TAX MANAGEMENT
PORTFOLIOS™

U.S. INCOME

Family and Household Transactions

by

Jeffrey J. Morella, Philip K. Deily and Gabrielle N. Morella
Morella and Associates

Prior version by

James Edward Maule, Esq.
Professor of Law
Villanova University School of Law
Villanova, Pennsylvania

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PORTFOLIO DESCRIPTION

Tax Management Portfolio, *Family and Household Transactions,* No. 513, provides explanation and analysis of the income tax provisions that affect taxpayers who are maintaining a family and/or operating a household. The Portfolio separates the analyses into three categories. The Portfolio also presents a history of the provisions as they have been added, expanded, and modified.

First, the Portfolio discusses the general limitation on the deduction of personal, living, and family expenses. It describes the scope of that limitation and the consequence of classifying an expense as a personal, living, or family expense.

Second, the Portfolio discusses exceptions that provide gross income exclusions or allow deductions or credits with respect to family expenses, including the medical expense deduction, the deduction for personal and dependency exemptions, the child tax credit, the household and dependent care credit, the credit for the elderly and disabled, the adoption assistance credit and the adoption assistance exclusion, and the dependent care assistance credit.

Third, the Portfolio discusses exceptions that provide gross income exclusions or allow credits with respect to household expenses, including the home mortgage interest credit, the exclusion for reimbursements of certain living expenses, the foster care payment exclusion, exclusions for housing relief, and disaster relief payment exclusions.

The Portfolio does not discuss tax provisions affecting personal and household transactions that are discussed in other Portfolios. These include: the tax treatment of interest and taxes paid in connection with home ownership and the exclusion of gain on the sale of a principal residence, discussed in 594 T.M., *Tax Implications of Home Ownership*; the treatment of vacation homes and the use of a portion of a principal residence for business purposes, discussed in 547 T.M., *Home Office, Vacation Home, and Home Rental Deductions*; credits with respect to energy conservation, discussed in 512 T.M., *Tax Incentives for Production and Conservation of Energy and Natural Resources*; alimony payments, discussed in 515 T.M., *Divorce and Separation*; and tax provisions with respect to education, discussed in 517 T.M., *Scholarships and Educational Expenses*.

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TABLE OF CONTENTS

ISBN 978-1-55871-737-4

ISBN 978-1-55871-737-4

ISBN 978-1-55871-737-4

ISBN 978-1-55871-737-4

ISBN 978-1-55871-737-4

ISBN 978-1-55871-737-4

DETAILED ANALYSIS

I. Introduction

A. Overview

The federal income tax rests on several fundamental propositions, one of which is that family and household expenses are not allowable as deductions in computing the taxable income with respect to which the income tax is computed nor allowable as credits in reducing that income tax. The proposition rests on the concept that personal expenses ought not be deductible nor generate credits. This proposition, however, is a general one, and there are a variety of exceptions to its application.

In an effort to promote or encourage specific activities, transactions, or behaviors, Congress has provided that certain types of family and household expenses can be deducted or used as a credit, in whole or in part. In addition, Congress has provided several gross income exclusions with respect to amounts received in connection with certain family or household expenses.

This Portfolio covers a number of deductions, credits, and exclusions applicable to family and household transactions but does not cover topics that are addressed in detail in other Portfolios. The tax treatment of interest and taxes paid in connection with home ownership and the exclusion of gain on the sale of a principal residence are discussed in 594 T.M., *Tax Implications of Home Ownership*. The treatment of vacation homes and the use of a portion of a principal residence for business purposes are discussed in 547 T.M., *Home Office, Vacation Home, and Home Rental Deductions*. Credits with respect to energy conservation are discussed in 512 T.M., *Tax Incentives for Production and Conservation of Energy and Natural Resources*. Alimony payments are discussed in 515 T.M., *Divorce and Separation*. Tax provisions with respect to education are discussed in 517 T.M., *Scholarships and Educational Expenses*.

This Portfolio first addresses the general rule in §262 that bars deductions for personal, living, and family expenses. The Portfolio then provides analysis of deductions, credits and exclusions available with respect to certain family and household expenses, including the §213 medical expense deduction,[1] the §151 personal and dependency exemption deduction,[2] the §24 child tax credit,[3] the §21 household and dependent care credit,[4] the §22 credit for the elderly and disabled,[5] the adoption assistance credit under §23,[6] the §137 adoption assistance exclusion,[7] the §129 child care exclusion,[8] the §36B Health Insurance Premium Tax Credit,[9] §529A exemptions attributable to ABLE programs and accounts,[10] the §32 earned income credit,[11] the 2020 and 2021 recovery rebates aka "stimulus payments" under §6428 and §6428B,[12] the §123 exclusion for reimbursements of certain living expenses,[13] the §131 exclusion for foster care payments,[14] tax exclusions with respect to housing assistance and subsidies, including the §136 energy conservation subsidy exclusion,[15] and tax breaks with respect to disasters affecting households, including the §139 exclusion for disaster relief payments.[16]

B. Tax Cuts and Jobs Act of 2017 and One Big Beautiful Bill Act

The Tax Cuts and Jobs Act of 2017 (TCJA)[17] made a number of temporary changes to the IRC affecting families and individuals, including changes to the §24 child tax credit, personal exemptions, and medical expense deduction. For tax years 2018 through 2025, the TCJA also temporarily eliminated the deduction for miscellaneous itemized deductions, including deductions for certain expenses related to the production or collection of income that would otherwise be deductible under §212.[18]

The One Big Beautiful Bill Act (OBBBA)[19] permanently extends certain temporary changes originally enacted by the TCJA, including the refundable portion of the child tax credit, reducing the personal and dependency exemptions to zero, and disallowing miscellaneous itemized deductions. The OBBBA also enacts new provisions effective primarily in 2025 or 2026.

C. Same-Sex Spouses

The status of marriage is a matter of state law.[20] Thus, if state law recognizes a couple's marriage, the marriage is valid for federal tax purposes.[21]

In 1996, however, Congress enacted the Defense of Marriage Act (DOMA),[22] which defined marriage for all federal purposes as only a legal union between one man and one

[1] *See* III.A., below.
[2] *See* III.B., below.
[3] *See* III.C., below.
[4] *See* III.D., below.
[5] *See* III.E., below.
[6] *See* III.F., below.
[7] *See* III.G., below.
[8] *See* III.H., below.
[9] *See* III.I., below.
[10] *See* III.J., below.
[11] *See* III.K., below.
[12] *See* III.L., and III.M., below.
[13] *See* IV.A., below.
[14] *See* IV.B., below.
[15] *See* IV.C., below.
[16] *See* IV.D., below.
[17] Pub. L. No. 115-97.
[18] *See* TCJA, §11045. All section references herein are to the Internal Revenue Code of 1986, as amended, and the regulations thereunder, unless otherwise stated.
[19] Pub. L. No. 119-21. For further details on the OBBBA, see the One Big Beautiful Bill Act Watch page.
[20] Rev. Rul. 58-66, *amplified and clarified* by Rev. Rul. 2013-17.
[21] Rev. Rul. 58-66, *amplified and clarified* by Rev. Rul. 2013-17 (recognizing common law marriage that was valid under state law even after couple relocated to a state not recognizing common law marriage). *See* Rev. Rul. 68-277 (upholding benefit of filing joint return to husband and wife of different races resident in a state with anti-miscegenation law).
[22] See Pub. L. No. 104-199.

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woman as husband and wife and defined "spouse" as referring only to a person of the opposite sex who was a husband or wife.[23] As a result, the IRS was prohibited from treating partners or spouses in same-sex marriages, which were legal under state law, as husband and wife, and thus same-sex couples did not receive the same tax treatment as married couples of opposite sex.

In *United States v. Windsor*,[24] the Supreme Court held that §3 of the Defense of Marriage Act (DOMA)[25] was unconstitutional. After this ruling, the IRS issued guidance stating that, for federal tax purposes, the terms "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if they were lawfully married in a jurisdiction whose laws authorize the marriage of two individuals of the same sex, and the term "marriage" includes such marriages of individuals of the same sex.[26] Ultimately, in *Obergefell v. Hodges*,[27] the Supreme Court held that, under the Fourteenth Amendment, same-sex couples have a fundamental right to marriage. As such, the Court held that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and requires states to recognize same-sex marriages lawfully performed out of state, effectively striking down §2 of DOMA.[28]

On December 13, 2022, the Respect for Marriage Act (RFMA) repealed the portion of DOMA remaining after *Obergefell* and *Windsor*.[29] Except in the case of religious liberty or conscience protections, the Respect for Marriage Act requires the recognition of any public act, record, or judicial proceeding of another state pertaining to a same-sex marriage between two individuals that is valid under the other state's law and prohibits the denial of any right or claim arising from that out-of-state marriage on the basis of sex.[30] Under RFMA, for purposes of all federal laws, rules, or regulations in which marital status is a factor, an individual is considered married if that individual's marriage is between two individuals and is valid in the state (including the District of Columbia, Puerto Rico, or any other U.S. territory or possession) where the marriage was entered into or, if the marriage was entered into somewhere other than a state, is valid where entered into and could have been entered into in a state.[31]

The IRS issued final regulations reflecting the holdings of *Obergefell* and *Windsor*, as well as some portions of IRS guidance issued in response to both cases.[32] Under the regulations, a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is entered into, regardless of the married couple's place of domicile.[33] In addition, two individuals entering into a relationship denominated as marriage under the laws of a foreign jurisdiction are married for federal tax purposes if the relationship would be recognized as marriage under the laws of at least one state, possession or territory of the United States.[34] This rule enables couples who are married in foreign jurisdictions to determine marriage for federal tax purposes regardless of whether they are domiciled and regardless of whether they ever reside in the U.S., and prevents taxpayers from having to review the laws of all states to determine if they would be treated as married. Instead, a couple only needs be treated as married in a single jurisdiction.

[23] Pre-2022 1 U.S.C. §7.
[24] 570 U.S. 744 (2013).
[25] Pub. L. No. 104-199.
[26] Rev. Rul. 2013-17.
[27] 576 U.S. 644 (2015).
[28] Pub. L. No. 104-199.
[29] Pub. L. No. 117-228.
[30] 28 U.S.C. §1738C(a). The denial of recognition of an out-of-state marriage on the basis of race, ethnicity, or national origin is also prohibited. 28 U.S.C. §1738C(a).
[31] 1 U.S.C. §7 (defining marriage for purposes of any federal law or rule in which marital status is a factor). RFMA does not require or authorize federal recognition of polygamous marriages. Pub. L. No. 117-228, §7(b).
[32] Reg. §1.7701-1, §20.7701-2, §25.7701-2, §26.7701-2, §31.7701-2, §301.7701-18.
[33] Reg. §301.7701-18(b)(1).
[34] Reg. §301.7701-18(b)(2).

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II. Personal, Living, and Family Expenses

A. General Rule

Under §262, a taxpayer is generally not allowed to deduct personal, living, or family expenses.[35] That is, unless another Code section specifically provides for a deduction, these types of expenses are nondeductible.[36] The three categories of nondeductible expenses provided in §262 are more specifically discussed in B. through D., below.

