

## MLI #9 Family Status Issues Under IRC §§ 2, 24, 32, and 151

### SUMMARY

Because family status issues center on interrelated exemptions, credits, and filing statuses claimed on federal tax returns, cases litigated in this area often involve multiple issues with similar factual determinations. This report combines the following issues into a single “family status” category:

- Head of household filing status;<sup>1</sup>
- Child Tax Credit (CTC);<sup>2</sup>
- Earned Income Tax Credit (EITC);<sup>3</sup> and
- Dependency exemption.<sup>4</sup>

We reviewed 24 federal court opinions issued between June 1, 2016, and May 31, 2017. Many of these opinions cover multiple family status issues, with the determination of one often affecting others. For example, a denial of the dependency exemption will lead to the summary denial of the CTC and may impact eligibility for head of household filing status. In tax year (TY) 2015, over 21 million taxpayers filed as head of household, nearly 28 million received the EITC, and almost 50 million sought some form of dependency exemption.<sup>5</sup>

### TAXPAYER RIGHTS IMPACTED<sup>6</sup>

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS’s Position and Be Heard*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

1 Internal Revenue Code (IRC) § 2(b).

2 IRC § 24.

3 IRC § 32.

4 IRC § 151(c).

5 IRS, Compliance Data Warehouse (CDW) *Individual Returns Transaction File (IRTF) tax year 2015* (Nov. 28, 2017). Taxpayers with a married filing joint filing status were counted as one taxpayer.

6 See Taxpayer Bill of Rights (TBOR), [www.TaxpayerAdvocate.irs.gov/taxpayer-rights](http://www.TaxpayerAdvocate.irs.gov/taxpayer-rights). The rights contained in the TBOR are now listed in the IRC. See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

## PRESENT LAW

### Uniform Definition of Qualifying Child

In the Working Families Tax Relief Act of 2004, Congress created a uniform definition of child in IRC § 152(c) of the Code.<sup>7</sup> Beginning in TY 2005, the Code defines the term “dependent” as a qualifying child or a qualifying relative.<sup>8</sup> The single definition of qualifying child, with certain modifications, applies for purposes of claiming the EITC, the CTC, a dependency exemption, and head of household filing status.<sup>9</sup>

### Qualifying Child

An individual must meet five tests in order to be a qualifying child under IRC § 152(c): relationship,<sup>10</sup> age,<sup>11</sup> residency,<sup>12</sup> support,<sup>13</sup> and no joint return filed with the individual’s spouse.<sup>14</sup> If an individual meets the definition of a qualifying child for more than one taxpayer, IRC § 152(c)(4) establishes tiebreaker rules to determine which taxpayer may claim the child.<sup>15</sup>

To be a qualifying relative of a taxpayer, an individual must: (A) bear a certain relationship to the taxpayer, (B) have gross income for the calendar year that is less than the exemption amount (as defined in IRC § 151(d)), and (C) receive over one-half of his or her support for the calendar year from the

7 The National Taxpayer Advocate recommended the creation of a uniform definition of a qualifying child in a previous report to Congress. See 2001 National Taxpayer Advocate Annual Report to Congress 78-81.

8 IRC § 152(a). If an individual does not meet the definition of a qualifying child under § 152(c), he or she may meet the definition of a qualifying relative under IRC § 152(d).

9 For a full discussion of the National Taxpayer Advocate’s concerns about the complexity of claiming the Earned Income Tax Credit (EITC) and other family status issues, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

10 An individual meets the relationship test to be a qualifying child if the individual is a child of the taxpayer or a descendant of a child of the taxpayer or a brother, sister, stepbrother or stepsister of the taxpayer or a descendant of such a relative, IRC § 152(c)(2). The term “child” means an individual who is a son, daughter, stepson, or stepdaughter of the taxpayer or an eligible foster child of the taxpayer. IRC § 152(f)(1)(A). A child legally adopted by a taxpayer or a child lawfully placed with a taxpayer for legal adoption is treated as a child of the taxpayer by blood. IRC § 152(f)(1)(B). An eligible foster child means an individual who is placed with the taxpayer by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction. IRC § 152(f)(1)(C). The terms “brother” and “sister” include a half-brother or a half-sister. IRC § 152(f)(4).

11 To meet the age requirement, to be a qualifying child, an individual must be under the age of 19 at the end of the year, under the age of 24 at the end of the year and a “student,” as defined in IRC § 152(f)(2), or any age if “permanently and totally disabled,” as defined in IRC § 22(e)(3). IRC § 152(c)(3).

