

INTERNAL REVENUE SERVICE

Number: **200002043**

Release Date: 1/14/2000

October 28, 1999

CC:DOM:IT&A:4

TL-N-4420-99

UILC: 2.02-00; 32.03-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE SERVICE CENTER ADVICE

MEMORANDUM FOR ASSISTANT DISTRICT COUNSEL,

FROM: Acting Assistant Chief Counsel (Income Tax & Accounting)
CC:DOM:IT&A

SUBJECT: EITC and Incarcerated Dependent

This is in reply to your request for Significant Service Center Advice dated July 27, 1999, regarding whether a child's detention in a juvenile facility constitutes a "temporary absence from the household due to special circumstances" under §1.2-2(c)(1) of the Income Tax Regulations, which concerns the definition of head of household. The conclusion affects whether the child meets the definition of a "qualifying child" for purposes of the Earned Income Credit (EIC). Section 1.2-2(c) may be applied to determine what is a temporary absence from the principal place of abode for purposes of §32.

ISSUE

Whether a child's detention in a juvenile facility pending trial may be a "temporary absence from the household due to special circumstances" within the meaning of §1.2-2(c)(1) of the regulations.

CONCLUSION

Detention in a juvenile facility pending trial is a temporary absence from the household due to special circumstances if there is no intent on the part of the taxpayer and child to change the child's principal place of abode. Notwithstanding the child's temporary detention in the facility, the child's parent may qualify as head of household if the other requirements of §2(b) and the regulations thereunder are satisfied. In addition, the child may meet the residency test of §32.

FACTS

The taxpayer's child is being held in a juvenile facility pending trial.¹ Prior to being detained, the juvenile lived with the taxpayer. Depending on the outcome of the trial, the child may be held after the trial in a juvenile facility for an extended period of time.

LAW

Section 32(a) of the Internal Revenue Code allows an EIC in the case of an eligible individual. Section 32(c)(1)(A)(i) of the Code defines an eligible individual to include any individual who has a qualifying child for the taxable year. Section 32(c)(3)(A) sets forth the three requirements for a qualifying child. Section 32(c)(3)(A)(ii) provides that the qualifying child must have the same principal place of abode as the eligible individual for more than one-half of the taxable year. If the qualifying child is the eligible foster child of eligible individual, the qualifying child must have the same principal place of abode as the eligible individual for the entire taxable year. Section 32(c)(B)(iii). This is known as the residency test.

The concept of "qualifying child" was added to §32 by the Omnibus Budget Reconciliation Act of 1990 (P. L. 101-508, 104 Stat. 1388 (1980)). In adding "qualifying child" to §32, Congress added a relationship test, a residency test and an age test. Section 32(c)(3). Your issue involves the residency test. In explaining the residency test, the legislative history provides:

An individual satisfies the residency test if the individual has the same principal place of abode as the taxpayer for more than half the taxable year (the entire year for foster children). The determination of whether the residence requirement is met is made under rules similar to those applicable with respect to whether an individual meets similar requirements with respect to head-of-household filing status. Thus, for example, rules apply with respect to temporary absences due to education or illness that would disregard certain of such absences for purposes of determining whether the child had the same principal place of abode for over half the year.

H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 2742 (1980).

Moreover, in interpreting an analogous residency requirement under prior law, §1.32-2(c)(1)(i) of the Income Tax Regulations specifically provides that the term

¹ We assume for purposes of this memorandum that the child is not being tried as an adult.

“principal place of abode” is defined with reference to §1.2-2(c) of the regulations.² Accordingly, the standards in §1.2-2(c) are controlling.

Section 2(b)(A) of the Code defines head of household as one who maintains as his home a household which constitutes for more than one-half of such taxable year the principal place of abode, as a member of such household, of specified persons. An individual shall be considered as maintaining a household only if over half of the cost of maintaining the household during the taxable year is furnished by such individual.