With respect to federal income tax credits, the general rule is that no credit exists unless a specific provision allows it. Thus, for personal, living or family expenses, unless there is a specific Code provision authorizing the credit, no credit is allowed.[37] Credits generally are discussed in 506 T.M., *Principles of Income Tax Credits.*

Note: To be nondeductible under §262, an expense need only be within the scope of one of its categories. Thus, for example, although funeral expenses are not "living" expenses as such, they nonetheless are personal and thus nondeductible.[38]

Observation: In many instances, the §262 deduction disallowance applies because the taxpayer has failed to persuade the IRS or the courts that the taxpayer is engaged in a trade or business or for-profit activity.[39] Thus, the expense is personal and, generally, nondeductible. Whether an expense is a trade or business or for-profit activity deduction is discussed in 505 T.M., *Trade or Business Expenses and For-Profit Activity Deductions.*

In spite of the general prohibition in §262 against the deduction of personal, living or family expenses, there are several specific Code sections that allow either a deduction or a credit for expenses that fall within these categories (each of which is discussed in Sections III. and IV., below).

B. Personal Expenses

1. Self-Improvement Expenses

a. Appearance

Expenses related to improving the taxpayer's personal appearance are nondeductible personal expenses.[40] These types of nondeductible expenses include the cost of maintaining a wardrobe, the cost of dry cleaning, and the costs of makeup, hair styling, and personal grooming.[41] These types of expenses are nondeductible even if the taxpayer is in a profession that demands frequent changes of clothes or in which a taxpayer must appear publicly, such as a newscaster.[42]

Note: Generally, the cost of clothing is deductible if the clothing is specifically required as a condition of employment and is not adaptable to general or continued usage.[43] The deductibility of work clothing expenses is also described in 503 T.M., *Principles of Income Tax Deductions.*

b. Physical Health

The cost of going to a health club or spa in order to lose weight or maintain good physical condition is a nondeductible expense.[44] This is true even if the taxpayer is a law enforcement officer whose job requires a person to be in good physical condition.[45] Thus, the cost of home exercise equipment is not deductible even if physical conditioning assists the taxpayer in maintaining an intense work schedule.[46]

Note: The IRS takes the position that health club membership fees incurred primarily to prevent or alleviate obesity may be deductible as a medical expense, but the IRS cautioned that it will consider additional facts and circumstances in each case.[47] The IRS also takes the position that the cost of home exercise equipment may be deductible as a medical expense if used to treat obesity diagnosed by a physician.[48]

In *Stemkowski v. Commissioner*,[49] the Second Circuit held that off-season conditioning expenses paid or incurred by a Canadian hockey player were deductible to the extent that the conditioning contributed to the taxpayer's physical fitness throughout the hockey season played in the United States.[50] These types of expenses are deductible only if they are adequately substantiated and only if the conditioning activities are engaged in by the taxpayer for the purpose of conditioning and not merely for recreation.[51]

Observation: Good physical condition is important and necessary to almost any taxpayer's employment, whether the taxpayer engages in physically demanding work, such as law enforcement, or work that is seemingly undemanding physically, such as office work. For this reason, unless there is a line drawn, any taxpayer could claim a deduction for conditioning expenses on the basis that the expenses are work-related. Ap-

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[35] §262(a); Reg. §1.262-1(a).

[36] §262(a).

[37] *See, e.g., Kahn v. United States*, 753 F.2d 1208, 1214 (3d Cir. 1985); *Wilkins v. Commissioner*, 120 T.C. 109 (2003).

[38] *See, e.g., Schroeder v. Commissioner*, 74 T.C.M. 1213 (1997).

[39] *See, e.g., Masat v. Commissioner*, 784 F.2d 573, 575 (5th Cir. 1986), *aff'g in part and rev'g in part* 48 T.C.M. 317 (1984); *Zell v. Commissioner*, 763 F.2d 1139, 1141 (10th Cir. 1985), *aff'g* 47 T.C.M. 1371 (1984); *Sabelis v. Commissioner*, 37 T.C. 1058, 1063 (1962); *Dunkelberger v. Commissioner*, 64 T.C.M. 1567 (1992); *DeVincent v. Commissioner*, 58 T.C.M. 179, 180 (1989), *aff'd per curiam*, 923 F.2d 861 (9th Cir. 1991); *Gerbert and Assocs., Inc. v. Commissioner*, 54 T.C.M. 420, 428 (1987), *aff'd by unpub. opin.*, 876 F.2d 106 (7th Cir. 5/24/98); *Burnett v. Commissioner*, 51 T.C.M. 147, 149 (1985); *Mueller v. Commissioner*, 50 T.C.M. 914, 916 (1985), *aff'd by unpub. opin.*, 813 F.2d 408 (9th Cir. 3/16/78); *Glaser v. Commissioner*, 48 T.C.M. 447, 448–49 (1984); *Birkenstock v. Commissioner*, 47 T.C.M. 491, 493 (1983); *Smith v. Commissioner*, 37 T.C.M. 325, 326 (1978); *Kasey v. Commissioner*, 35 T.C.M. 1160, 1166 (1976); *Zimmermann v. Commissioner*, 35 T.C.M. 559, 562 (1976); *Drew v. Commissioner*, 31 T.C.M. 799, 806 (1972); *Stoltzfus v. Commissioner*, 29 T.C.M. 1610, 1638 (1970); *Wrightsman v. United States*, 428 F.2d 1316, 1320 (Ct. Cl. 1970).

[40] Reg. §1.212-1(f); *Hynes v. Commissioner*, 74 T.C. 1266, 1289–92 (1980); *Salman v. Commissioner*, 44 T.C.M. 1354, 1356 (1982), *aff'd by unpub. opin.* (9th Cir. 6/6/83).

[41] *Hynes*, 74 T.C. at 1289–92; *Hawbaker v. Commissioner*, 47 T.C.M. 231, 233 (1983); *Salman*, 44 T.C.M. at 1356.

[42] *Hynes*, 74 T.C. at 1291–92; *Salman*, 44 T.C.M. at 1356.

[43] Rev. Rul. 70-474.

[44] *See, e.g.,* Rev. Rul. 78-128.

[45] *Id. See also Kessler v. Commissioner*, 49 T.C.M. 1565, 1574 (1985).

[46] *Kelly v. Commissioner*, 62 T.C.M. 1406, 1407 (1991).

[47] IRS Info. Letter 2002-0077.

[48] IRS Info. Letter 2003-0202.

[49] 690 F.2d 40 (2d Cir. 1982), *on remand*, 82 T.C. 854 (1984), *aff'g in part and rev'g in part*, 76 T.C. 252 (1981).

[50] 690 F.2d at 46. *See Hanna v. Commissioner*, 76 T.C. 252 (1981), *aff'd and rem'd per curiam on other issues*, 763 F.2d 171 (4th Cir. 1985).

[51] *See Stemkowski v. Commissioner*, 82 T.C. 854, 855–56, 868 (1984), *on remand from* 690 F.2d 40 (2d Cir. 1982).

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parently the dividing line between whether or not physical conditioning expenses are deductible is whether the taxpayer's use of the body in good physical condition is the primary objective of the taxpayer's profession. These types of professions should include not only athletes but also aerobics or fitness instructors, bodybuilders, stunt artists, and any other similar profession.

c. Prestige and Reputation

Expenses related to developing prestige and reputation are nondeductible personal expenses even if the expenses are paid or incurred in order to eventually increase the taxpayer's income.[52]

2. Entertainment and Meal Expenses

Because of their inherently personal nature, Congress historically has imposed additional deduction requirements and limitations on deductions for entertainment and meal expenses. After 2017, most entertainment expenses were disallowed. Generally, expenses paid or incurred by a taxpayer for meals are nondeductible personal expenses unless the expenses satisfy the requirements for deduction as trade or business expenses under §162 or as for-profit activity expenses under §212 or, in very limited circumstances, qualify as medical expenses under §213 or moving expenses under §217.[53] As an example, a law school professor is not allowed to deduct the cost of a reception held to celebrate admission to the bar if the primary purpose of the reception is personal pleasure and not business.[54] Similarly, a physician is not allowed to deduct the cost of lunches with nurses, residents, or other physicians if there is no connection between the lunch and an income-producing activity.[55] If the cost of a meal is a nondeductible expense, the cost of leaving a tip is also nondeductible.[56] A firefighter's voluntary contributions to a house fund, maintained to pay for meals, are nondeductible expenses regardless of the fact that the contributions are strongly encouraged,[57] but involuntary contributions to a house plan are deductible.[58]

The deductibility of entertainment or meal expenses is discussed in detail in 519 T.M., *Travel, Transportation, Entertainment, Meal, and Gift Expenses.*

3. Subscription Costs

The cost of subscribing to magazines and other publications is a nondeductible personal expense unless the cost of the subscription satisfies the requirements for deduction as a trade or business expense under §162 or as a for-profit activity expense under §212.[59]

The deductibility of subscription expenses under §162 or §212 is discussed in 505 T.M., *Trade or Business Expenses and For-Profit Activity Deductions.*

4. Insurance Costs

Generally, premium payments made by a taxpayer for life insurance are not deductible expenses.[60] The cost of insurance for a dwelling owned and occupied by a taxpayer as a personal residence is also a nondeductible expense.[61] Likewise, amounts paid by a taxpayer for personal disability insurance are nondeductible expenses.[62] Amounts contributed by employees to voluntary disability plans are nondeductible personal expenses, whereas the employee may deduct, under §164(a)(3), any amount withheld from the employee's wages for contribution to a state disability fund because such amounts are state taxes.[63]

Note: Under appropriate circumstances, expenditures for insurance premiums are deductible if the taxpayer proves that the expenditures satisfy the requirements for deduction as trade or business expenses under §162 or as for-profit activity expenses under §212, as discussed in 505 T.M., *Trade or Business Expenses and For-Profit Activity Deductions.* Amounts withheld from an employee's wages for mandatory contribution to a state disability fund are deductible as taxes, as discussed in detail in 525 T.M., *State, Local, and Federal Taxes.*

5. Hobby Expenses

Expenses related to hobbies are nondeductible expenses except to the extent that the hobby generates gross income.[64] The deductibility of hobby expenses is discussed in detail in 548 T.M., *Hobby Losses.*

6. Travel Away from Home

Under §262, a taxpayer is not allowed to deduct expenses paid or incurred while traveling away from home, including transportation expenses or meals and lodging, unless the expenses satisfy the requirements for deduction as trade or business expenses under §162, as for-profit activity expenses under §212, as charitable contributions under §170, as medical expenses under §213, or as moving expenses under §217.[65] For

[52] Rev. Rul. 55-291.

[53] *Moss v. Commissioner*, 758 F.2d 211, 213 (7th Cir. 1985), *aff'g* 80 T.C. 1073 (1983); *Walsh v. Commissioner*, 52 T.C.M. 1344, 1344 (1987); *Mal Spinrad, Inc. v. Commissioner*, 48 T.C.M. 520, 524 (1984), *aff'd by unpub. opin.*, 770 F.2d 1072 (3d Cir. 6/24/85); *Leubert v. Commissioner*, 46 T.C.M. 945, 952 (1983); *Patterson v. Commissioner*, 36 T.C.M. 484, 485 (1977), *aff'd by unpub. opin.*, 618 F.2d 117 (9th Cir. 3/31/80); *Antos v. Commissioner*, 35 T.C.M. 387 (1976), *aff'd by unpub. opin.* (9th Cir. 2/24/78); *Gunther v. Commissioner*, 13 T.C.M. 984, 991 (1954); *McNary v. Commissioner*, 11 T.C.M. 692, 693 (1952).

[54] *Ryman v. Commissioner*, 51 T.C. 799, 804–05 (1969).

[55] *Hankenson v. Commissioner*, 47 T.C.M. 1567, 1569 (1984).