12 To meet the residency requirement to be a qualifying child, an individual must have the same principal place of abode as the taxpayer for more than half of the taxable year. IRC § 152(c)(1)(B). See, however, IRC § 152(e) for a special rule for a child of parents who are divorced or separated or who live apart and IRC § 152(f)(6) for rules on the treatment of missing children. See also the regulations under section 152 for rules on temporary absences, children who were placed with the taxpayer in foster care or for adoption during the taxable year, or children who were born or died during the taxable year.

13 To meet the support test to be a qualifying child, an individual must not have provided more than one-half of his or her own support for the calendar year in which the taxable year of the taxpayer begins. IRC § 152(c)(1)(D).

14 The individual must not have filed a joint return with the individual’s spouse for the taxable year in question. IRC § 152(c)(1)(E).

15 The taxpayer who claims the qualifying child is entitled to the dependency exemption for the child, head of household filing status, the Child Tax Credit (CTC), the EITC and the Child and Dependent Care Credit (unless the special rule in § 152(e) applies and assuming all other eligibility requirements are met). Under the tiebreaker rules, if only one of the taxpayers claiming a child is the child’s parent, then the child will be treated as the qualifying child of the parent. IRC § 152(c)(4)(A)(i). If both taxpayers claiming a child are the child’s parents, then the child will be treated as the qualifying child of the parent with whom the child resided for the longest period during the taxable year. IRC § 152(c)(4)(B)(i). If the child lived with both parents for the same amount of time during the taxable year, then the child will be treated as the qualifying child of the parent with the highest adjusted gross income. IRC § 152(c)(4)(B)(ii). If neither of the taxpayers claiming a child is the child’s parent, then the child is treated as the qualifying child of the taxpayer with the highest adjusted gross income for the taxable year. IRC § 152(c)(4)(A)(ii).

taxpayer.<sup>16</sup> In addition, the individual cannot be a qualifying child of the taxpayer or of “any other taxpayer” for the taxable year.<sup>17</sup> A qualifying relative may include an individual who has the same principal place of abode as the taxpayer for the taxable year and who is a member of the taxpayer’s household.<sup>18</sup>

### Earned Income Tax Credit (EITC) — IRC § 32

The EITC entitles certain working low income taxpayers to claim a refundable credit of up to \$6,269 for 2016.<sup>19</sup> The EITC may be available to taxpayers either with or without a qualifying child. Certain limitations apply to the EITC related to residency,<sup>20</sup> filing status,<sup>21</sup> certain foreign benefits,<sup>22</sup> and status as a qualifying child of another taxpayer.<sup>23</sup> The taxpayer must have a Social Security number valid for employment in the United States,<sup>24</sup> earned income,<sup>25</sup> and limited amounts of certain types of income.<sup>26</sup> Taxpayers wishing to claim the EITC without a qualifying child must meet additional eligibility requirements, including an age requirement of being at least age 25 but under age 65.<sup>27</sup> To be considered a qualifying child for the EITC, an individual must meet the definition of a qualifying child in IRC § 152(c),<sup>28</sup> he or she must be unmarried at the end of the taxable year (unless the taxpayer is entitled to a deduction under IRC § 151 (or would be so entitled but for IRC § 152(e)) for the married individual),<sup>29</sup> and his or her principal place of abode must be in the United States with the taxpayer for more than half of the taxable year.<sup>30</sup>