The legislative history for the head-of-household provision includes the following statement:

Under both [the House and Senate] bills, a taxpayer is considered as maintaining a household only if during the year he furnishes more than half the maintenance costs of such household. Moreover, the individual who makes it possible for the taxpayer to gain the benefits of the head-of-household status must actually live in the taxpayer’s household during the entire taxable year unless he is temporarily absent, for example, attending school or for reasons of health. (emphasis added) S. Rep. 82-781, 1951-2 C.B. 458, 464.

Section 1.2-2(c)(1) of the regulations provides that the taxpayer and such other person will be considered as occupying the household notwithstanding temporary absences from the household due to special circumstances. A nonpermanent failure to occupy the common abode by reason of illness, education, business, vacation, military service, or a custody agreement under which a child or stepchild is absent for less than 6 months in the taxable year of the taxpayer, shall be considered temporary absence due to special circumstances. Such absence will not prevent the taxpayer from being considered as maintaining a household if (i) it is reasonable to assume that the taxpayer or such other person will return to the household, and (ii) the taxpayer continues to maintain such household or a substantially equivalent household in anticipation of such return.

In Hein v. Commissioner, 28 T.C. 826 (1957), acq. 1958-2 C.B. 6, the issue was whether the taxpayer could claim head of household filing status based on his sister. The sister was continuously confined to a nursing home for several years including the entire year under consideration. The sister had been a member of the taxpayer’s household prior to the confinement and the taxpayer paid all of the sister’s expenses in the nursing home. Due to illness and age, it was unlikely that the sister would return to the taxpayer’s household. The court held that the sister’s stay in the nursing home was temporary due to special circumstances even though she was unlikely to return to the

² Section 1.32-2 was promulgated in 1980 as §1.43-2, and redesignated as §1.32-2 in 1992. Due to subsequent statutory changes in section 32, these regulations are not entirely in conformity with current law.

taxpayer's household. The court reasoned that if she did recover, neither she nor taxpayer intended to terminate the relationship to the pre-existing home.

Rev. Rul. 66-28, 1966-1 C.B. 31, applies Hein to the dependency exemption because as the revenue ruling notes, the regulations under §152(a)(9) contain a provision identical to §1.2-2(c) of the regulations concerning temporary absence from the household due to special circumstances.³ The revenue ruling holds that the period of time during which a dependent is confined to a nursing home because of illness will be considered a temporary absence due to special circumstances under §152(a)(9), even though such absence is for an extended period of time. However, there must be an absence of intent on the part of the taxpayer and dependent to change the dependent's principal place of abode. The possibility or probability that death might intervene before the dependent returns to the household is not sufficient to make such absence permanent.

DISCUSSION

The legislative history for the head-of-household provisions lists two situations involving temporary absence from the household due to special circumstances, namely, absence for reasons of health and education. It is clear from the legislative history that these situations are intended as examples of temporary absence. The regulations list four additional situations involving temporary absence due to special circumstances. There is no indication from the language of the regulations that the regulations provide an exclusive list of situations involving temporary absence from the household. Also, except in the case of child custody agreements, the regulations do not limit or restrict a temporary absence to a specific period of time (e.g., one year or less).

Detention in a juvenile facility pending trial can be a temporary absence notwithstanding the possibility that the child may be detained after the trial for an extended period of time in a juvenile facility. As indicated by the Hein case and Rev. Rul. 66-28, the length of the person's absence from the household does not, by itself, determine whether the absence is temporary. What is determinative is whether there is any intent to change the principal place of abode.

³ See §1.152-1(b) of the regulations. The language in §1.152-1(b) concerning temporary absence from the household due to special circumstances is identical to that of §1.2-2(c)(1). However, the focus in §1.152-1(b) is on individuals who may qualify as members of a taxpayer's household under §152(a)(9).

If you have any questions about the memorandum, please contact John Moran at 622-4940.

HEATHER C. MALOY

By: s/ Michael L. Gompertz
MICHAEL L. GOMPERTZ
Assistant to the Branch Chief,
Branch 4