[56] *Feistman v. Commissioner*, 44 T.C.M. 30, 32 (1982), *aff'd by unpub. opin.*, 718 F.2d 1110 (9th Cir. 9/22/83); *Feistman v. Commissioner*, 41 T.C.M. 1057, 1060 (1981), *aff'd by unpub. opin.*, 705 F.2d 467 (9th Cir. 3/25/83); *Feistman v. Commissioner*, 35 T.C.M. 1045, 1047 (1976), *aff'd by unpub. opin.*, 614 F.2d 776 (9th Cir. 1/14/80).

[57] *Morton v. Commissioner*, 51 T.C.M. 783, 784 (1986); *Alvarado v. Commissioner*, 49 T.C.M. 967, 970 (1985), *aff'd without opin.*, 781 F.2d 901 (5th Cir. 1986).

[58] *Sibla v. Commissioner*, 68 T.C. 422 (1979), *aff'd*, 611 F.2d 1260 (9th Cir. 1980); *Cooper v. Commissioner*, 67 T.C. 870 (1977).

[59] *See, e.g.*, *Siragusa v. Commissioner*, 39 T.C.M. 1196, 1203 (1980); *Ives v. Commissioner*, 5 B.T.A. 934, 937 (1926).

[60] Reg. §1.262-1(b)(1).

[61] Reg. §1.262-1(b)(2); *Edens v. Commissioner*, 33 T.C.M. 1419, 1422 (1974).

[62] Rev. Rul. 55-331.

[63] Rev. Rul. 81-194, *superseded by* Rev. Rul. 75-149; Rev. Rul. 81-193; Rev. Rul. 81-192, *superseding* Rev. Rul. 71-73, *and modifying* Rev. Rul. 72-91; Rev. Rul. 75-48, *superseded*, Rev. Rul. 81-193.

[64] §183.

[65] Reg. §1.262-1(b)(5), §1.162-2(a). *E.g.*, *Hicks v. Commissioner*, 47 T.C. 71, 75 (1966); *Robertson v. Commissioner*, 74 T.C.M. 1257 (1997), *aff'd*, 190 F.3d 392 (5th Cir. 1999); *Cook v. Commissioner*, 57 T.C.M. 681, 683 (1989);

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example, a taxpayer who is a member of the United States Foreign Service is allowed to deduct travel and living expenses paid or incurred while the taxpayer is on home leave in the United States because the expenses satisfy the requirements of §162.[66] Similarly, in Rev. Rul. 62-2, the IRS ruled that a taxpayer who was a Fulbright professor was allowed to deduct travel and living expenses paid or incurred while visiting a French university. However, the travel and living expenses of the taxpayer's family are nondeductible personal expenses.[67]

The deductibility of travel expenses is discussed in detail in 519 T.M., *Travel, Transportation, Entertainment, Meal, and Gift Expenses.*

7. Attorney's Fees and Related Expenses

a. In General

As discussed above, personal expenses are generally not deductible pursuant to the general rule in §262. Thus, legal and other professional fees are not deductible if the underlying claim or action is personal in nature.[68] This is so even if the claim or action has a beneficial effect on the taxpayer's employment, finances, or personal reputation.[69] Thus, in *Harden v. Commissioner*,[70] the Tax Court held that amounts paid by a professional athlete to obtain dismissal of criminal charges were not deductible even though the athlete's employer had informed the athlete that he would lose his position unless the charges were dropped and the negative publicity avoided.[71] A corporation is not permitted to deduct legal fees paid to defend its sole shareholder against criminal charges for bribery and tax evasion.[72]

Legal expenses paid or incurred in connection with an attempt to recover personal-use property are nondeductible expenses.[73] Fees paid to a private investigator in order to ascertain the source of job harassment are nondeductible.[74]

The deductibility of legal and other professional fees is discussed in detail in 523 T.M., *Deductibility of Legal and Other Professional Fees.*

b. Expenses Related to Family Matters

(1) Children

Expenses related to the adoption of a child are nondeductible,[75] but may qualify for the adoption credit,[76] discussed in III.F., below. Expenses paid or incurred by a taxpayer in order to defend the taxpayer's child against criminal charges are nondeductible,[77] as are legal expenses related to the incarceration of a child in a detention center.[78] Legal costs related to a suit to have a taxpayer's child declared incompetent are nondeductible regardless of whether the taxpayer's or the child's financial interests are in jeopardy.[79]

(2) Incompetency and Related Proceedings

Expenses related to securing a taxpayer's release from a mental institution are nondeductible.[80] Attorney's fees and related expenses paid or incurred by a taxpayer in order to defend against an incompetency proceeding are nondeductible.[81] In *Ferguson v. Commissioner*,[82] the Tax Court held that legal expenses paid or incurred by a taxpayer in order to manage the affairs of the taxpayer's mother who resides in a convalescent home are nondeductible.[83]

(3) Family Property Management

Legal expenses related to the preparation of a will, the admission of a will to probate, or the determination of rights under a will are nondeductible.[84] Legal fees and other expenses related to creating a family trust or a trust to manage personal assets are nondeductible.[85] Attorney's fees related to negotiations for the formation of a corporation to maintain and operate family property are nondeductible.[86] Legal fees incurred by a personal representative to restore reputation and to defend against a dissatisfied heir's claims reflecting the representative's per-

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Allison v. Commissioner, 52 T.C.M. 42, 48 (1986); *Albert v. Commissioner*, 51 T.C.M. 1371, 1372 (1986); *Levine v. Commissioner*, 46 T.C.M. 426, 427–28 (1983); *Cole v. Commissioner*, 45 T.C.M. 730, 731 (1983); *Dady v. Commissioner*, 42 T.C.M. 781, 784 (1981), *aff'd by unpub. opin.*, 696 F.2d 1006 (11th Cir. 1/6/83); *Cervilla v. Commissioner*, 35 T.C.M. 775, 777–78 (1976); *McLaurin v. Commissioner*, 35 T.C.M. 703, 706–07 (1976); *Olsen v. Commissioner*, 34 T.C.M. 1558, 1560 (1975); *LaRocca v. Commissioner*, 32 T.C.M. 872, 873–74 (1973); Rev. Rul. 75-432; Rev. Rul. 74-292; Rev. Rul. 73-529.

[66] *Hitchcock v. Commissioner*, 578 F.2d 972, 975 (4th Cir. 1978), *rev'g* 66 T.C. 950 (1976); Rev. Rul. 82-2.

[67] Rev. Rul. 62-2.

[68] *United States v. Gilmore*, 372 U.S. 39, 49 (1963).

[69] *See, e.g., id.*; *Lloyd v. Commissioner*, 55 F.2d 842, 844 (7th Cir. 1932), *aff'g* 22 B.T.A. 674 (1931); *Srivastava v. Commissioner*, 76 T.C.M. 638 (1998), *aff'd in part and rev'd in part and rem'd on other issues*, 220 F.3d 353 (5th Cir. 2000); *Patch v. Commissioner*, 39 T.C.M. 880, 885 (1980); *Harper v. Commissioner*, 22 T.C.M. 705, 707 (1963).

[70] 62 T.C.M. 756 (1991).

[71] *Id.* at 758.

[72] *Capital Video Corp. v. Commissioner*, 311 F.3d 458 (1st Cir. 2002), *aff'g* 83 T.C.M. 1229 (2002).

[73] *E.g.*, *Vance v. Commissioner*, 36 T.C. 547, 552 (1961); *Gurry v. Commissioner*, 27 B.T.A. 1237, 1238 (1933); *Orbach v. Commissioner*, 1 B.T.A. 1256, 1256 (1925); *Hughes v. Commissioner*, 1 B.T.A. 944, 946 (1925); *McClendon v. Commissioner*, 52 T.C.M. 391, 391–92 (1986).

[74] *Imeson v. Commissioner*, 28 T.C.M. 899, 901–02 (1969), *aff'd per curiam on other issues*, 487 F.2d 319 (9th Cir. 1973).

[75] Rev. Rul. 56-401.

[76] *See* §23.

[77] *Lenington v. Commissioner*, 25 T.C.M. 1350, 1352 (1966).

[78] *Collins v. Commissioner*, 47 T.C.M. 1211, 1212 (1984).

[79] *Wallace v. Commissioner*, 56 T.C. 624, 634 (1971).

[80] *Hinkle v. Commissioner*, 47 B.T.A. 670, 671 (1942); *Oram v. Commissioner*, 18 T.C.M. 395, 395 (1959).

[81] *Lewis v. Commissioner*, 253 F.2d 821, 824–25 (2d Cir. 1958), *aff'g* 27 T.C. 158 (1956).

[82] 43 T.C.M. 1317 (1982).

[83] *Id.* at 1320.

[84] *E.g.*, *Commissioner v. Field*, 42 F.2d 820, 823 (2d Cir. 1930), *aff'g in part and rev'g in part*, 15 B.T.A. 718 (1929); *Hendrick v. Commissioner*, 35 T.C. 1223, 1234 (1961); *Drake v. Commissioner*, 30 B.T.A. 461, 468 (1934); *Merriman v. Commissioner*, 21 B.T.A. 67, 68 (1930), *aff'd*, 55 F.2d 879 (1st Cir. 1931); *McKee v. Commissioner*, 19 B.T.A. 430, 433 (1930); *Jordan v. Commissioner*, 12 B.T.A. 423, 425 (1928); *Pennell Est. v. Commissioner*, 4 B.T.A. 1039, 1039 (1926).

[85] *Carlin v. Commissioner*, 46 T.C.M. 1198, 1203 (1983); *Monesmith v. Commissioner*, 46 T.C.M. 446, 449 (1983); *Snyder Est. v. Commissioner*, 43 T.C.M. 1337, 1340–41 (1982); *Johnston v. Commissioner*, 37 T.C.M. 544, 545 (1978).

[86] *Patch v. Commissioner*, 11 B.T.A.M. 1322, 1328 (1941).

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sonal relationship with the decedent are nondeductible because they originate in personal, not income-generating, matters.[87]

The deductibility of legal fees paid for tax advice is discussed in detail in 523 T.M., *Deductibility of Legal and Other Professional Fees.*

(4) Marital Situations

(a) Marriage Contracts

Attorney's fees and other costs paid or incurred to recover damages for breach of a promise to marry are nondeductible,[88] as are damages paid for breach of a promise to marry.[89]

(b) Divorce or Separation

Generally, attorney's fees and other costs paid in connection with a divorce, separation, written separation agreement, decree for support, or postnuptial agreement, are nondeductible personal expenses.[90] This principle applies even if the taxpayer can show that a portion of the expenses are attributable to retention and protection of a home office.[91]

Lodging expenses paid or incurred by a taxpayer during divorce proceedings while living away from home pursuant to a court order are nondeductible personal expenses.[92]

For further discussion of divorce or separation, see 515 T.M., *Divorce and Separation.*

(c) Child Support and Custody

Attorney's fees and other costs paid in connection with a suit for child support or custody are nondeductible expenses.[93] Legal fees paid or incurred by grandparents in connection with a legal action to sever parental rights are nondeductible expenses.[94] Child support payments are nondeductible personal expenses even if the taxpayer would lose his employment if he was incarcerated for nonpayment.[95]

[87] *See Stiebling v. Commissioner*, 113 F.3d 1242 (9th Cir. 1997), *aff'g* 67 T.C.M. 3006 (1994).

[88] Reg. §1.262-1(b)(6).

[89] Reg. §1.262-1(b)(6).

