



**DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224**

**OFFICE OF
CHIEF COUNSEL**

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

**MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SBSE)
ATTENTION: LESLIE BUZZUTTO CC:SB:4:LOU**

FROM: Heather C. Maloy
Associate Chief Counsel
(Income Tax & Accounting)

SUBJECT:

This Chief Counsel Advice responds to your memorandum dated August 7, 2001. In accordance with § 6110(k)(3) of the Internal Revenue Code, this Chief Counsel Advice should not be cited as precedent.

LEGEND

A =
Year 1 =
Date 1 =
Date 2 =
Date 3 =
Date 4 =

ISSUE

Whether the Petitioner meets the support test of §152(e) for the purpose of deducting a dependency exemption for his son in Year 1?

CONCLUSION

Based on the facts presented, the Petitioner does not meet the support test of § 152(e). Therefore, the Petitioner may not claim a dependency exemption for his son in Year 1.

FACTS

Petitioner and A are the divorced parents of a son and a daughter. On Date 1, Petitioner and A signed an order stating that Petitioner could claim the son as a dependent and that A could claim the daughter as a dependent. At that time, Petitioner had custody of both children. Petitioner signed a Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents on Date 2, releasing his claim to an exemption for his daughter. In an order signed by a judge on Date 3, A was granted custody of the two children. The order stated that if Petitioner was current on his payments of child support and medical expenses, he could claim his daughter as a dependent. The order did not state who could claim the dependency exemption for the son. On Date 4, the Petitioner obtained a clarification order stating that the order on Date 3, along with the terms of the divorce decree, granted the Petitioner the right to claim dependency exemptions for both children on his tax returns. This order was not signed by Petitioner or A. In Year 1, both Petitioner and A claimed a dependency exemption for the son.

LAW AND ANALYSIS

Section 152(e)(1) provides that if a child receives over half of his support during the calendar year from his parents who are divorced and the child is in the custody of one or both of his parents for more than one-half of the calendar year, the child shall be treated as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year.

Section 152(e)(2) provides an exception to the general rule that the custodial parent is treated as providing over half of the child's support. It provides that the noncustodial parent is treated as providing over half of the child's support if the custodial parent signs a written declaration that the custodial parent will not claim the child as a dependent for the tax year and the noncustodial parent attaches the written declaration to the noncustodial parent's return for the tax year. Under A-3 of §1.152-4T of the Income Tax Regulations, the custodial parent may release a claim to an exemption by Form 8332 or a written declaration that conforms to the substance of that form.

Federal tax law determines whether a parent may claim a dependency exemption for a child. Section 152(e) sets forth the rules for determining which parent will meet the support test for claiming the child as a dependent when the parents are divorced, the child is in the custody of one or both parents for more than one-half of the calendar year, and the parents provide over half of the child's support during the calendar year.

Although Petitioner had custody of his son for a time after the divorce, the statement of facts submitted to this office indicates that in Year 1, A was the

custodial parent of the son of Petitioner and A. A did not sign a Form 8332 releasing her claim to an exemption for the son, nor did A make a written declaration that conformed in substance to Form 8332. In response to your specific question, the order on Date 1, which was signed by A, is not a written declaration that satisfies § 152(e)(2)(A) because A was not the custodial parent at that time. Therefore, Petitioner is not entitled to claim a dependency exemption for the son in Year 1.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

In general, the Internal Revenue Service should take a protective position in cases under § 152(e) when two parents have claimed an exemption for the same child.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Please call if you have any further questions.