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- 16 IRC § 152(d)(1)(A)-(C). The relationship between the qualifying relative and the taxpayer must meet one of the relationships set forth in IRC § 152(d)(2).
- 17 IRC § 152(d)(1)(D).
- 18 IRC § 152(d)(2)(H).
- 19 IRC § 32. The maximum amount of the credit is available to a taxpayer with three or more qualifying children. For tax years beginning in 2016, the maximum credit available for a taxpayer with one qualifying child is \$3,373, with two qualifying children is \$5,572, and with no qualifying children is \$506. Rev. Proc. 2015-53, 2015-44 I.R.B. 615. The actual amount of the EITC varies depending on the earned income of the taxpayer.
- 20 A taxpayer is not eligible for the EITC if he or she is a nonresident alien for any portion of the taxable year, unless the taxpayer files a joint return with a spouse who is a United States citizen or resident alien. IRC § 32(c)(1)(D).
- 21 A taxpayer is not eligible for the EITC if he or she files married filing separately. IRC § 32(d).
- 22 A taxpayer is not eligible for the EITC if he or she claims a foreign income exclusion or deducts or excludes a foreign housing cost amount. IRC § 32(c)(1)(C).
- 23 A taxpayer is not eligible for the EITC if he or she is the qualifying child of another taxpayer. IRC § 32(c)(1)(B).
- 24 A taxpayer cannot claim the EITC if he or she does not have a Social Security number valid for employment. IRC § 32(c)(1)(E) and (m).
- 25 A taxpayer cannot claim the EITC unless he or she has earned income. IRC § 32(a).
- 26 A taxpayer’s earned income, adjusted gross income, and investment income must all be within limits established annually. IRC § 32(a)(2), (i), and (j).
- 27 A taxpayer is not eligible to claim the EITC without a qualifying child unless the taxpayer’s principal place of abode is in the United States for more than half of the taxable year, the taxpayer is at least age 25 but under age 65 at the close of the taxable year, and the taxpayer does not qualify as a dependent of another taxpayer for whom a deduction is allowable under IRC § 151 for the taxable year. IRC § 32(c)(1)(A)(ii).
- 28 IRC § 32(c)(3)(A). For purposes of the EITC, a qualifying child under IRC § 152(c) is determined without applying IRC § 152(c)(1)(D) (support test for a qualifying child) and IRC § 152(e) (special rule for a child of parents who are divorced or separated or who live apart).
- 29 IRC § 32(c)(3)(B).
- 30 IRC § 32(c)(3)(C). For the National Taxpayer Advocate’s recommendation to consolidate the EITC, Personal and Dependent Exemptions, Head of Household Status, and the CTC into two refundable credits, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

### Child Tax Credit (CTC) — IRC § 24

The CTC entitles a taxpayer to claim a credit of up to \$1,000 for each qualifying child, as defined in IRC § 152(c), who is under age 17 at the end of the tax year (with an exception for certain noncitizens).<sup>31</sup> The amount of the credit is applied to any taxes due and, in some instances, is refundable (known as the Additional Child Tax Credit, or ACTC).<sup>32</sup>

### Dependency Exemption — IRC § 151

The dependency exemption entitles a taxpayer to claim an additional exemption for each dependent who is a qualifying child or qualifying relative of the taxpayer, as defined in IRC § 152. A qualifying child must be under the age of 19 at the close of the taxable year, under 24 and a full-time student, or be permanently or totally disabled.<sup>33</sup>

### Head of Household — IRC § 2(b)

Head of household filing status entitles a taxpayer to a larger standard deduction and a more favorable tax rate than a taxpayer filing single or married filing separately.<sup>34</sup> To qualify as a head of household, a taxpayer must be unmarried or “considered unmarried” at the end of the taxable year.<sup>35</sup> For more than half of the taxable year, a taxpayer must maintain, as the taxpayer’s home, a household that is the principal place of abode of a qualifying child (as defined in IRC § 152(c), determined without applying IRC § 152(e))<sup>36</sup> or a qualifying relative (as defined under IRC § 152(d) without applying §152(d)(2)(H) or § 152(d)(3)), for whom the taxpayer may claim a dependency exemption under IRC § 151.<sup>37</sup>

Additionally, the taxpayer may qualify for head of household filing status if he or she maintains for the taxable year a household that is the principal place of abode of the taxpayer’s mother or father for whom the taxpayer may claim a dependency exemption under IRC § 151.<sup>38</sup>

31 IRC § 24(a) and (c). The amount of the CTC is reduced (but not below zero) by \$50 for each \$1,000 (or fraction thereof) by which the taxpayer’s modified adjusted gross income exceeds the threshold amount (\$110,000 in the case of a joint return, \$75,000 in the case of a taxpayer who is not married, and \$55,000 in the case of a married taxpayer filing separately). IRC § 24(b)(1) and (2).

