

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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to: Tamara Kotzker
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(Small Business/Self-Employed)

from: William A. Jackson
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(Income Tax & Accounting)

subject: TAS Request for Assistance concerning E.O. on ACA and Lump Sum Social Security

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

ISSUE

Whether Executive Order 13765, January 20, 2017, provides the IRS the authority to relieve taxpayers of the tax imposed on excess advance payments of the premium tax credit when the excess advance credit payments arise from the taxpayer having received a lump sum disability payment from the Social Security Administration that relates to benefits for prior years.

CONCLUSION

Executive Order 13765 does not provide the IRS with the authority to ignore social security lump sum payments in determining eligibility for the premium tax credit. Nor does it provide authority to relieve taxpayers of the tax imposed on excess advance payments of the premium tax credit when the excess advance credit payments arises from the taxpayer having received a lump sum disability from the Social Security Administration.

FACTS

This issue arises from a taxpayer's request for a refund of \$ _____ for the _____ tax year. The taxpayer received a lump sum Social Security Disability payment in _____, which included amounts allocated across _____ years. For the _____ taxable year, the taxpayer also received the benefit of advance payments of the premium tax credit (APTC). Unfortunately, it appears that at the time the taxpayer's APTC was authorized, the Health Insurance Marketplace (Marketplace) did not include the lump sum social security payment in his household income. Because the taxpayer's household income used to compute his APTC did not include the _____ social security payment, the APTC was more than the amount of the allowable premium tax credit for _____. As a result, an additional tax is imposed under § 36B on the taxpayer equal to the excess APTC that was paid on his behalf.

LAW AND ANALYSIS

The premium tax credit under I.R.C. § 36B is a refundable tax credit for certain individuals who enroll, or who have a family member who enrolls, in a health insurance plan through a Marketplace, and is intended to subsidize the cost of the insurance.

The amount of a taxpayer's premium tax credit for a year depends on the amount of the taxpayer's household income and his or her family size for the year. To be eligible for the premium tax credit, a taxpayer's household income must be at least 100% but not more than 400% of the Federal poverty line. Household income is the sum of the taxpayer's modified adjusted gross income (MAGI), the MAGI of the taxpayer's spouse if a joint return is filed, and the MAGI of the taxpayer's dependents who are required by I.R.C. § 1 to file a tax return for the taxable year. See I.R.C. § 36B(d)(2) and Treas. Reg. § 1.36B-1(e)(i) & (ii). Under I.R.C. § 36B(d)(2)(B) of the Code, an individual's MAGI is his or her adjusted gross income (within the meaning of I.R.C. § 62), increased by Social Security benefits not included in gross income under I.R.C. § 86, untaxed foreign earned income, and tax-exempt interest.

The statutory language of I.R.C. § 36B is clear that a taxpayer must include in MAGI Social Security benefits received during the taxable year that were not included in gross income. Congress specifically intended the full amount of Social Security benefits received to be used to determine a taxpayer's eligibility for the premium tax credit. See H.R. Rep. No. 112-254 (2011), ("Modification of Calculation of Modified Adjusted Gross Income for Determining Certain Health Care Program Eligibility").

In a case with similar facts to those of this taxpayer, the Tax Court held that the statutory language of § 36B is clear and unambiguous in specifically requiring that the full amount of a taxpayer's social security benefits received during a taxable year be included in MAGI for the taxable year. See Johnson v. Commissioner, 152 T.C. No. 6 (2019).

In his request for refund, the taxpayer cites Section 2 of E.O. 13765, which provides that “to the maximum extent permitted by law”, the Secretary of HHS and the heads of all other executive departments and agencies in the executive branch with responsibilities under the ACA shall take actions to minimize the economic regulatory burdens imposed by the Act. Specifically, the taxpayer suggests that the order stated that the agencies should exercise all authority and discretion to waive, defer, grant exemptions from, or delay the implementation of any requirement of the ACA.

E.O. 13765 does not provide authority for the IRS to relieve taxpayers of the tax imposed on excess APTC, when that tax arises from having received a lump sum Social Security disability payment. As stated earlier, the Internal Revenue Code specifically includes in MAGI, social security benefits not included in gross income under I.R.C. § 86, for the taxable year. Consequently, the Taxpayer Advocate Service (TAS) should not be utilizing an Operations Assistance Request¹ to request the IRS to relieve taxpayers of the tax.

By its own terms, E.O. 13765 allows departments and agencies in the executive branch to exercise authority and discretion to minimize burdens imposed by the ACA only “[t]o the maximum extent permitted by law . . .” For the IRS to ignore the statutory requirement of I.R.C. § 36B to include social security benefits in MAGI would be an action that is not permitted by law. Thus, E.O. 13765 does not provide the IRS with the authority to ignore the social security lump sum payments in determining eligibility for the premium tax credit. Nor does the E.O. provide authority to relieve taxpayers from any tax liability arising from excess APTC due to the taxpayer’s receipt of social security benefits.

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) 317-7006 if you have any further questions.

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¹ TAS utilizes an Operations Assistance Request, Form 12412, when it lacks the statutory or delegated authority to take action on a taxpayer’s account.