[90] Reg. §1.262-1(b)(7); *Sanderson v. Burnet*, 63 F.2d 268, 269 (D.C. Cir. 1933), *aff'g* 23 B.T.A. 304 (1931); *Glasgow v. Commissioner*, 21 T.C. 211, 219 (1953); *Condello v. Commissioner*, 76 T.C.M. 460 (1998); *Conway v. Commissioner*, 68 T.C.M. 469 (1994); *Karelas v. Commissioner*, 56 T.C.M. 832, 833 (1988); *Sefton v. Commissioner*, 18 T.C.M. 1121, 1126 (1959), *aff'd*, 292 F.2d 399 (9th Cir. 1961); *Coursey v. Commissioner*, 33 B.T.A. 1068, 1073 (1936); *Robins v. Commissioner*, 8 B.T.A. 523, 525 (1927); *Joyce v. Commissioner*, 3 B.T.A. 393, 392 (1926).

[91] *Swain v. Commissioner*, 71 T.C.M. 1846 (1996), *aff'd*, 96 F.3d 1439 (4th Cir. 1996).

[92] *Brattain v. Commissioner*, 23 T.C.M. 828, 828 (1964).

[93] *Karelas*, 56 T.C.M. at 833; *Albergottie v. Commissioner*, 32 T.C.M. 33, 35 (1973); *Harper v. Commissioner*, 30 T.C.M. 1255, 1256 (1971); *Freund v. Commissioner*, 10 T.C.M. 514, 517 (1951).

[94] *Jones v. Commissioner*, 50 T.C.M. 1230, 1231 (1985).

[95] *Clarke v. Commissioner*, 33 T.C.M. 20, 21 (1974).

C. Living Expenses

1. Household Expenses

a. In General

Generally, the expenses of maintaining a household are nondeductible.[96] Nondeductible household expenses include, but are not limited to, amounts paid or incurred by a taxpayer for rent, water, utilities, domestic service, household furnishings, and tools used in the home.[97]

The cost of repairs made to a personal residence is a nondeductible expense.[98] Household maintenance expenses are nondeductible expenses even if the taxpayer is on furlough during a strike.[99] Maintenance charges assessed by a realty company against owners of residential lots are nondeductible expenses.[100] The cost of landscaping for a personal residence is a nondeductible expense.[101] The cost of hazard insurance for a personal residence is nondeductible.[102]

Subject to statutory limitations, real estate taxes are deductible under §164.[103] Subject to statutory limitations, mortgage interest is deductible under §163 to the extent the mortgage qualifies as acquisition indebtedness or home equity indebtedness.[104] The deductibility of real estate taxes is discussed in 525 T.M., *State, Local, and Federal Taxes.* The deductibility of mortgage interest is discussed in 594 T.M., *Tax Implications of Home Ownership.* Several other exceptions to the general rule are discussed in IV., below.

The costs of maintaining a residence near a job site are nondeductible expenses.[105] This is true even if the taxpayer is required to reside near the job site.[106]

b. Multiple-Use Property

If a taxpayer owns property, part of which is rented or used by the taxpayer for trade or business purposes and part of which is used by the taxpayer for personal purposes, maintenance ex-

[96] Reg. §1.262-1(b)(3); *Kurzet v. Commissioner*, 222 F.3d 830 (10th Cir. 2000), *aff'g* 73 T.C.M. 1867 (1997); *DeSargent v. Commissioner*, 52 T.C.M. 246, 248 (1986); *Bothke v. Commissioner*, 39 T.C.M. 826, 828 (1980), *aff'd without opin.*, 667 F.2d 1030 (9th Cir. 1981).

[97] Reg. §1.262-1(b)(3); *Springmann v. Commissioner*, 54 T.C.M. 592, 594–95 (1987); *Daniels v. Commissioner*, 35 T.C.M. 784, 784 (1976); *Tussaud's Wax Museums, Inc. v. Commissioner*, 25 T.C.M. 1081, 1091–92 (1966); *Jamieson v. Commissioner*, 8 T.C.M. 961, 961–62 (1949); Rev. Rul. 90-64, *modifying and superseding*, Rev. Rul. 84-86; Rev. Rul. 75-159; Rev. Rul. 73-531; Rev. Rul. 68-12.

[98] *Miller v. Commissioner*, 40 T.C.M. 243, 247 (1980); *Page v. Commissioner*, 1 B.T.A. 400, 402 (1925).

[99] *Kennedy v. Commissioner*, 29 T.C.M. 255, 257 (1970), *aff'd per curiam*, 451 F.2d 1023 (3d Cir. 1971).

[100] Rev. Rul. 55-154.

[101] *Gross v. United States*, 83-1 USTC ¶9188 (C.D. Cal. 1982), *aff'd*, 730 F.2d 765 (9th Cir. 1984).

[102] *Lange v. Commissioner*, 90 T.C.M. 69 (2005).

[103] *See* §164(a)(1).

[104] *See* §163(a), §163(h)(1), §163(h)(3).

[105] *Hynes v. Commissioner*, 74 T.C. 1266, 1293 (1980); *Peterson v. Commissioner*, 53 T.C.M. 1281, 1282 (1987); *Hyslep v. Commissioner*, 52 T.C.M. 242, 243 (1986), *aff'd by unpub. opin.*, 833 F.2d 1019 (11th Cir. 10/27/87); *Abbott v. Commissioner*, 42 T.C.M. 646, 649 (1981).

[106] *See, e.g., Ciro v. Commissioner*, 17 T.C.M. 76, 77 (1958).

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penses allocable to the portion maintained for personal use are nondeductible expenses.[107]

Observation: In many instances the §262 disallowance applies to multiple-use property expenses because the taxpayer fails to persuade the IRS or the courts that (1) a portion of the taxpayer's property is used for trade or business purposes[108] or that (2) it is held for the production of income.[109] Thus, farmers who fail to show that any portion of the cost of food and farmhouse lodging is attributable to the farming business are not permitted to deduct those costs.[110]

The deductibility of maintenance and similar expenses under §162 or §212 is discussed in detail in 547 T.M., *Home Office, Vacation Home, and Home Rental Deductions.*

c. Increased Living Expenses

The increase in a taxpayer's living expenses caused by a flood, or other casualty, which forces evacuation from the taxpayer's home, is a nondeductible expense.[111]

Note: Insurance proceeds received by a taxpayer in order to compensate or reimburse the taxpayer for an increase in living expenses due to a casualty may be excluded from the taxpayer's gross income under §123.[112] The exclusion of insurance proceeds from gross income under §123 is discussed in detail in IV.B., below.

2. Groceries and Clothing

Nondeductible living expenses include expenditures for groceries and clothing for a taxpayer, spouse, or dependent.[113] A taxpayer may not deduct the cost of food, clothing, and other personal living expenses paid by the taxpayer for a third person, including the taxpayer's parent.[114]

Note: Generally, the cost of clothing is deductible if the clothing is specifically required as a condition of employment and is not adaptable to general or continued usage.[115] For example, the cost of special safety boots used by a taxpayer who is a pipe-fitter is a deductible expense,[116] but the cost of heavy jeans used at work by this taxpayer is not deductible.[117] A professional violinist's expenditures on sequined gowns and formal clothing that could not be adapted to personal use were held deductible,[118] but the costs of business suits and women's black or white suits and dresses are not because they are adaptable for general use.[119] The cost of a newscaster's wardrobe is nondeductible because the clothing can be worn for personal use,[120] the costs of a tennis pro's clothes and shoes are nondeductible expenses because they are suitable for personal use,[121] and the cost of a dance teacher's warm-up clothes, exercise clothing, and athletic footwear are nondeductible expenses because they are suitable for personal use.[122]

3. Equipment Purchased by Members of the Armed Forces

A taxpayer who is a member of the Armed Forces may deduct the cost of equipment only to the extent that the cost exceeds nontaxable allowances received by the taxpayer for the equipment and only to the extent that the equipment is required by the taxpayer's profession and does not merely serve to replace articles required in civilian life.[123] For example, a member of the Armed Forces may deduct the cost of a sword to the extent that it exceeds nontaxable allowances received for such costs.[124] However, the cost of a uniform is not deductible, unless the uniform is purchased by a reservist and may be worn only when on active duty for training for temporary periods, when attending service school courses, or when attending training assemblies.[125] The cost of a uniform purchased by a reservist under these conditions is deductible to the extent that it exceeds nontaxable allowances received for the cost.[126]

4. Telephone Expenses

a. In General

Under §262(b), the cost of local telephone service provided for the first telephone line at the taxpayer's residence is a nondeductible personal expense regardless of whether the taxpayer's use of the telephone relates to a business or income-producing activity.[127] The nondeductible cost includes any sales or excise taxes related to the service paid by the taxpayer,[128] regardless of whether the residence is the taxpayer's principal residence.[129]

Comment: The §262(b) disallowance does not apply to telephone expenses with respect to telephone service for other

[107] *Rhoads v. Commissioner*, 53 T.C.M. 1308, 1312 (1987); *Mal Spinrad, Inc. v. Commissioner*, 48 T.C.M. 520, 523 (1984), *aff'd by unpub. opin.*, 770 F.2d 1072 (3d Cir. 6/24/85); *Tucker v. Commissioner*, 39 T.C.M. 463, 465 (1979); *Brown v. Commissioner*, 39 T.C.M. 442, 446 (1979); *Hannaford v. Commissioner*, 19 T.C.M. 409, 414, 419 (1960); Rev. Rul. 76-287.

[108] *Miller v. Commissioner*, 40 T.C.M. 243, 248 (1980); *Monsky v. Commissioner*, 36 T.C.M. 1046, 1049 (1977); *Salviati v. Commissioner*, 36 T.C.M. 1041, 1042 (1977).

[109] *Neubauer v. Commissioner*, 51 T.C.M. 1037, 1044 (1986); *Richardson v. Commissioner*, 37 T.C.M. 1335, 1340 (1978); *Drexler v. Commissioner*, 25 B.T.A. 79, 81 (1932), *aff'd per curiam*, 65 F.2d 1015 (9th Cir. 1933).

[110] *Waterfall Farms, Inc. v. Commissioner*, 86 T.C.M. 648 (2003); *Tschetter v. Commissioner*, 86 T.C.M. 639 (2003); *Schmidt v. Commissioner*, 86 T.C.M. 631 (2003); *Weeldreyer v. Commissioner*, 86 T.C.M. 622 (2003).

[111] *Eschauzier v. United States*, 69-1 USTC ¶9273 (D. Conn. 1969); *Arnold v. United States*, 289 F. Supp. 206, 210 (E.D.N.Y. 1968); PLR P-H ¶76,171 (Jan. 21, 1952).

[112] §123. *See, e.g.*, Rev. Rul. 93-43.

[113] *E.g.*, *Hynes v. Commissioner*, 74 T.C. 1266, 1290 (1980); Rev. Rul. 90-64.

[114] *Byram v. United States*, 81-2 USTC ¶9592 (N.D. Ala. 1980); *Carr v. United States*, 65-2 USTC ¶9682 (W.D. Tex. 1965).

[115] Rev. Rul. 70-474. *See, e.g.*, *Cotton v. Commissioner*, 80 T.C.M. 594 (2000); *Campbell v. Commissioner*, 63 T.C.M. 1979 (1992); *Kozera v. Commissioner*, 52 T.C.M. 1264 (1986).

[116] *Jeffers v. Commissioner*, 51 T.C.M. 1403, 1406 (1986).

[117] *Id.*

[118] *Popov v. Commissioner*, 76 T.C.M. 695 (1998), *aff'd in part and rev'd in part and rem'd in part on other issues*, 246 F.3d 1190 (9th Cir. 2001).

[119] *Bernardo v. Commissioner*, 88 T.C.M. 191 (2004); *Gapikia v. Commissioner*, 81 T.C.M. 1488 (2001).

[120] *Hynes*, 74 T.C. at 1290; *Salman v. Commissioner*, 44 T.C.M. 1354, 1356 (1982), *aff'd by unpub. opin.*, (9th Cir. 6/6/83).

