



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR

FROM: Assistant Chief Counsel
(Employee Benefits and Exempt Organizations) CC:EBEO

SUBJECT: EIC based on taxpayer's permanently and totally disabled
parent - TL-N-5621-98, WLI3

This responds to your request for Significant Service Center Advice dated September 14, 1998, regarding whether a permanently and totally disabled parent may qualify as an eligible foster child for purposes of the earned income credit (EIC) under section 32 of the Internal Revenue Code.

ISSUE:

Whether a taxpayer can claim the EIC on the basis of the taxpayer's permanently and totally disabled parent.

CONCLUSION:

A taxpayer cannot claim the EIC on the basis of a permanently and totally disabled parent.

FACTS:

The taxpayer is 40 years old and has earned income of \$12,000. The taxpayer's mother lives with the taxpayer for the entire taxable year. The mother is 65 years old and is permanently and totally disabled. The taxpayer takes care of her mother and provides all of the mother's necessities.

LAW AND ANALYSIS

Section 32(a) of the Code allows an EIC in the case of an eligible individual. An eligible individual is defined by section 32(c)(1)(A) of the Code to include an individual who has a qualifying child for the taxable year.

“Qualifying child” is defined in section 32(c)(3)(A) of the Code as an individual:

- (i) who bears a relationship to the taxpayer described in subparagraph (B),
- (ii) except as provided in subparagraph (B)(iii), who has the same principal place of abode as the taxpayer for more than one-half of [the] taxable year, and
- (iii) who meets the age requirements of subparagraph (C).¹

An individual satisfies the relationship requirement under section 32(c)(3)(B) of the Code if the individual is the son or daughter of the taxpayer, or the descendant of either; a stepson or stepdaughter of the taxpayer; or an eligible foster child. An “eligible foster child” is defined in section 32(c)(3)(B)(iii) as an individual, who is not the son or daughter of the taxpayer, or a descendant of either, or a stepson or stepdaughter of the taxpayer, whom the taxpayer cares for as his or her own child and who has the same principal place of abode as the taxpayer for the entire taxable year. Under section 32(c)(3)(C) an individual satisfies the age requirement if he or she is under age 19 as of the close of the taxable year, or under age 24 as of the close of the taxable year if a full-time student, or any age if permanently and totally disabled.

In this situation, the taxpayer is entitled to claim the EIC on the basis of her mother if the mother is a qualifying child of the taxpayer. She is a qualifying child of the taxpayer if the relationship, abode, and age tests are satisfied. Because the mother is not the son, daughter, stepchild, adopted child, or grandchild of the taxpayer, the mother satisfies the relationship test only if she is an eligible foster child of the taxpayer.

This situation raises the question of whether a parent of the taxpayer can ever be an eligible foster child. The concepts of qualifying child and eligible foster child

¹ Please note that a technical correction enacted in section 6021 of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, amended section 32(c)(3) to clarify that the identification requirement of section 32(c)(3)(D) is not an element of the definition of a qualifying child. The amendment is effective as if included in the 1990 amending legislation.

were added to section 32 of the Code by section 11111(a) of the Revenue Reconciliation Act of 1990, Pub. L. 101-508, 104 Stat. 1388, 1388-408 (1990). The Conference Report contains the same definition of eligible foster child as section 32(c)(3) of the Code. See H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 1035, 1037 (1990). The language was the same in the House and Senate bills. The provision was added on the floor of the House, so it was not addressed in the House committee reports. A Ways and Means Committee Print explains that

. . . The individual satisfies the relationship test if the individual is a son, stepson, daughter or stepdaughter of the taxpayer, a descendent of a son or daughter of the taxpayer, or a foster child of the taxpayer. The definition of child under the bill is the same as the definition of child for purposes of the dependency exemption (secs. 151 and 152). A foster child is defined as an individual who the taxpayer cares for as the taxpayer's own child.