32 IRC § 24(d). For the National Taxpayer Advocate’s recommendation to consolidate the EITC, Personal and Dependent Exemptions, Head of Household Status, and the CTC into two refundable credits, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

33 IRC § 151(c)(1), and IRC § 152(a), (c), and (d). For tax year 2016, the dependency exemption amount is \$4,050. Rev. Proc. 2015-53, 2015-44 I.R.B. 615. For the National Taxpayer Advocate’s recommendation to consolidate the EITC, Personal and Dependent Exemptions, Head of Household Status, and the CTC into two refundable credits, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

34 For tax year 2016, the standard deduction for head of household is \$9,300. Rev. Proc. 2015-53, 2015-44 I.R.B. 615.

35 IRC § 2(b). A taxpayer whose spouse died during the taxable year is considered married for that year. IRC § 2(b)(2)(C). A taxpayer is not considered as married if he or she is legally separated from his or her spouse under a decree of divorce or separate maintenance or if his or her spouse is a nonresident alien at any time during the taxable year. IRC § 2(b)(2)(A) and (B). A taxpayer is also considered unmarried if he or she is treated as unmarried under the provisions of IRC § 7703. IRC § 2(c). For a recommendation to modify and expand the definition of not married to include a taxpayer separated from his or her spouse under the terms of a written separation agreement on the last day of the calendar year, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

36 IRC § 2(b)(1)(A)(i), which also contains specific rules for married children.

37 IRC § 2(b)(1)(A)(ii). A taxpayer is considered as maintaining a household if the taxpayer provides over half of the cost of maintaining the household for the taxable year. IRC § 2(b).

38 IRC § 2(b)(1)(B). For the National Taxpayer Advocate’s recommendation to consolidate the EITC, Personal and Dependent Exemptions, Head of Household Status, and the CTC into two refundable credits, see 2016 National Taxpayer Advocate Annual Report to Congress 325-57.

## ANALYSIS OF LITIGATED CASES

Family Status Issues appears in the top ten most litigated issues for the first time since 2010.<sup>39</sup> We identified 24 opinions issued under the four IRC sections that we discuss in this narrative. Half of the litigated cases were small Tax Court cases.<sup>40</sup> Most cases involve factual disputes between the IRS and the taxpayer(s), not novel issues of law.<sup>41</sup> A detailed list of the cases appears in Table 9 of Appendix 3.

In five cases (about 21 percent), taxpayers were represented, while the rest were *pro se* (without counsel). One taxpayer with representation prevailed in full, whereas *pro se* taxpayers prevailed in full or in part in four cases. Overall, taxpayers prevailed in full or in part in five of 24 cases (about 21 percent). The fact-specific nature of cases involving these code sections, in addition to the complicated and intertwined rules for these provisions, suggest that taxpayers could benefit from the assistance of counsel.<sup>42</sup> Many of the taxpayers involved in these cases may have qualified for assistance from a Low Income Taxpayer Clinic (LITC).<sup>43</sup>

### Head of Household Filing Status — IRC § 2(b)

We reviewed ten cases involving head of household filing status.<sup>44</sup> The taxpayer prevailed on this issue in only one case.<sup>45</sup> In *Binns vs. Commissioner*, the IRS denied the taxpayer's entitlement to head of household filing status, his claim of his minor child and the minor child's mother as dependents, the EITC, and the ACTC in the statutory notice of deficiency.<sup>46</sup> Under Tax Court Rule 142(a), the taxpayer had the burden of proving entitlement to head of household filing status to the court.<sup>47</sup> The taxpayer resided for part of the tax year in question with his child and the child's mother, to whom he was not married. He was unable to reside with the child and the child's mother for the rest of the year due to his incarceration, which the court construed as a temporary absence due to special circumstances and did not preclude the taxpayer from meeting the residency test under IRC § 152(c)(1)(B).<sup>48</sup> Prior to his incarceration, he prepaid six months of rent for the apartment they shared and set up a bank account with funds to be used for the support of his child and the child's mother. During this time, the child's mother did not work and there were no childcare expenses. Because the court found that the taxpayer maintained a household and provided more than one-half of the household's expenses during the year in question, he was entitled to head of household filing status.<sup>49</sup>

39 2010 National Taxpayer Advocate Annual Report to Congress.

40 In certain tax disputes involving \$50,000 or less, taxpayers may elect to have their case conducted under the simplified small tax case procedures. Trials in small tax cases are generally less formal and result in a speedier disposition. However, decisions in these cases cannot be appealed or cited as precedent. See IRC § 7463.

41 The cases analyzed in this section often involve multiple family status issues. Therefore, a single case might be listed and analyzed in multiple family status categories, though there are only 24 cases discussed.

42 For a discussion of the benefits of obtaining counsel during an EITC audit, see 2007 National Taxpayer Advocate Annual Report to Congress vol. 2, 94-117.