[121] *Mella v. Commissioner*, 52 T.C.M. 1216, 1217–18 (1986).

[122] *Meeks v. Commissioner*, 75 T.C.M. 1997 (1998), *aff'd without opin.*, 208 F.3d 221 (9th Cir. 2000).

[123] Reg. §1.262-1(b)(8).

[124] Reg. §1.262-1(b)(8).

[125] Reg. §1.262-1(b)(8).

[126] Reg. §1.262-1(b)(8).

[127] §262(b); H.R. Rep. No. 795, 100th Cong., 2d Sess. 530 (1988); H.R. Rep. No. 1104, 100th Cong., 2d Sess., vol. 2, 129 (1988).

[128] H.R. Rep. No. 1104 at 129.

[129] H.R. Rep. No. 1104 at 129.

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than the first residential line. Whether other telephone expenses are deductible depends on whether they are paid or incurred in carrying on a trade or business or for-profit activity.[130] The deductibility of telephone expenses is also discussed in 503 T.M., *Principles of Income Tax Deductions*.

b. Local Telephone Service

For purposes of §262(b), local telephone service means access to a local telephone system and the privilege of telephone quality communication with persons who have access to stations that are part of the local telephone system.[131] Therefore, the entire standard base charge as well as any other federal, state, or local mandatory charges, related to local telephone service for the first telephone line, are nondeductible.[132] Even if the taxpayer chooses a more expensive form of basic local service, such as a touch-tone line over a rotary line, the entire charge for the basic service selected by the taxpayer is nondeductible.[133]

c. Optional Services

If a taxpayer pays for optional services, such as call waiting or call forwarding, for the first telephone line in the taxpayer's residence, §262(b) does not prevent the taxpayer from deducting these charges provided that the charges would otherwise be deductible under another provision of the Code.[134] In addition, §262 does not affect the deductibility of otherwise deductible toll charges for long-distance calls made by the taxpayer over the first telephone line.[135]

If a taxpayer installs a second telephone line in the taxpayer's residence, the deductibility of the charges for local telephone service is not affected by §262(b).[136] If the charges for local service attributable to adding a second line are less than the charges for the first line, the higher charges are treated as relating to the first line and are, therefore, nondeductible.[137]

The prohibition on deducting telephone expenses in §262(b) does not apply to cellphone expenses, but these expenses are only deductible if they qualify as business expenses (i.e., deductible to the extent that the taxpayer uses the phone for business purposes). If a taxpayer is self-employed, the taxpayer is able to deduct the cost of the business use of a cellphone. If a taxpayer is not self-employed but is using a cellphone for business purposes, the taxpayer might be able to deduct the business portion of the cost as an unreimbursed business expense. However, these expenses are considered miscellaneous itemized deductions and are, therefore, subject to limitation under §67(a) and disallowed completely for tax years beginning in 2018 through 2025.[138]

5. Commuting and Parking Costs

The costs incurred by a taxpayer related to commuting between work and home are nondeductible personal expenses.[139]

[130] §162, §212.

[131] H.R. Rep. No. 795 at 530.

[132] H.R. Rep. No. 795 at 530; H.R. Rep. No. 1104 at 129.

[133] H.R. Rep. No. 795 at 530.

[134] *Id.*; H.R. Rep. No. 1104, at 129–30.

[135] H.R. Rep. No. 795 at 530; H.R. Rep. No. 1104 at 129.

[136] H.R. Rep. No. 795 at 530–31; H.R. Rep. No. 1104 at 129–30.

[137] H.R. Rep. No. 795 at 531.

[138] *See* §67(g).

Thus, a taxpayer is not allowed to deduct car pool costs, or toll costs incurred while commuting between home and work, or the cost of parking while at work.[140] A taxpayer is not allowed to deduct the cost of commuting between home and the site of educational courses, even if the cost of the courses is deductible.[141]

Commuting expenses are nondeductible even if there is a long distance between the taxpayer's home and the workplace.[142] In fact, these types of expenses are nondeductible even if the long distance is caused by factors beyond the taxpayer's control, including racial discrimination,[143] the inability to sell a home,[144] the inability to live at a work site,[145] or the remoteness or unsuitability of the area at which the work site is located.[146]

Commuting expenses are nondeductible even if the taxpayer is called to work on a beeper,[147] or is on 24-hour call for a job that demands punctuality.[148] Commuting is a nondeductible personal expense even if the taxpayer is physically impaired

[139] Reg. §1.212-1(f), §1.262-1(b)(5); *Green v. Commissioner*, 59 T.C. 456, 459 (1972); *Mitchell v. Commissioner*, 42 T.C. 953, 970–71 (1964); *Irwin v. Commissioner*, 72 T.C.M. 1148 (1996), *aff'd*, 131 F.3d 146 (9th Cir. 1997); *Marason v. Commissioner*, 71 T.C.M. 1690 (1996), *aff'd on other issue*, 121 F.3d 716 (9th Cir. 1997); *Kirsch v. Commissioner*, 70 T.C.M. 768 (1995); *Sisson v. Commissioner*, 68 T.C.M. 1078 (1994), *aff'd*, 108 F.3d 339 (9th Cir. 1996); *Casey v. Commissioner*, 55 T.C.M. 664, 665 (1988), *aff'd without opin.*, 876 F.2d 899 (11th Cir. 1989); *Levine v. Commissioner*, 54 T.C.M. 209, 212 (1987); *Rhoads v. Commissioner*, 53 T.C.M. 1308, 1311 (1987); *Flippen v. Commissioner*, 51 T.C.M. 1158, 1159 (1986); *Dickson v. Commissioner*, 51 T.C.M. 970, 972 (1986); *Kourouklis v. Commissioner*, 51 T.C.M. 471, 472 (1986); *Thalacker v. Commissioner*, 48 T.C.M. 1104, 1106 (1984); *Seymour v. Commissioner*, 48 T.C.M. 650, 651 (1984); *Moriarty v. Commissioner*, 48 T.C.M. 59, 68 (1984); *Brill v. Commissioner*, 43 T.C.M. 1542, 1545 (1982); *Solon v. Commissioner*, 39 T.C.M. 1245, 1249 (1980), *aff'd by unpub. opin.* (5th Cir. 10/5/81); *Bothke v. Commissioner*, 39 T.C.M. 826, 828 (1980), *aff'd without opin.* (9th Cir. 1981); *Tucker v. Commissioner*, 31 T.C.M. 215, 216 (1972); *Barton v. Commissioner*, 28 T.C.M. 261, 262 (1969), *aff'd per curiam*, 424 F.2d 1295 (7th Cir. 1970); *Riscalla v. Commissioner*, 22 T.C.M. 541, 547 (1963), *aff'd per curiam*, 337 F.2d 859 (5th Cir. 1964); *Brightwell v. United States*, 71-1 USTC ¶9157 (D. Ariz. 1971); *Smith v. Warren*, 67-1 USTC ¶9353 (W.D. Wash. 1967), *aff'd per curiam*, 388 F.2d 671 (9th Cir. 1968).

[140] *Henderson v. Commissioner*, 46 T.C.M. 566, 567 (1983); *Greenway v. Commissioner*, 40 T.C.M. 24, 28 (1980); *Towne v. Commissioner*, 36 T.C.M. 1422, 1424 (1977); Rev. Rul. 55-555.

[141] *Zimmerman v. Commissioner*, 71 T.C. 367, 370–71 (1978), *aff'd without opin.*, 614 F.2d 1294 (2d Cir. 1979); *Jouett v. Commissioner*, 43 T.C.M. 664, 666 (1982).

[142] *Coombs v. Commissioner*, 608 F.2d 1269, 1272 (9th Cir. 1979), *aff'g in part and rev'g in part*, 67 T.C. 426 (1976); *Edmerson v. United States*, 72-2 USTC ¶9702 (9th Cir. 1972); *Verner v. Commissioner*, 39 T.C. 749, 756 (1963); *Mann v. Commissioner*, 36 T.C.M. 130, 131 (1977); *Smith v. Commissioner*, 31 T.C.M. 739, 740 (1972); *Tietjen v. Commissioner*, 29 T.C.M. 281, 283 (1970); *Gross v. United States*, 83-1 USTC ¶9188 (C.D. Cal. 1982), *aff'd*, 730 F.2d 765 (9th Cir. 1984); *Wag-Aero, Inc. v. United States*, 81-1 USTC ¶9183 (E.D. Wis. 1980); *Cox v. United States*, 78-2 USTC ¶9572 (D. Nev. 1978), *aff'd sub nom.*, *Coombs v. Commissioner*, 608 F.2d 1269 (9th Cir. 1979).

[143] *Brown v. Commissioner*, 47 T.C.M. 526, 527 (1983).

[144] *Hill v. Commissioner*, 31 T.C.M. 14, 15 (1972).

[145] *Sanders v. Commissioner*, 439 F.2d 296, 299 (9th Cir. 1971), *aff'g* 52 T.C. 964 (1969); *United States v. Tauferner*, 407 F.2d 243, 246–47 (10th Cir. 1969), *rev'g* 68-1 USTC ¶9212 (D. Utah 1968).

[146] *Pilcher v. Commissioner*, 651 F.2d 717, 718 (10th Cir. 1981) (per curiam), *aff'g* 38 T.C.M. 1089 (1979); *Coombs*, 608 F.2d at 1272 (9th Cir.); *Edmerson*, 72-2 USTC at ¶9702; *Watkins v. Commissioner*, 38 T.C.M. 1062, 1064 (1979); *White v. Commissioner*, 31 T.C.M. 357, 358–59 (1972); *White v. Commissioner*, 31 T.C.M. 273, 274 (1972); *Sciume v. Commissioner*, 17 T.C.M. 74, 75 (1958); *Cox*, 78-2 USTC at ¶9572.

[147] *Barnes v. United States*, 86-1 USTC ¶9130 (S.D.N.Y. 1985).

[148] *Bodholdt v. Commissioner*, 20 T.C.M. 390, 393 (1961).

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and is, therefore, unable to get a driver's license or walk, drive, or take public transportation.[149]

Under appropriate circumstances, the cost of transportation between home and work is deductible if the expenditure satisfies the requirements of another provision of the Code. The deductibility of transportation expenses is discussed in detail in 519 T.M., *Travel, Transportation, Entertainment, Meal, and Gift Expenses.*

6. Vehicle Expenses

The costs of acquiring or maintaining an automobile, boat, or plane generally, subject to the exception described in the next paragraph, are nondeductible personal expenses unless the costs satisfy the requirements for deduction as trade or business expenses under §162, as for-profit activity expenses under §212, as charitable contributions under §170, as medical expenses under §213, or as moving expenses under §217.[150]

For tax years beginning in 2025–2028, §163(h)(4) provides a deduction by excepting "qualified passenger vehicle interest" from the definition of nondeductible personal interest.[151] Qualified passenger vehicle interest accrues on indebtedness, including certain refinance loans, secured by a first lien on an applicable passenger vehicle intended for personal use.[152] Applicable passenger vehicle generally means a new vehicle with at least two wheels (car, van, minivan, SUV, truck, motorcycle), a gross vehicle weight of less than 14,000 pounds, manufactured primarily for street use, with a final assembly in the U.S.[153] The deduction is limited to $10,000 annually, reduced by $200 for each $1,000 the taxpayer's modified gross adjusted gross income exceeds $100,000 ($200,000 for joint filers).[154] Interest paid to related parties (as per §267(b) and §707(b)(1)) is disallowed.[155] The deduction is available to non-itemizers.[156]

The deductibility of vehicle expenses is discussed in detail in 519 T.M., *Travel, Transportation, Entertainment, Meal, and Gift Expenses*; the deduction for qualified passenger vehicle interest is discussed in detail in 536 T.M., *Interest Expense Deductions*, at V.C.

