

Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Chief, Discretionary Exam
Reporting Compliance, W&I
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from: Branch Chief
Associate Chief Counsel
(Income Tax & Accounting)
CC:ITA:4

subject: Noncustodial Parent's Claim of a Dependency Exemption

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

This memorandum responds to a request for advice on the documentation that a noncustodial parent must provide to the Internal Revenue Service (Service) to claim an exemption for a child under §152(e) of the Internal Revenue Code. Specifically, the request is to clarify whether a noncustodial parent may claim an exemption for a child by submitting proof of support in satisfaction of a condition in a divorce decree that the noncustodial parent may claim the exemption if current in his or her support obligation. This memorandum also explains the effect of recently-published final regulations under § 152(e) on the form of a custodial parent's release of claim to exemption.

Law and Analysis

Section 152(e) allows the noncustodial parent to claim a dependency exemption for a child if the custodial parent signs a written declaration releasing a claim to exemption, and the noncustodial parent attaches the written declaration to his or her return. Regulations under §152(e) prescribe the form of the written declaration.

For taxable years beginning on or before July 2, 2008, the regulations under § 152(e) provided that a release of a claim to exemption must be on Form 8332 or, if not on such

form, must “conform to the substance of such form.” See former § 1.152-4T, Q&A 3, of the Temporary Income Tax Regulations. These regulations, as well as the final regulations published on July 2, 2008, reflect the concern of Congress with problems of substantiating a claim to a dependency exemption for a child. In amending § 152(e) to provide for the release of a custodial parent’s claim to exemption by a written declaration, Congress intended to avoid “difficult problems of proof and substantiation,” minimize controversy by providing certainty, and minimize costs to the Government and to parents. See H. R. Rept. No. 98-432 (Part II), at 1498-99 (1984).

In Publication 501, *Exemptions, Standard Deduction, and Filing Information*, and other publications, the Service has stated that a noncustodial parent may attach certain pages of a divorce decree or separation agreement instead of Form 8332, if the attached pages include the information required in the publications. One requirement is that the decree or agreement states that the noncustodial parent may claim the exemption “without regard to any condition, such as payment of support.” In *Miller v. Commissioner*, 114 T. C. 184 (2000), *aff’d on other grounds sub nom. Lovejoy v. Commissioner*, 293 F. 3d 1208 (10th Cir. 2002), the Tax Court clarified when a divorce decree or separation agreement is substantially similar to a Form 8332. A divorce decree or separation agreement that allows a noncustodial parent to claim the exemption for a child only if a condition, such as payment of support, is met does not conform to the substance of Form 8332, because it is not a clear release of a claim to exemption. Moreover, attaching an additional statement intended to show that a support obligation has been met does not suffice to make the attachments substantially similar to Form 8332, because the claim of having met a support obligation raises the difficult issues of proof and substantiation that Congress intended to avoid in enacting amendments to §152(e).

The Service and Treasury issued final regulations under § 152(e), effective for taxable years beginning after July 2, 2008. Section 1.152-4(e)(1)(ii) provides that a release of claim to exemption must be on Form 8332 or must be a “document executed for the sole purpose of serving as a written declaration” that the custodial parent will not claim the dependency exemption for a child. Further, a noncustodial parent may not substantiate a claim to a dependency exemption for a child by attaching a copy of a court decree or separation agreement. This general rule is subject, however, to the rule in §1.152-4(e)(5), which allows a noncustodial parent to continue to attach pages of a divorce decree executed on or before July 2, 2008, if the pages constitute a statement substantially similar to Form 8332 under the requirements in effect at the time the decree was executed. As stated in the preamble to the final regulations published on July 2, 2008, divorce decrees are complex documents that may be subject to differing interpretations governed by state law. Accordingly, the final regulations do not allow a noncustodial parent to attach a court decree or separation agreement executed after July 2, 2008, to substantiate a claim to a dependency exemption.

Conclusions

A divorce decree or separation agreement that allows a noncustodial parent to claim an exemption for a child only if a condition is met does not conform to the substance of Form 8332 and may not be used by a noncustodial parent to substantiate a dependency exemption for a child, even if accompanied by a statement intended to show that the condition in the decree or agreement was met.

For tax years beginning after July 2, 2008, a custodial parent's release of a claim to exemption for a child must be separate from a court decree or separation agreement. The release must be on Form 8332 or must be a document that conforms to the substance of Form 8332 and that has as its only purpose the release of a claim to exemption. However, a noncustodial parent may continue to attach pages of a divorce decree or separation instrument executed on or before July 2, 2008, that unconditionally allows the noncustodial parent to claim an exemption for a child, if the pages constitute a statement substantially similar to Form 8332 under the requirements in effect at the time the decree or agreement was executed.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-4920 if you have any further questions.