43 For more information on the LITC program, which is administered by TAS, see IRC § 7526; IRS Pub. 3319 (Apr. 2017). See also <https://www.irs.gov/advocate/low-income-taxpayer-clinics>.

44 See, e.g., *Cappel v. Comm'r*, T.C. Memo. 2016-150. Although *Brown v. Comm'r*, T.C. Summ. Op. 2017-24 and *Moss v. Comm'r*, T.C. Memo. 2017-30 involve filing status issues, these cases do not address head of household status and are not included for the purposes of this count.

45 *Binns v. Comm'r*, T.C. Summ. Op. 2016-90.

46 This case does not have precedential value and is being used for illustration.

47 See Tax Court Rule 142(a) ("The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in the answer, it shall be upon the respondent."); *INDOPCO, Inc. v. Comm'r*, 503 U.S. 79 (1992).

48 Treas. Reg. § 1.152-1(b).

49 *Binns v. Comm'r*, T.C. Summ. Op. 2016-90. The taxpayer was also entitled to the child tax credit and the EITC.

### Child Tax Credit (CTC)

We reviewed 14 cases involving the child tax credit, of which ten taxpayers appeared *pro se*. Four taxpayers prevailed on this issue; three<sup>50</sup> appeared *pro se* and one<sup>51</sup> was represented. To receive the CTC, the taxpayer must be able to claim the child as a dependent on his or her tax return, and the child must meet the requirements of IRC § 152(c).<sup>52</sup> In *Tsehay v. Commissioner*, the court found the taxpayer was entitled to the CTC for TY 2013.<sup>53</sup> The taxpayer in this case had claimed the CTC for his four minor children, which the IRS denied due to a child support order showing the taxpayer as the non-custodial parent. However, the support order was for 2015, and the tax year at issue was 2013. Because the court found credible the taxpayer's testimony that he and his wife were not separated in 2013 and lived in the same apartment, the taxpayer was entitled to the CTC for that year for all four minor children.<sup>54</sup>

In contrast, in *Polsky v. United States*, the court found that the taxpayers were not entitled to the CTC for their daughter.<sup>55</sup> The Polskys are parents of a permanently disabled child. On their 2010 and 2011 tax returns, the taxpayers claimed the CTC for their daughter, which the IRS disallowed due to the child being over age 17. On appeal, the taxpayers argued that IRC § 152(c)(3)(B) controls, not the age of 17 listed under IRC § 24. IRC § 24(c)(1) states that a qualifying child must meet the requirements of IRC § 152(c) and be under the age of 17. IRC § 152(c)(3)(B) provides that a person meets the age requirements for the purposes of a qualifying child under IRC § 152(c)(3)(A) if at any time during the year the person was permanently and totally disabled. The Polskys thus argued that as their daughter was permanently and totally disabled in the years at question and is therefore a qualifying child under IRC § 152(c), she is also a qualifying child for the purposes of IRC § 24. The court agreed with the rationale of the lower court's decision that IRC § 24 incorporates the basic requirements of IRC § 152(c) and adds the additional age limitation of 17 for the purposes of the CTC. The exception under IRC § 152(c)(3)(B) for permanently and totally disabled individuals is intended to allow taxpayers such as the Polskys to continue to claim the individual as a dependent so long as their daughter remains permanently and totally disabled and meets the other requirements under IRC § 152(c). Thus, the court held that the taxpayers were not entitled to the CTC for the years at issue.<sup>56</sup>

### Earned Income Tax Credit (EITC)<sup>57</sup>

We reviewed ten cases where the EITC was at issue. Three taxpayers were represented, two<sup>58</sup> taxpayers who appeared *pro se* prevailed, and one<sup>59</sup> represented taxpayer succeeded. In *Lopez v. Commissioner*,<sup>60</sup> the court found that the taxpayer was entitled to the EITC for both tax years at issue.<sup>61</sup> The taxpayer

50 See *Tsehay v. Comm'r*, T.C. Memo. 2016-200, *McCutcheon-Cox v. Comm'r*, T.C. Summ. Op. 2017-20, *Binns v. Comm'r*, T.C. Summ. Op. 2016-90.

51 See *Lopez v. Comm'r*, T.C. Summ. Op. 2017-16.

52 *Sheikh v. Comm'r*, T.C. Memo. 2010-33.

53 T.C. Memo. 2016-200.

54 *Id.*

55 844 F.3d 170 (3d Cir. 2016).