7. Losses on the Acquisition and Disposition of Residences

Losses sustained by a taxpayer on the sale or disposition of a residence or other property held for personal, living, or family purposes are nondeductible.[157] A taxpayer is not allowed to deduct expenses related to rescinding a sales contract to purchase a personal residence even if business considerations compelled the taxpayer to relocate.[158] Nor is a taxpayer permitted to deduct losses realized on the contribution of residential property to a fund established to repay claims by defrauded customers of a corporation in which the taxpayer is a shareholder.[159]

Note: Losses sustained to personal-use property caused by casualty may be deductible under §165.[160] The deductibility of casualty losses is discussed in detail in 527 T.M., *Loss Deductions.*

Comment: The sole act of listing a personal residence for sale or rent does not convert it into property held for business or for-profit purposes.[161]

D. Family Expenses

1. Payments to Family Members

Payments made to family members for personal services rendered to the taxpayer are nondeductible expenses.[162] For example, a taxpayer is not allowed to deduct an amount paid to the taxpayer's spouse for the spouse's services as husband or wife.[163] In addition, a taxpayer is not allowed to deduct amounts paid to a spouse in return for the spouse's consent to change professions.[164] In *Harrison v. Commissioner*,[165] the Tax Court held that a taxpayer was not allowed to deduct the cost of food, clothing, and similar expenses related to the support of orphan children living in the taxpayer's home who were helping the taxpayer operate a farm.[166]

Observation: The §262 disallowance often applies to payments made to family members because the taxpayer fails to prove that the payment is business related or that the services performed are, for example, services that a business employee would perform.[167]

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[149] *Donnelly v. Commissioner*, 262 F.2d 411, 412 (2d Cir. 1959), *aff'g* 28 T.C. 1278 (1957); *Bruton v. Commissioner*, 9 T.C. 882, 886 (1947); *Clark v. Commissioner*, 37 T.C.M. 1178, 1179 (1978); *Teer v. Commissioner*, 23 T.C.M. 493, 495 (1964); *Ranstead v. Commissioner*, 10 T.C.M. 117, 118 (1951).

[150] *See, e.g.*, *May v. Commissioner*, 299 F.2d 725, 728 (4th Cir. 1962), *aff'g* 35 T.C. 865 (1961); *Westerman v. Commissioner*, 55 T.C. 478, 481 (1970); *Downing v. Commissioner*, 57 T.C.M. 1379, 1380 (1989); *McCarty v. Commissioner*, 53 T.C.M. 854, 859 (1987), *aff'd by unpub. opin.* (2d Cir. 1988); *Wott v. Commissioner*, 51 T.C.M. 1577, 1582 (1986), *aff'd by unpub. opin.* 819 F.2d 1143 (7th Cir. 1987); *O'Donnell v. Commissioner*, 51 T.C.M. 266, 267 (1986); *Seymour v. Commissioner*, 48 T.C.M. 650, 651 (1984); *Landahl v. Commissioner*, 41 T.C.M. 189, 192 (1980); *Jones v. Commissioner*, 37 T.C.M. 1222, 1224 (1978); *Whipple Chrysler-Plymouth v. Commissioner*, 31 T.C.M. 230, 232 (1972); *Dawson v. Commissioner*, 31 T.C.M. 5, 10 (1972); *Warren v. Commissioner*, 27 T.C.M. 940, 943 (1968); *Limerick v. Commissioner*, 9 T.C.M. 465, 471 (1950); *Haines v. Commissioner*, 8 T.C.M. 793, 794 (1949); *Paramount-Richards Theatres v. Commissioner*, 3 T.C.M. 806, 811 (1944), *aff'd on other issues*, 153 F.2d 602 (5th Cir. 1946); *Larrabee v. United States*, 68-2 USTC ¶9442 (C.D. Cal. 1968). *But see* §30B (alternative motor vehicle credit).

[151] Added by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70203(a).

[152] §163(h)(4)(B) and §163(h)(4)(E)(ii), added by the OBBBA, §70203(a).

[153] §163(h)(4)(D) and §163(h)(4)(E)(i), added by the OBBBA, §70203(a).

[154] §163(h)(4)(C), added by the OBBBA, §70203(a).

[155] §163(h)(4)(E)(iii), added by the OBBBA, §70203(a).

[156] §63(b)(7), added by the OBBBA, §70203(b).

[157] Reg. §1.262-1(b)(4); *Christensen v. Commissioner*, 47 T.C.M. 1558, 1559 (1984), *aff'd in part and rem'd in part on other issues*, 786 F.2d 1382 (9th Cir. 1986).

[158] *Lennox v. Commissioner*, 19 T.C.M. 1244 (1960).

[159] *Blodgett v. Commissioner*, 86 T.C.M. 90 (2003), *aff'd*, 394 F.3d 1030 (8th Cir 2005).

[160] §165(c)(3).

[161] *Christensen*, 47 T.C.M. at 1559.

[162] *E.g.*, *Clark v. Commissioner*, 5 T.C.M. 236, 238 (1946), *aff'd per curiam*, 158 F.2d 851 (6th Cir. 1946).

[163] *Id.*

[164] *Robinson v. Commissioner*, 4 B.T.A. 504, 506 (1926).

[165] 18 T.C. 540 (1952).

[166] *Id.* at 543.

[167] *See, e.g.*, *Brown v. Commissioner*, 22 B.T.A. 678, 683–84 (1931), *aff'd on other issues*, 63 F.2d 66 (9th Cir. 1933), *aff'd*, 291 U.S. 193 (1934); *Brauer v. Commissioner*, 6 B.T.A. 579, 581 (1927).

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2. Education Expenses

The expenses of obtaining or furthering an education are not deductible unless they satisfy the requirements for deduction as trade or business expenses under §162, or if they are deductible as qualified tuition and related expenses under former §222, effective for tax years 2020 and earlier.[168] These expenses might qualify for the American opportunity and lifetime learning credits if the conditions for those credits are satisfied.[169] The deductibility of education expenses and the availability of the American opportunity and lifetime learning credits are discussed in detail in 517 T.M., *Scholarships and Educational Expenses.*

Payments made by a taxpayer for the education of a child that do not qualify under former §222 are nondeductible even if the payments are made in return for a contractual promise that the child will eventually work for the taxpayer.[170] A child's education expenses not qualifying under former §222 are nondeductible even if the expenses are paid by a Clifford trust.[171]

Comment: If a taxpayer meets certain requirements, a limited deduction is available for interest paid on qualified education loans.[172] This deduction is an exception to the general rule that personal interest is not deductible.[173] Interest payments deductible under §221 are expressly excluded from the definition of the term "personal interest."[174] This deduction is discussed in detail in 517 T.M., *Scholarships and Educational Expenses.*

3. Child Care Expenses

Amounts paid or incurred by a taxpayer for child care are nondeductible personal expenses.[175] This is true even if the child care expenses are incurred in order for the taxpayer to work,[176] or in order for the taxpayer to receive medical treatment.[177] Payments made by a taxpayer to a county probation department for the care of an incarcerated child are nondeductible expenses.[178]

Note: Under appropriate circumstances, a taxpayer may be eligible to claim a household and dependent care credit,[179] as discussed in III.D., below.

4. Credit Card Expenses

Convenience fees charged by credit and debit card companies for the use of a credit or debit card to pay personal income taxes, including estimated taxes, may be deducted under §212(3) as an expense paid or incurred in connection with collection of a tax.[180] Note, though, that these expenses are considered miscellaneous itemized deductions and are, therefore, subject to limitation under §67(a) and disallowed completely for tax years beginning in 2018 through 2025.[181]

The Chief Counsel's office had previously advised that these convenience fees were not deductible, taking the position that although §212(3) allows a taxpayer to deduct all the ordinary and necessary expenses incurred in connection with determining the extent of their tax liability, a taxpayer may not deduct the expenses incurred in paying that liability after its extent has been determined.[182] In PMTA 2009-002, the Chief Counsel's Office explained that while it previously concluded in SCA 200115032 that credit and debit card convenience fees were not fees to "determine" a tax under §212(3), the SCA did not address whether the fees might qualify under §212(3) as fees to "collect" a tax. PMTA 2009-002 concluded that convenience fees are deductible as fees to "collect" a tax under §212(3), thus effectively overriding SCA 200011532.

The deductibility of fees paid in connection with the determination, collection, or refund of tax are discussed in 523 T.M., *Deductibility of Legal and Other Professional Fees.*

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[168] Reg. §1.262-1(b)(9); *Kroll v. Commissioner*, 49 T.C. 557, 568 (1968). The tuition and fees deduction under former §222 was permanently repealed for tax years beginning after December 31, 2020.

[169] *See* §25A.

[170] *E.g.*, *Lewis v. Commissioner*, 8 T.C. 770, 776 (1947), *aff'd per curiam*, 164 F.2d 885 (2d Cir. 1947).

[171] *Kang v. Commissioner*, 83-2 USTC ¶9692 (E.D.N.Y. 1983).

[172] *See* §221.

[173] §163(h)(1).

[174] §163(h)(2)(F).

[175] *E.g.*, *Shonkwiler v. Commissioner*, 37 T.C.M. 546, 547 (1978); Rev. Rul. 73-597.

[176] *E.g.*, *King v. Commissioner*, 19 T.C.M. 1519, 1520 (1960); *Thurston v. Commissioner*, 10 T.C.M. 809, 810 (1951).

[177] Rev. Rul. 78-266.

[178] *Collins v. Commissioner*, 47 T.C.M. 1211, 1212 (1984).

[179] *See* §21.

[180] IR-2009-37 (4/7/2009); PMTA 2009-002.

[181] *See* §67(g).

[182] SCA 200115032.

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III. Exceptions Related to Family Expenses

A. *Medical Expenses*

1. *In General*

Under §213, a taxpayer is allowed an itemized deduction for medical expenses paid during the tax year to the extent that the expenses exceed 7.5% of the taxpayer's adjusted gross income.[183] The medical expense deduction applies only to expenses incurred by the taxpayer, the taxpayer's spouse, or a dependent.[184] In addition, the deduction applies only to expenses not compensated for by insurance or otherwise.[185] With the exception of decedents' estates,[186] the medical expense deduction is available only to individuals.[187]

Practice Point: The medical expense deduction is available only if a taxpayer itemizes deductions (on Schedule A). If a taxpayer claims the standard deduction, there is no deduction for medical expenses. Thus, the medical expense deduction is valuable to a taxpayer only if the taxpayer's combination of all itemized deductions (e.g., medical expenses (in excess of 7.5% of AGI), state and local taxes, and home mortgage interest) exceeds the amount of the standard deduction. The standard deduction has significantly increased and beginning in 2026 a taxpayer's itemized deductions (including deductions for medical expenses) is reduced by 2/37 of the lesser of (i) the taxpayer's itemized deductions or (ii) the taxpayer's taxable income that exceeds the §1 dollar threshold for the 37% tax bracket.[188] The combination of the high 7.5% of AGI threshold for deductibility, overall limitation on itemized deductions, and higher standard deduction generally means that the medical expense deduction is valuable to a taxpayer only if the taxpayer has a relatively extraordinary amount of out-of-pocket medical costs.

Additional information regarding medical and dental expenses is available in IRS Pub. 502, *Medical and Dental Expenses*.

