might well have created just the kind of conditional release forbidden by the statute. Allowing separation agreements to substitute for Form 8332 or a

⁹ National Taxpayer Advocate, *FY 2001 Annual Report to Congress* 107 (footnotes omitted), available at http://www.irs.gov/pub/irs-utl/2001_tas.pdf.

¹⁰ *Id.* at 109.

similar one-issue document may well embroil both the Service and the Tax Court in the very type of state law disputes which the Proposed Regulations seek to avoid.

We are further concerned with the “original written declaration” requirement in subsection (d)(2). Modern technology has rendered almost obsolete distinctions between “original” and “copy.” Faxes of documents, included faxed signatures, are routinely accepted in contract law to trigger legal rights and obligations. In fact, the Service has long accepted faxed Form 4828 as sufficient to allow the release of taxpayer return information under section 6103 to a taxpayer’s representative. Requiring taxpayers to keep track of an original Form 8332 (or its equivalent) is unnecessary and could be burdensome for taxpayers, especially in situations of last-minute filings where one spouse faxes the written declaration to the other. Allowing an accurate copy of Form 8332 (or its equivalent) is a far more practical approach than requiring an “original” and requires fewer campus resources to process.

Our final recommendation on this topic is to clarify Example 2. Currently, the example refers readers generally to section 152(c) to determine “whether Child is treated as the qualifying child of D or E.” However, the example specifies that D is the custodial parent (because it says “Child resides with D for 7 months”). Accordingly, the example should conclude that D is entitled to the dependent exemption under the rules of section 152(c)(4)(B) and not under the rules in section 152(e).

REVOCAION OF WRITTEN DECLARATION

The Code provides a mechanism for a custodial parent to release, by written declaration, the right to claim a child as a dependent for purposes of the dependent exemption and child tax credit¹¹ (but not with respect to other child-related tax benefits).¹² The noncustodial parent is allowed to claim the child as a dependent for these purposes by attaching a copy of the written declaration to his or her tax return.¹³ The Service has developed Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents, for this purpose. The Form allows the custodial parent to effect a release for the current tax year and/or future tax years.

The statute is silent as to whether a release may be operative for more than one year, and whether or how a custodial taxpayer may revoke a release. The Proposed Regulations allow releases for multiple years and allow the custodial parent to revoke the release for specified years by providing written notice of the revocation to the other parent¹⁴ and attaching the original (or a

¹¹ Section 152(e)(2)(A).

¹² See sections 2(b)(1)(A)(i) (head-of-household), 21(e)(5) (child and dependent care credit), and 32(c)(3)(A) (EITC).

¹³ Section 152(e)(2)(B).

¹⁴ Prop. Reg. § 1.152-4(d)(3)(i).

copy in future years) to the custodial parent's tax return.¹⁵ The custodial parent must keep a copy of the revocation and proof of delivery to the noncustodial parent.¹⁶ The earliest year for which the revocation would be effective is the tax year that begins in the first calendar year after the calendar year in which the parent revoking the release provides notice to the other parent.¹⁷

We support these provisions of the Proposed Regulations because they provide flexibility for parents whose economic and tax circumstances may have changed since the time a multi-year release was executed. In addition, the right to revoke may help the custodial parent ensure that a noncustodial parent remains in compliance with child support obligations, especially because the Proposed Regulations require that a written release must be unconditional and cannot be contingent on the payment of support or satisfaction of other obligations or conditions.¹⁸

We are concerned, however, that the flexibility and usefulness of the revocation provision is undermined by the extended time frame. Delaying the effect of the revocation until "the tax year that begins in the first calendar year after the calendar year in which the parent revoking the release provides notice to the other parent" undermines its potentially significant utility as an incentive device, and even threatens to render the revocation entirely useless in some situations.

For example, assume that the custodial parent signs an unconditional release in 2007 covering all future tax years based on the assumption that the noncustodial parent will pay child support for the next 10 years. Assume further that in early 2009 the noncustodial parent stops making child support payments. In response, the custodial parent might sign a written revocation and notify the noncustodial parent in July 2009 by mailing that revocation to the noncustodial parent. Under the Proposed Regulations, the revocation would not be effective for the 2009 tax year. Instead, the noncustodial parent could still validly claim the exemption on his or her 2009 tax return. We see no reason in this circumstance to allow the noncustodial parent a dependent exemption deduction for the 2009 tax year.

Further, the revocation right could be rendered entirely useless by alternate-year claiming arrangements, commonly ordered by domestic relations courts. If the custodial parent is instructed to issue an unconditional multiple-year exemption waiver for alternate years, the threat of revocation is only useful for the years in which the exemption is waived. The noncustodial parent has incentive to fulfill support obligations only during alternate years; during the years where the custodial parent has not waived, and therefore has no opportunity to revoke, the noncustodial parent has little incentive to comply.

¹⁵ Prop. Reg. § 1.152-4(d)(3)(iii).

¹⁶ Prop. Reg. § 1.152-4(d)(3)(iii).

¹⁷ Prop. Reg. § 1.152-4(d)(3)(i).

¹⁸ Prop. Reg. § 1.152-4(d)(1)(i).

We recommend that the Regulations, when finalized, make the revocation effective for the tax year in which it is properly mailed or otherwise delivered to the noncustodial parent. In the example above, the revocation would be effective for calendar year 2009, because that is the year in which the custodial parent properly notified the noncustodial parent of the revocation. We do not believe that such a “same year” revocation rule would increase either the Service’s or the Tax Court’s involvement in support disputes. Under either the proposed rule or our recommendation, the test for awarding the dependent exemption as between two claimants remains the same. In addition, our recommendation has the advantage of decreasing the chance that the revoking parent will lose the proof of revocation.

We further recommend that the Regulations, when finalized, clarify how written notice of revocation is to be made to the noncustodial parent and what constitutes evidence of delivery.¹⁹ We suggest that the Regulations, when finalized, provide a “mailbox rule,” requiring the custodial parent to send a copy of the written revocation to the noncustodial parent at his or her last known address or at an address reasonably calculated to ensure receipt. We recommend that proof of mailing by certified mail or a similar tracked delivery constitute sufficient evidence of notification.

NEVER MARRIED PARENTS

We commend the Service for following the decision in *King v. Comm’r*, 121 T.C. 24 (2003) and applying the Proposed Regulations to parents who had never married as well as those who were previously married.

¹⁹ See Prop. Reg. § 1.152-4(d)(1)(i).