56 *Id.*

57 The EITC is a complex area of law and most low income taxpayers require specialized assistance in order to claim the credit successfully. National Taxpayer Advocate 2015 Annual Report to Congress 240-47. See also National Taxpayer Advocate 2008 Annual Report to Congress 243; National Taxpayer Advocate 2007 Annual Report to Congress vol. 2, 94 (*IRS Earned Income Credit Audits – A Challenge to Taxpayers*).

58 See *Tsehay v. Comm'r*, T.C. Memo. 2016-200, *Binns v. Comm'r*, T.C. Summ. Op. 2016-90.

59 See *Lopez v. Comm'r*, T.C. Summ. Op. 2017-16.

60 *Id.*

61 This case does not have precedential value and is being used for illustration.

lived in a rented apartment in New York City with her two minor daughters and provided cosmetology services out of her home to her friends and neighbors. The taxpayer did not have a bank account, did not maintain any business records, and received all payments in cash. The taxpayer timely filed her tax returns reporting on a Schedule C the income from her cosmetology business and additional 1099-MISC, *Miscellaneous Income*. The IRS adjusted the taxpayer's income by removing all Schedule C income and, as a result, disallowed the EITC and barred the taxpayer from claiming the EITC for certain future years. The taxpayer submitted written notarized statements from her clients attesting to the fact that the taxpayer provided cosmetology services to them, for which they paid her, during the years at issue. The court found these statements credible, and while the court reduced the total of the taxpayer's income from her business, it allowed the EITC.<sup>62</sup>

In contrast, in *Skaggs v. Commissioner*, the court found that the taxpayer was not entitled to the EITC.<sup>63</sup> Mr. Skaggs filed his income tax return for TY 2015 and claimed the EITC. The IRS issued a statutory notice of deficiency disallowing the claimed EITC due to Mr. Skaggs being incarcerated and earning the income at a penal institution. Under IRC § 32(c)(2)(B)(iv), the income used to qualify for the EITC cannot be earned for services provided while the taxpayer is an inmate at a penal institution. The taxpayer earned his reported income while at a state security hospital for mentally ill inmates and those committed by the state to custody. The taxpayer argued that he was a patient, not an inmate, and thus entitled to the EITC. The court used the plain language definition of inmate and penal institution and determined that under the laws of Kansas, the hospital is a penal institution and Mr. Skaggs's transfer there was recorded as an "inter-facility" transfer from the prison in which he was previously confined, not a release from custody or his prison sentence. As a result, the court determined that the taxpayer was not entitled to the EITC, as his income was earned while providing services in a penal institution of which he was an inmate.<sup>64</sup>

### Dependency Exemption – IRC § 151

We reviewed 18 cases involving the dependency exemption, the most common of the family status issues in this reporting cycle. Taxpayers prevailed in full or in part in only three cases and all three were *pro se*.<sup>65</sup> Taxpayers experienced issues related to the requirements under IRC § 152(e) for the use of Form 8332, *Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent*, or an equivalent document.<sup>66</sup> Taxpayers also attempted to claim children or other persons where the individual claimed was not a qualifying child or a qualifying relative.<sup>67</sup>

In one case, *Smyth v. Commissioner*, even the court acknowledged that the outcome seemed unfair to the taxpayer, but the court had to follow the law.<sup>68</sup> The taxpayer, a certified nursing assistant in Texas, provided a home and all of the support for her adult son, his wife, and her two grandchildren for the tax

62 *Lopez v. Comm'r*, T.C. Summ. Op. 2017-16. For a discussion of the National Taxpayer Advocate's concerns regarding the application of the EITC two-year ban, see 2013 National Taxpayer Advocate Annual Report to Congress 103-15; 311-15.

63 148 T.C. No. 15 (2017).

64 *Id.*

65 See *Binns v. Comm'r*, T.C. Summ. Op. 2016-90, *McCutcheon-Cox v. Comm'r*, T.C. Summ. Op. 2017-20, *Tsehay v. Comm'r*, T.C. Memo. 2016-200.

66 The final regulations under IRC § 152(e), effective for taxable years beginning after July 2, 2008, require that a release of claim to dependency exemption for a child be on Form 8332 or be a "document executed for the sole purpose of serving as a written declaration" that the custodial parent will not claim a dependency exemption for a child in a specific year or specific years. IRC § 152(e)(2). See, e.g., *Cappel v. Comm'r*, T.C. Memo. 2016-150.