2. *Scope of Deduction*

a. *Taxpayers Entitled to Deduction*

Generally, the §213 medical expense deduction is available only to individuals.[189] A nonresident alien individual who is working within the United States is not entitled to the §213 deduction.[190]

Under an exception to the general rule,[191] a taxpayer's medical expenses paid out of the estate during the one-year period beginning on the day after death are treated as if paid by the taxpayer at the time the medical services were rendered.[192] The exception does not apply if the amount paid by the estate is allowable under §2053 as a deduction in computing the taxable estate of the decedent except with the filing of both a statement that the expenses have not been allowed as a deduction under §2053 and a waiver of the right to have the expenses allowed at any time as a deduction under §2053.[193] The statement and the waiver must be filed with the return, amended return, or claim for credit or refund for any tax year for which the medical expenses are claimed as a deduction.[194] The §213(c) election is discussed in 855 T.M., *Estate and Trust Administration — Tax Planning* (Estates, Gifts, and Trusts Series).

b. *Persons Whose Medical Expenses Qualify*

(1) *In General*

Under §213, the taxpayer is allowed to deduct only those medical expenses incurred by the taxpayer, the taxpayer's spouse, or a dependent.[195]

(2) *Spouses*

Medical expenses paid for the care of a spouse are deductible only if the status of the person as spouse exists either at the time the medical care is rendered or at the time the expenses are paid.[196] A taxpayer and spouse legally separated under a decree of separate maintenance are not considered married for purposes of §213.[197]

Example: W incurs $1,000 of medical expenses in November 20X1. H and W are married in February 20X2. In March 20X2, H pays W's 20X1 medical bill. H and W file separate income tax returns. Assuming all other requirements are met, H is allowed to deduct in 20X2 the 20X1 medical expenses incurred by W because H and W were married at the time the expenses were paid.

Example: H and W are married in 20X1. In 20X2, H incurs $5,000 of medical expenses. In July 20X3, H and W are legally divorced. In August 20X3, W pays H's $5,000 medical bill. Assuming all other requirements are met, W is allowed to deduct the medical expenses incurred by H in 20X3 because H and W were married at the time that the medical services were rendered.

Example: H and W are married in 20X1. In February 20X3, H and W separate under a decree of separate maintenance. In March 20X3, W incurs $5,000 of medical expenses. In November 20X3, H and W are divorced. In December 20X3, H pays W's $5,000 medical bill. H is not allowed to deduct the $5,000 medical expense because H

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[183] §213(a).
[184] §213(a); Reg. §1.213-1(a)(3).
[185] §213(a); Reg. §1.213-1(a)(3).
[186] §213(c); Reg. §1.213-1(d).
[187] Reg. §1.213-1(a)(1).
[188] §68, amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70111.
[189] §213(a); Reg. §1.213-1(a)(1).
[190] Rev. Rul. 56-514.
[191] §213(c); Reg. §1.213-1(d).
[192] §213(c)(1); Reg. §1.213-1(d)(1).
[193] §213(c)(2); Reg. §1.213-1(d)(2).
[194] Reg. §1.213-1(d)(2).
[195] §213(a); Reg. §1.213-1(a)(3)(i), §1.213-1(e)(3). *See Morrissey v. United States*, 871 F.3d 1260 (11th Cir. 2017) (male taxpayer may not deduct in vitro fertilization expenses for surrogate gestational carrier; court rejected taxpayer argument that it was medically necessary to involve third parties to enable his own body to fulfill its reproductive function).
[196] Reg. §1.213-1(e)(3).
[197] Reg. §1.213-1(e)(3); *Garsaud v. Commissioner*, 28 T.C. 1086 (1957).

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and W were not married either at the time the services were rendered or at the time the payment was made.

A taxpayer may deduct a medical expense incurred by a common law spouse only if the state in which the taxpayer is residing recognizes the taxpayer as legally married.[198] A taxpayer is not permitted to deduct the childbirth expenses of a woman who is the mother of his child but who is not his spouse or dependent.[199]

In Rev. Rul. 59-66, the IRS ruled that, absent competent evidence to the contrary, spouses residing in noncommunity property states who file separate returns and maintain a joint bank account are each presumed to have paid half of the medical expenses paid during the tax year regardless of whether only one spouse actually paid all of the expenses with checks drawn from funds in the account.

Comment: The IRS did not discuss what types of evidence would be considered competent evidence to rebut the presumption.[200] However, the IRS referred to *Higgins v. Commissioner*,[201] in which the Tax Court implied that if a written agreement is executed before the expenses are paid and provides that the expenses will be considered drawn from the payor's separate funds, there would be sufficient evidence to rebut the presumption that the expenses are paid from joint funds.[202] Absent an agreement, it may be necessary to prove that the funds in the joint account consist entirely of the payor's separate funds and that only the payor draws checks from the account.[203]

Spouses residing in community property states who file separate returns and pay medical expenses out of community funds are each allowed to deduct half of the expenses paid during the tax year.[204] Medical expenses paid from funds maintained separately by one spouse are deductible only by the spouse who actually makes the payments.[205] However, if separate funds are commingled with community funds, the taxpayer may deduct medical expenses on a separate return only if the taxpayer proves that the expenses were actually paid from separate funds.[206]

(3) Dependents

Except for spouses, otherwise deductible medical expenses paid by a taxpayer for the care of any other person are not deductible unless the person qualifies as a dependent.[207] The test for whether a person qualifies as a dependent for purposes of §213 is the test for purposes of the dependency exemption under §152, which requires that a person be a qualifying child or a qualifying relative of the taxpayer, but determining whether a person is a dependent for medical expense deduction purposes disregards two exceptions and one requirement for being a qualifying child.[208] Insured are the exception that precludes a person from being a dependent of the taxpayer if the taxpayer is the dependent of another person as well as[209] the exception that precludes a person from being a dependent of the taxpayer if the person files a joint return for the tax year.[210] Also not taken into account is the requirement that a person cannot be a qualifying child unless his or her gross income is less than the exemption amount.[211] The qualifying child and qualifying relative tests are discussed in III.B.3.c. and III.B.3.d., respectively.

If a custodial parent releases the claim to the dependency exemption and the release is valid, then the child is treated as a dependent of both parents for purposes of the medical expense deduction, whereas if a custodial parent does not release the claim to the exemption, then only the taxpayer who is entitled to claim the child as a dependent may treat the child as a dependent for purposes of the medical expense deduction.[212] However, the IRS has determined that if four conditions are satisfied, both parents may treat the child as a dependent for purposes of the medical expense deduction, even if the custodial parent does not release the claim to the exception.[213] First, the parents must be divorced, legally separated, or living apart for the last six months of the tax year.[214] Second, the child must receive more than one-half of his or her support during the calendar year from the parents.[215] Third, the child must be in the custody of one or both parents for more than one-half of the calendar year.[216] Fourth, the child must be a qualifying child or a qualifying relative of one of the parents.[217] Release of the claim to the dependency exemption is discussed in III.B.3.h.(4), below.

To be a dependent and have deductible medical expenses, the person must be a citizen or resident of the United States or a contiguous country.[218] The IRS has noted that a same-sex domestic partner may qualify as the taxpayer's dependent.[219]

In Rev. Rul. 71-347, the IRS ruled that in determining the support of a dependent, financial assistance provided by a state for room, board, and tuition of a child in a school for the mentally disabled is not considered.[220] Similarly, hospital costs covered by Part A Medicare payments are not taken into account in determining whether the support test has been met.[221]

Medical expenses paid for the care of a dependent are deductible even if the dependent does not meet the gross income

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[198] *E.g.*, *Cox v. Commissioner*, T.C. Memo 1977-360; *Ross v. Commissioner*, T.C. Memo 1972-122.

[199] *Presby v. Commissioner*, 69 T.C.M. 2648 (1995).

[200] Rev. Rul. 59-66.

[201] 16 T.C. 140 (1951).

[202] *Higgins*, 16 T.C. 140 at 142–43.

[203] *Higgins*, 16 T.C. 140 at 142–43.

[204] *Haseltine v. Commissioner*, 38 T.C.M. 1259, 1264 (1979); Rev. Rul. 55-479.

[205] Rev. Rul. 55-479.

[206] *Clemens v. Commissioner*, 8 T.C. 121 (1947), *appeal dismissed* (5th Cir. 1948).

[207] §213(a). *See Roberts v. Commissioner*, 72 T.C.M. 1034 (1996), *aff'd*, 127 F.3d 1106 (9th Cir. 1997).

[208] §213(a).

[209] §213(a) (reference to §152(b)(1)).

[210] §213(a) (reference to §152(b)(2)).

[211] §213(a) (reference to §152(d)(1)(B)).

[212] Reg. §1.152-4(f). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate this rule as Reg. §1.152-5(f).

[213] Rev. Proc. 2008-48.

[214] Rev. Proc. 2008-48.

[215] Rev. Proc. 2008-48.

[216] Rev. Proc. 2008-48.

[217] Rev. Proc. 2008-48.

[218] *See Solati v. Commissioner*, 64 T.C.M. 1280 (1992).

[219] PLR 200339001; PLR 9850011.

[220] Rev. Rul. 71-347.

[221] *Turecamo v. Commissioner*, 554 F.2d 564, 568 (2d Cir. 1977), *aff'g* 64 T.C. 720 (1975); *Archer v. Commissioner*, 73 T.C. 963, 968–69 (1980).

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test[222] that is discussed in III.B.3.c., and III.B.3.d., below. The deduction is disallowed, however, if the person for whom the payments are made fails either the support test[223] or the relationship test.[224]

For purposes of §213, if §152(e) applies with respect to a child, the child is treated as a dependent of both parents.[225] Thus, divorced or separated parents who together contribute at least half of a child's total support are allowed to deduct medical expenses paid for the child regardless of which parent has custody or is entitled to the dependency exemption for the child.[226]

If a person's medical expenses are paid for by two or more persons qualifying for multiple support agreement treatment under §152, the expenses are deductible only by the person designated in the multiple support agreement as entitled to the dependency exemption deduction and the medical expense deduction exemption deduction is limited to the amount of the expenses actually paid by that person.[227]

Medical expenses paid by a taxpayer for the care of a dependent are deductible only if the person is a dependent either at the time the medical care is rendered or at the time the expenses are paid.[228] No deduction is allowed for a payment that is reimbursement to the adoption agency for medical expenses incurred and paid before the beginning of adoption negotiations.[229]

> *Example:* S is H's adopted son. Before S was placed in H's home, S incurred $5,000 of medical expenses. H may deduct the $5,000 of medical expenses if S is H's dependent at the time H pays the expenses, assuming that the payment is not a reimbursement of the adoption agency's payment of the expenses.

Generally, expenses paid for the medical care of a pet are not deductible.[230] Pets are not considered dependents.[231]

Note: Medical expenses paid for the maintenance and care of pets or other animals used in providing medical treatment for the taxpayer are deductible. These deductions are discussed in III.A.4.e.(2)(b), below.

If a taxpayer is paying medical expenses for both dependents and persons who are not dependents, it is important for the taxpayer to maintain detailed records differentiating between those payments made for the care of dependents and those for the care of the other persons.[232] If no such records are kept, the entire deduction may be disallowed.[233]

3. Limitations on Deduction

a. Percentage Limitations

(1) In General

Under §213, a taxpayer is allowed to deduct medical expenses paid during the tax year only to the extent that they exceed 7.5% of the taxpayer's adjusted gross income.[234]

> *Example (1):* T incurs $10,000 of otherwise deductible medical expenses in 20X1. T's adjusted gross income for 20X1 is $60,000. T may deduct only $5,500 of medical expenses ($10,000 total expenses – $4,500 ($60,000 × 0.075)).