Majority Staff of House Comm. on Ways and Means, Legislative History of Ways and Means Democratic Alternative, 101st Cong., 2d Sess. 8, 10 (WMCP 101-37, 1990).

The sentence in the committee print that refers to "child" as having the same definition as in sections 151 and 152 of the Code may be confusing because in section 32 the term is generally not used except as part of an expression ("qualifying child" or "eligible foster child") that has its own definition. The sentence is not repeated in the informal Senate Report², or in the Conference Report's description of the House and Senate bills.

In light of this history, we have considered the terminology of sections 151 and 152 of the Code for any clues that it may yield. Section 151(c)(1) allows an exemption for each dependent (as defined in section 152) whose gross income is less than the exemption amount or who is a child of the taxpayer and who meets certain age requirements. Section 151(c)(3) defines child as an individual who (within the meaning of section 152) is a son, stepson, daughter, or stepdaughter of the taxpayer. Section 1.151-3(a) of the Income Tax Regulations contains the same definition, with certain additions, including foster children (if such foster children satisfy the requirements of section 1.152-1(b) of the regulations) of the taxpayer.

² The bill that was enacted as Pub. L. 101-508 was H.R. 5835. The Senate version consisted of the amended text of S. 3209, a bill that had gone directly to the Senate floor without an official report having been printed. The only "official" report language is an informal report printed in the Congressional Record. See 136 Cong. Record S15629, S15684-S15686.

To summarize, the legislative history of section 32(c)(3)(B)(iii) of the Code is inconclusive. Although there is a suggestion in a committee print that "child" is defined by reference to the definition found in sections 151 and 152, those sections define child as including a foster child. The regulations under section 152 further define a foster child as a "child" who is in the care of a person or persons (other than the parents or adopted parents of the child) who cares for the child as his or her own. This definition does not resolve the issue of whether a parent can be an eligible foster child for purposes of the EIC.

We have found no case law casting light on the issue of whether a parent can be an eligible foster child. Thus, we must draw our conclusion directly from the language of the statute without additional guidance. Unlike the regulations under section 152, section 32(c)(3)(A) of the Code defines qualifying child as an individual who meets certain requirements. Similarly, section 32(c)(3)(B)(iii) defines eligible foster child as an individual who meets certain requirements.

Although the statute does not explicitly prohibit any individual or class of individuals from being an eligible foster child, other than the individuals specifically identified in section 32(c)(3)(B)(i)(I) and (II) (son, daughter, etc.), we do not believe the statutory definition includes the parent of a taxpayer. In construing the meaning of a statute, words are interpreted according to their plain meaning unless otherwise indicated. St. Charles Investment Co. v. Commissioner, 110 T.C. 46 (1998). The common understanding of the term "foster child" is a child whose care, comfort, education, and upbringing has been left to persons other than his or her natural parents. See Black's Law Dictionary (6th Ed.). This suggests that an eligible foster child does not include a parent. Although the term "individual" in section 32(c)(3)(B)(iii) may suggest that anyone, including a parent, may be an eligible foster child in certain circumstances, we believe the reference to "individual" in that section is better understood as merely recognizing the fact that an eligible foster child might not be a child, in terms of age, because of permanent and total disability. Moreover, this conclusion is supported by analogy to the statutory rule of construction, ejusdem generis. Under the rule of ejusdem generis, which means "of the same kind," where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified. See United States v. Powell, 423 U.S. 87, 90 (1975); Gooch v. United States, 297 U.S. 124, 128 (1936). This rule suggests that the phrase "eligible foster child," which is a broader term than the other items described in section 32(c)(3)(B)(i), should be limited to individuals similar to the others described in that section, so that an eligible foster child should not include a parent.

Based on the foregoing, the taxpayer's mother is not an eligible foster child of the taxpayer, and therefore she is not a qualifying child. Accordingly, the taxpayer cannot claim the EIC on the basis of her mother.

If you have any further questions, please call (202) 622-6060.

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