

Legislative Recommendation #55**Clarify Whether Dependents Are Required to Have Taxpayer Identification Numbers for Purposes of the Credit for Other Dependents****SUMMARY**

- *Problem:* As part of the Tax Cuts and Jobs Act (TCJA), Congress authorized taxpayers to claim a tax credit for “dependents” who do not meet the more stringent requirements of a “qualifying child.” Congress did not require that the dependents have Taxpayer Identification Numbers (TINs), but the IRS has imposed this requirement. This IRS requirement has rendered hundreds of thousands of otherwise qualifying “dependents” ineligible for credit claims.
- *Solution:* Clarify whether a dependent is required to have a TIN to qualify a taxpayer to claim the Credit for Other Dependents (ODC).

PRESENT LAW

IRC § 24 authorizes a Child Tax Credit (CTC) of up to \$2,000 per “qualifying child,” of which up to \$1,400 is refundable.¹ The TCJA added a new provision to IRC § 24 that allows a nonrefundable credit of \$500 for each “dependent” who is not a “qualifying child.”² This nonrefundable credit is referred to as the ODC.³

IRC § 24(e) provides that a “qualifying child” must have a TIN to be claimed under this section. IRC § 24(h)(7) further provides that the qualifying child’s TIN must be a Social Security number (SSN) valid for employment in the United States.

Under IRC § 24(h)(4), the ODC is available for a “dependent of the taxpayer (as defined in section 152).” There is no requirement in IRC § 152 that to be a “dependent,” an individual must have a TIN (either an SSN or an Individual Taxpayer Identification Number). IRC § 24 specifically provides that where a qualifying child’s lack of an SSN prevents a taxpayer from claiming the CTC for that child, the taxpayer may receive the ODC for that child.⁴

REASONS FOR CHANGE

Despite the absence of a TIN requirement in the statute, the IRS has taken the position that a dependent must have a TIN to be claimed for purposes of the ODC.⁵ The IRS has used its summary assessment authority to disallow the ODC claimed by nearly 95,000 taxpayers on their 2020 returns because their dependents did not have TINs.⁶

1 For tax year 2021, the American Rescue Plan Act makes this credit fully refundable for certain taxpayers and increases the credit to \$3,000 for children under 18 and to \$3,600 for children under six. Pub. L. No. 117-2, § 9611, 135 Stat. 4, 359-376 (2021).

2 TCJA, Pub. L. 115-97, § 11022, 131 Stat. 2054, 2073 (2017), adding IRC § 24(h)(4) (applicable to taxable years beginning after Dec. 31, 2017, and before Jan. 1, 2026).

3 IRC § 24(h)(4).

4 IRC § 24(h)(4)(C).

5 See, e.g., IRS Form 1040 and 1040-SR Instructions 20 (2021); IRS Form 1040 and 1040-SR Instructions 18-19 (2021); 2021 Schedule 8812 (Form 1040) Instructions 2 (2021).

6 We presume the IRS exercised its summary assessment authority in reliance on IRC § 6213(g)(2)(I), which includes in the definition of “mathematical or clerical error” “an omission of a correct TIN required under section 24(e) (relating to child tax credit) to be included on a return.” Nearly 95,000 taxpayers were issued summary assessment notices, removing 93,734 dependents with respect to whom the ODC had been claimed because the dependents had invalid or missing TINs. (The nearly 95,000 taxpayers include both primary and secondary taxpayers on married filing joint returns and correspond to 63,580 tax returns.) IRS, Compliance Data Warehouse, Individual Returns Transaction File Form 1040 and Entity tables, TY 2020, returns posted by cycle 202234. If \$500 of ODC was claimed with respect to each dependent, then the total amount of disallowed ODC would be nearly \$47 million (i.e., 93,734 multiplied by \$500).

In response to an inquiry from TAS, the IRS Office of Chief Counsel explained its legal rationale as follows: “[I]n order to avoid treating dependents for whom a taxpayer may claim a credit under section 24(h)(4)(A) [*i.e.*, the ODC] inconsistently, section 24(e)(1) [which imposes a TIN requirement for claiming a “qualifying child” for a credit under section 24] should be interpreted as applying to all dependents for whom a taxpayer claims a credit under section 24(h)(4)(A), not only a qualifying child described in section 24(h)(4)(C) [*i.e.*, a “qualifying child” who lacks the SSN required by section 24(h)(7)].”⁷

It is a basic canon of statutory construction that the plain language of a statute controls, absent a clearly expressed legislative intent to the contrary.⁸ Here, there is no statutory requirement that a dependent have a TIN to be claimed for the ODC. The IRS Office of Chief Counsel has imposed the requirement on its own, perhaps to deter fraudulent claims.

The TCJA legislative history suggests Congress considered a TIN requirement and did not adopt it. The House version of the TCJA included a requirement that a dependent have a TIN for purposes of the ODC, but the subsequent Senate version of the TCJA did not. The enacted bill followed the Senate approach.⁹ It is possible that a drafting error was made, but if so, Congress – not the IRS – should correct it.¹⁰

To resolve the inconsistency between the absence of a TIN requirement in the ODC statute and the IRS’s decision to impose the requirement on its own, the National Taxpayer Advocate recommends that Congress clarify its intent.

RECOMMENDATIONS

- Clarify whether a dependent with respect to whom a taxpayer claims the ODC under IRC § 24(h)(4) is required to have a TIN.
- If a dependent with respect to whom a taxpayer claims the ODC is required to have a TIN, clarify the type of taxpayer identification number required.

7 Email communication from the Office of Division Counsel/Associate Chief Counsel (National Taxpayer Advocate Program) to TAS Management & Program Analyst (Dec. 19, 2019) (on file with TAS). The email does not contain any references or citations to any legal authority for this position.

8 See, e.g., *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”); *Connecticut Nat’l Bank v. Germain*, 503 U.S. 245, 254 (1992) (“[W]hen the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”).

9 See H.R. REP. NO. 115-466, at 225-227 (2017), (CONF. REP.) <https://www.congress.gov/115/crpt/hrpt466/CRPT-115hrpt466.pdf>.

10 A technical correction was proposed, but the correction was not enacted into law. See Joint Committee on Taxation, JCX-1-19, *Technical Explanation of the House Ways and Means Committee Chairman’s Discussion Draft of the “Tax Technical and Clerical Corrections Act”* 5 (2019), <https://www.jct.gov/publications.html?func=startdown&id=5154>. The fact that Congress sought to make this a “technical correction” provides further evidence that the law does not require dependents to have TINs for purposes of the ODC.