



DEPARTMENT OF THE TREASURY
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The Honorable Keith Ellison
Member, U.S. House of Representatives
2100 Plymouth Avenue North
Minneapolis, MN 55411

Attention:

Dear Congressman Ellison:

I am responding to your inquiry, dated October 9, 2008, on behalf of your constituent, . works for an adoption agency dealing with the adoption of children with special needs. He raised two questions about the adoption tax credit in § 23 of the Internal Revenue Code (the Code). He asked about an individual taxpayer who was eligible to claim the credit in 2003 or 2004 for a special needs child but did not do so, and now wants to claim the credit by amending his or her 2003 or 2004 return or by carrying forward the credit to 2005 or later years.

Generally, taxpayers cannot now amend their 2003 or 2004 federal income tax returns because the statute of limitations bars refunds of taxes paid in those years. Taxpayers may be eligible to carry forward credits arising in 2003 or 2004 to 2005 or later years, but only after first reducing the credit by amounts that were allowable in earlier years.

The law permits individual taxpayers to claim an adoption credit for reasonable and necessary qualified adoption expenses (QAE) they have paid or incurred. (Section 23 of the Code). The maximum per-child credit was \$10,160 for 2003 and \$10,390 for 2004. Although QAE includes fees paid to adoption agencies and attorneys, court costs, and travel expenses while away from home, these expenses are not QAE if someone other than the adoptive parent, such as an employer or a governmental unit, either pays the expenses directly or reimburses the adoptive parent for the expenses. However, beginning in 2003, Congress has permitted adoptive parents of special needs children to claim the adoption credit in the year the adoption becomes final, whether or not the parents paid any qualified adoption expenses. (See the Job Creation and Worker Assistance Act of 2002, H.R. 3090, Pub. L. 107-147, § 411(c)(1)(B), 116 STAT. 1, adding § 23(a)(2) to the Code).

To obtain a credit or refund for an overpayment of tax, a taxpayer must file a timely claim. Generally, the filing deadline for refund claims is either three years from the time the return was filed or two years from the time the tax is paid, whichever period ends later. (Section 6511(a) of the Code). Thus, in general, if a taxpayer was eligible to claim the adoption tax credit in 2003 or 2004 but did not claim it, the taxpayer cannot now file an amended tax return for those years. However, in some situations, those tax years may remain "open" for purposes of filing an amended return. For example, if the taxpayer paid the tax for the 2003 or 2004 tax year within the last two years, he or she could still ask for a refund of the tax paid. Further, taxpayers may file an amended return in cases where the adoption of a special needs child became final in 2005 or later. Those years remain open for purposes of § 6511.

also asked if a taxpayer can carry forward and use in a later tax year an adoption credit earned in 2003 or 2004. While taxpayers may carry forward an unused adoption credit up to five years, the credit is carried forward only to the extent it was not allowable in a prior taxable year. (Section 23(c) of the Code). For example, if an individual adopted a special needs child in 2003 and had a pre-credit tax liability of \$8,000 that year, \$8,000 of the adoption credit is allowable in 2003 and \$2,160 is carried forward to 2004. Alternatively, if the individual had a pre-credit tax liability of \$10,160 or more, all of the credit is allowable in 2003 and no portion is carried forward to 2004. Thus, before a taxpayer can carry forward and use an adoption credit in a later tax year, he or she must first reduce the credit by the portion that was allowable in prior years.

You can find additional guidance on the adoption credit in the instructions to Form 8839, *Qualified Adoption Benefits*, and in Publication 968, *Tax Benefits for Adoption* (2004).

I hope this information is helpful. If we can assist you further, please call
or me at .

Sincerely,

Michael J. Montemurro
Branch Chief
Office of Associate Chief Counsel
(Income Tax & Accounting)