



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

January 15, 2002

OFFICE OF
CHIEF COUNSEL

Number: **200224005**
Release Date: 6/14/2002
UIL No. 152.08-02

CC:ITA:5
PREF-160734-01

MEMORANDUM FOR JEFFREY C. VENZIE
ATTORNEY (SBSE)
CC:SB:2:PHI:1

FROM: George Baker
Assistant to Branch Chief, CC:ITA:5

SUBJECT: Support Test for Divorced Parents

This is in response to your memorandum requesting service center advice concerning whether Figure B, Support Test for Children of Divorced or Separated Parents, on page 16 of the 2001 version of Publication 501, Exemptions, Standard Deduction, and Filing Information, requires revision.¹ Specifically, your memorandum addresses the block in that flow chart that asks: "Is there a decree or agreement executed after 1984 that unconditionally entitles the noncustodial parent to the exemption?" The flow chart's arrows continue by providing that if the answer is "Yes," the noncustodial parent meets the support test; if the answer is "No," the reader must continue to answer additional questions. The memorandum continues by stating that the language in the block could be misleading since it gives the reader the impression that merely having a post-1984 decree or agreement is sufficient to meet the support test, which could be inconsistent with case law. The memorandum recommends eliminating this block altogether. For the reasons set forth below, we believe that we should recommend to the Forms and Publications office that this block be revised.

Section 152(e)(2) of the Code provides special rules for the "support test" for a child of divorced or separated parents. A child of parents described in section 152(e)(1) shall be treated as having received over half of his support during a calendar year from the noncustodial parent if (A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and (B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

Section 1.152-4T(a), Q&A 3, of the temporary Income Tax Regulations provides that a noncustodial parent may claim the exemption for a dependent child only if the noncustodial parent attaches to his/her income tax return for the year of the exemption a written declaration from the custodial parent stating that he/she will not claim the child

¹ The same figure appears as Figure 1 on page 9 of the 2001 version of Publication 504, Divorced or Separated Individuals.

PREF-160734-01

as a dependent for the taxable year beginning in the calendar year. The written declaration may be made on a form to be provided by the Service for this purpose. Once the Service has released the form, any declaration made other than on the official form shall conform to the substance of such form.

Your memorandum cites two cases, Miller v. Commissioner, 114 T.C. 184 (2000), and White v. Commissioner, T.C. Memo 1996-438 (1996), where the Tax Court concluded that a post-1984 divorce decree granting the noncustodial parent the dependency exemption for the child of divorcing parents did not constitute a written declaration sufficient to meet the requirements of section 152(e)(2)(A) of the Code. In Miller the Tax Court denied the dependency exemption to the noncustodial parent even though that parent was granted the dependency exemption in permanent orders issued by the divorce court as part of the divorce decree. The noncustodial parent also attached the relevant portions of the permanent orders to his tax return. However, because the attorney for the custodial parent signed the permanent orders, rather than the custodial parent as required by section 152(e)(2)(A), the Tax Court found that the permanent orders did not meet the statute's signature requirements. It thus did not constitute a "written declaration" for purposes of section 152(e)(2)(A).

In White, a shared custody situation, the dependency exemption was denied to the former husband because a letter he received from the former wife pursuant to the divorce decree, which granted him the dependency exemption, did not "conform to the substance" of Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents, as required by section 1.152-4T(a), Q&A 3, of the temporary Income Tax Regulations. The letter failed to state the years in which the former wife was releasing the claims for exemptions, the social security numbers of either parent, and, most importantly, that the former spouse explicitly agrees that she will not claim the two named children as dependents. Accordingly, the court found that the letter was not sufficient to meet the requirements of section 152(e)(2)(A) and section 1.152-4T(a), Q&A 3.

Consequently, in view of the above case law, we agree with your observation that this block in Figure B, as presently drafted, could lead a taxpayer to incorrectly conclude that the support test is met merely because a post-1984 divorce decree or agreement unconditionally entitles such taxpayer, as the noncustodial parent, to the dependency exemption. Thus, where such decree or agreement does not meet the requirements of the statute and regulations (that is, it is not signed by the custodial parent or does not contain the information set forth in Form 8332), the taxpayer may be led by the chart to improperly claim the dependency exemption anyway.

However, we disagree with your memorandum's recommendation that the above-referenced block be deleted from the chart. In our view, deleting this block is too broad a remedy. That is, it could lead many taxpayers who have post-1984 divorce decrees or agreements that do meet the requirements of the statute and regulations (that is, the decree or agreement is properly signed by the custodial parent and contains the information set forth in Form 8332) to improperly conclude that such

PREF-160734-01

documents do not constitute sufficient “written declarations” for purposes of the support test. Such taxpayers may be led to believe that they are not entitled to the dependency exemption because the other parent has not executed a Form 8332 or other similar statement. This would also lead to incorrect reporting.

Accordingly, we think this concern could be removed by revising the block in Figure B to require the signature of the custodial parent and to refer to Form 8332, which sets forth the necessary requirements for meeting the support test in this situation. For instance, the block could read: “Is there a divorce decree or separation agreement signed after 1984 by the custodial parent that unconditionally contains all the information required on Form 8332?”

We also note that the middle column of page 15 of Publication 501 presently contains an explanatory paragraph titled in bold letters **Divorce decree or separation agreement** in which the noncustodial parent is instructed to attach a copy of the following pages from the decree or agreement to his or her return in lieu of attaching a Form 8332: 1) Cover page (write the other parent’s social security number on this page). 2) The page that states you can claim the child as your dependent. 3) Signature page with the other parent’s signature and the date of the agreement.

We think that 2) above can be revised along the following lines: “2) The pages that state unconditionally that you can claim the child as your dependent and that the other spouse will not, and, if specified, for which years.”

In our view, these revisions will clarify this area for taxpayers. We will make these recommendations to the Forms and Publications office. In addition, we will recommend that conforming changes be made to Publication 504. If you have further questions, please contact our office at 622-4960.