67 See, e.g., *Rivas v. Comm'r*, T.C. Memo. 2016-158.

68 *Smyth v. Comm'r*, T.C. Memo. 2017-29.

year at question. Her son told her that she should claim the grandchildren as dependents, as he and his wife did not intend to file a return and she should get back some money that she had spent providing for their care. Thus, the taxpayer filed her return and claimed the two children for dependency exemptions, the CTC, the EITC, and head of household filing status. Unfortunately, before she filed her return, “[her] unemployed son had already claimed the children on his tax return, gotten a check from the government, and cashed it to spend on drugs,” without letting the taxpayer know.<sup>69</sup> The IRS denied the taxpayer’s claims.

At trial, the taxpayer argued that her son filed an amended return in which he did not claim the children. However, that return was presented to IRS counsel two weeks before trial. Amended returns must be filed with the proper service center or with a person designated to receive returns by the IRS. Counsel, as the court has previously found, is not designated to receive returns for filing.<sup>70</sup> Thus, even if the son intended to amend his original return, submitting the return to IRS counsel did not qualify as filing an amended return. Since the children were claimed on an original return by the children’s parents, the taxpayer could not also claim the children on her return, even if the children met the definition of being her qualifying children as well.<sup>71</sup> As a result, the court found the taxpayer was not entitled to claim the children. The court was very sympathetic to the taxpayer, as she had provided all of the support not just for the children but for the parents as well and had been told by her son to claim the children. Additionally, the court noted that it did not think that it was intended for money to support children to go to someone who spent it all on drugs, but the court was bound by the law. The court further expressed the hope that someone who could address this problem would take notice of the opinion.<sup>72</sup>

## CONCLUSION

While family status has not been a most litigated issue since 2010, the National Taxpayer Advocate has continued to express concern regarding the complexity of the laws surrounding these IRC provisions. In her 2016 Annual Report to Congress, the National Taxpayer Advocate again recommended legislative changes to help simplify the family status provisions to help taxpayers and protect taxpayer rights.<sup>73</sup>

The National Taxpayer Advocate and others have long expressed concerns about the complexity of the family status provisions and the burden imposed on taxpayers attempting to comply as they file their returns.<sup>74</sup> While the National Taxpayer Advocate has identified areas where the IRS can improve

69 *Smyth v. Comm’r*, T.C. Memo. 2017-29.

70 *Quarterman v. Comm’r*, T.C. Memo. 2004-241.

71 IRC § 152(c)(4)(A).

72 *Smyth v. Comm’r*, T.C. Memo. 2017-29.

73 2016 National Taxpayer Advocate Annual Report to Congress 326-57 (Legislative Recommendation: Tax Reform: *Restructure the Earned Income Tax Credit and Related Family Status Provisions to Improve Compliance and Minimize Taxpayer Burden*).

74 See, e.g., National Taxpayer Advocate 2005 Annual Report to Congress, 397-406; National Taxpayer Advocate 2008 Annual Report to Congress, 363-369; National Taxpayer Advocate 2012 Annual Report to Congress, 508-512; Steve Holt, *The Role of the IRS as a Social Benefits Administrator*, American Enterprise Institute (July 2016), <https://www.aei.org/publication/the-role-of-the-irs-as-a-social-benefit-administrator/>; Elaine Maag, *A Redesigned Earned Income Tax Credit Could Encourage Work By Childless Adults*, Tax Policy Center (TPC), (May 2015) <http://www.taxpolicycenter.org/taxvox/redesigned-earned-income-tax-credit-could-encourage-work-childless-adults>; The President’s Advisory Panel on Federal Tax Reform, *Simple, Fair, and Pro-Growth: Proposals to Fix America’s Tax System* (November 2005); Adam Carasso, Jeffrey Rohaly, and C. Eugene Steuerle, *A Unified Children’s Tax Credit*, National Tax Association Proceedings (May 15, 2005), <http://www.urban.org/uploadedPDF/1000790.pdf>; Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Sized Adjustment to the Minimum Wage*, 57 Tax Law Rev. 301 (Spring 2004); Max B. Sawicky, Robert Cherry and Robert Denk, *The Next Tax Reform: Advancing Benefits for Children*, Economic Policy Institute (2002).



its administration of the family status provisions, significant legislative change is necessary to reduce complexity and minimize taxpayer burden.