(2) Adjusted Gross Income Recomputations

If the taxpayer's adjusted gross income for a tax year is recomputed through audit, amended return, or otherwise, the taxpayer must also recompute the amount of any medical expense deduction claimed in that year.[235] A recomputation that increases adjusted gross income will necessarily decrease the allowable medical expense deduction.[236]

> *Example:* T pays $8,000 of otherwise deductible medical expenses in 20X1. T's 20X1 adjusted gross income is $50,000. T deducts $4,250 of medical expenses in 20X1 ($8,000 – $3,750 ($50,000 × .075)). In 20X2, T's adjusted gross income for 20X1 is recomputed to $60,000. T's allowable medical expense deduction for 20X1 is reduced to $3,500 ($8,000 – $4,500 ($60,000 × .075)).

b. Coordination with Credits

Expenses that are allowed as dependent care credits under §21 are not treated as expenses paid for medical care.[237]

c. No Maximum Limitation

There is no maximum limitation on the amount of the §213 medical expense deduction.[238]

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[222] Reg. §1.213-1(a)(3)(i). *Clark v. Commissioner*, 29 T.C. 196, 199 (1957), *acq.*, 1958-1 C.B. 4; *Shemerdiak v. Commissioner*, 22 T.C.M. 1194, 1195 (1963).

[223] *E.g.*, *Raffaelli v. Commissioner*, 52 T.C.M. 708, 709 (1986); *Dern v. Commissioner*, 46 T.C.M. 1545, 1549 (1983); *Ragsdale v. Commissioner*, 42 T.C.M. 213, 217 (1981); *Ranheim v. Commissioner*, 39 T.C.M. 720, 722 (1979); *Perkins v. Commissioner*, 37 T.C.M. 1378, 1379 (1978); *Jernigan v. Commissioner*, 37 T.C.M. 46, 48 (1978); *Cox v. Commissioner*, 36 T.C.M. 1435, 1437 (1977); *Meshulam v. Commissioner*, 35 T.C.M. 501, 503 (1976); *Schoen v. Commissioner*, 34 T.C.M. 746 (1975); *Rountree v. Commissioner*, 30 T.C.M. 137, 140–41 (1971), *aff'd*, 456 F.2d 1110 (6th Cir. 1972); *Beck v. Commissioner*, 29 T.C.M. 659, 660–61 (1970); *Sanders and Sons, Inc. v. Commissioner*, 26 T.C.M. 671, 678 (1967), *appeal dismissed* (10th Cir. 1968); *Feeney v. Commissioner*, 25 T.C.M. 40 (1966).

[224] *Solati*, 64 T.C.M. 1280 (1992); *Peacock v. Commissioner*, 37 T.C.M. 177, 181–82 (1978), *appeal dismissed* (9th Cir. 1980); *Cox v. Commissioner*, 36 T.C.M. 1435, 1438 (1977); *Angstadt v. Commissioner*, 27 T.C.M 693, 695 (1968).

[225] §213(d)(5).

[226] §213(d)(5).

[227] Reg. §1.213-1(a)(3)(i). *See Puryear v. Commissioner*, 41 T.C.M. 1294, 1295 (1981) (deduction *denied* in absence of multiple support agreement); *Jiu v. Commissioner*, 30 T.C.M. 220 (1971) (taxpayer claiming deduction must be designated in agreement as entitled to deduction).

[228] Reg. §1.213-1(e)(3). *See, e.g., Carroll v. Commissioner*, 28 T.C.M. 532, 533 (1969).

[229] Rev. Rul. 60-255.

[230] *E.g.*, *Schoen v. Commissioner*, 34 T.C.M. 746 (1975).

[231] *Id.* at 746.

[232] *E.g.*, *DeVere v. Commissioner*, 35 T.C.M. 28, 29 (1976).

[233] *Id.*

[234] §213(a).

[235] *Perry v. Commissioner*, 22 T.C. 968, 975 (1954); *Osborne v. Commissioner*, T.C. Memo 1995-353, *Jackson v. Commissioner*, T.C. Memo 1981-594, *Ross v. Commissioner*, T.C. Memo 1954-177, *rev'd on other issues*, 227 F.2d 265 (5th Cir. 1955).

[236] *Perry*, 22 T.C. at 975.

[237] §213(e).

[238] Reg. §1.213-1(c)(1).

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d. *Reimbursements*

(1) *In General*

Under §213, a taxpayer is allowed to deduct medical expenses paid during the tax year only to the extent that the expenses are not compensated for by insurance or otherwise.[239] To deduct medical expenses, a taxpayer must establish that the amount deducted represents unreimbursed expenses.[240] If a taxpayer voluntarily elects not to file an insurance claim and, therefore, not to receive reimbursement for medical expenses paid, the amount of the available reimbursement reduces the amount of deductible medical expenses.[241] A taxpayer must reduce the amount of deductible expenses by the entire amount of reimbursement received under hospital insurance policies even if the policy does not indemnify all medical expenses.[242]

(2) *Dependent's Resources*

A taxpayer who pays a parent's medical bills and is allowed to claim the dependency exemption deduction under a multiple support agreement relating to the parent must reduce the amount of deductible medical expenses by the amount of reimbursement from other parties to the agreement.[243] A taxpayer who pays medical expenses for a dependent parent must reduce the amount of deductible medical expenses by amounts received from Social Security and state assistance plans.[244] In addition, if a taxpayer receives and uses a portion of a dependent's pension income to pay medical expenses, the taxpayer must reduce the amount of deductible medical expenses by the portion of the dependent's pension income so used.[245] A taxpayer who pays a dependent parent's medical bills with checks drawn on a personal account is not considered reimbursed merely because funds are available in a joint account with the dependent parent if, under state law, the taxpayer has no current ownership rights to the funds.[246]

(3) *Corporations and Shareholders*

Medical expenses paid by a corporation on behalf of a principal stockholder are treated as constructive dividends to the extent of the corporation's earnings and profits.[247] The medical expenses are treated as having been paid by the stockholder to the extent that the constructive dividends are included in the stockholder's income, and are, to that extent, deductible by the stockholder.[248]

(4) *Awards to Crime and Disaster Victims*

The amount of medical expenses for which compensation is received through an award from a crime victim's compensation board are not deductible.[249]

Note: In addition, under the tax benefit rule, awards of this type that compensate for previously deducted medical expenses must be included in gross income to the extent that the previous deduction resulted in a tax benefit.[250] The tax benefit rule is discussed in detail in 502 T.M., *Gross Income: Tax Benefit, Claim of Right and Assignment of Income.*

A taxpayer must reduce the amount of deductible medical expenses to the extent that the expenses are reimbursed by a grant received under §408 of the Disaster Relief Act of 1974.[251]

(5) *Disability Benefit Payments*

The amount of deductible medical expenses is not reduced by disability benefit payments received by a taxpayer.[252] If a taxpayer receives a payment under an accident insurance policy, only the portion of the payment specifically designated as indemnification for hospitalization and medical care is considered reimbursement for medical expenses and, therefore, reduces the amount of the medical expense deduction.[253]

(6) *Personal Injury Awards for Future Medical Expenses*

Any portion of a personal injury award specifically allocated to future medical expenses must be offset against future medical expenses related to the injury as they are incurred.[254] A taxpayer may not deduct any portion of future medical expenses until the entire amount of the award allocated to those expenses is offset.[255]

In *Niles v. United States*,[256] the court held that the IRS cannot allocate part of a lump sum personal injury award to future medical expenses if the award does not include a specific allocation to future medical expenses.[257] The court stated that even if the taxpayer, when arguing before the court, gives a hypothetical breakdown of future medical expenses, without a specific jury breakdown the IRS may not allocate any portion of the award to such expenses.[258] According to the *Niles* court, in the case of a lump sum personal injury award, the taxpayer may exclude from gross income the entire amount of the award and may also deduct portions of the award used to pay future medical expenses.[259] The IRS had previously ruled, in Rev. Rul. 79-427, that a hypothetical breakdown of a lump sum award

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[239] §213(a); *Saunders v. Commissioner*, 83 T.C.M. 1795 (2002), *aff'd on other issues*, 75 Fed. Appx. 494 (6th Cir. 2003).

[240] *Cooper v. Commissioner*, 53 T.C.M. 1304, 1307–08 (1987); *Gardner v. Commissioner*, 46 T.C.M. 1283, 1288 (1983); *Hill v. Commissioner*, 37 T.C.M. 447, 448 (1978); *Lemmon v. Commissioner*, 27 T.C.M. 503, 506 (1968); *Kilgannon v. Commissioner*, 24 T.C.M. 619, 625 (1965); *Goodman v. Commissioner*, 9 T.C.M. 789, 804–05 (1950), *aff'd*, 200 F.2d 681 (2d Cir. 1953).

[241] TAM 8102010.

[242] Rev. Rul. 56-18.

[243] *Litchfield v. Commissioner*, 330 F.2d 509 (1st Cir. 1964), *aff'g* 40 T.C. 967 (1963).

[244] *Hodge v. Commissioner*, 44 T.C. 186, 188–89 (1965).

[245] *McDermid v. Commissioner*, 54 T.C. 1727, 1730 (1970).

[246] *Jewell v. Commissioner*, 69 T.C. 791, 804 (1978), *acq.*, 1978-1 C.B. 2.

[247] *Estate of Slater v. Commissioner*, T.C. Memo 1962-256.

[248] *Estate of Slater v. Commissioner*, T.C. Memo 1962-256.

[249] Rev. Rul. 74-74; PLR 8028065.

[250] Rev. Rul. 74-74.

[251] Rev. Rul. 76-144. *See also* CCA 200114045.

[252] *Deming v. Commissioner*, 9 T.C. 383, 386–87 (1947).

[253] *Deming v. Commissioner*, 9 T.C. 383, 386–87 (1947).

[254] Rev. Rul. 75-232.

[255] Rev. Rul. 75-232.

[256] 710 F.2d 1391 (9th Cir. 1983), *aff'g* 520 F. Supp. 808 (N.D. Cal. 1981).

[257] *Niles v. United States*, 710 F.2d 1391, 1394, 1395 (9th Cir. 1983), *aff'g* 520 F. Supp. 808 (N.D. Cal. 1981).

[258] *Niles v. United States*, 710 F.2d 1391, 1394 (9th Cir. 1983), *aff'g* 520 F. Supp. 808 (N.D. Cal. 1981).

[259] *Niles v. United States*, 710 F.2d 1391 (9th Cir. 1983), *aff'g* 520 F. Supp. 808 (N.D. Cal. 1981).

ISBN 978-1-55871-737-4

presented to the court as evidence of future medical expenses is a proper basis for allocation of the award.[260]

(7) Personal Injury Awards for Past Medical Expenses

The amount of a personal injury award allocated to previously paid medical expenses is included in the taxpayer's gross income to the extent that the previously paid medical expenses resulted in deductions.[261] If a taxpayer receives a lump sum personal injury award with no allocation for previously paid medical expenses, the medical expenses previously paid and deducted are presumed to be recovered first out of the award and are included in gross income.[262]

(8) Payments Received Under Employer Accident and Health Plans

Amounts received by a taxpayer under an employer accident and health plan are not included in the taxpayer's gross income and are not considered reimbursement for medical expenses to the extent that the amount received constitutes payment for the permanent loss or loss of use of a member or function of the body or permanent disfigurement.[263] The amount of a taxpayer's medical expense deduction is not reduced by excludible benefit payments received under these plans.[264] Amounts received by a taxpayer under an employer accident and health plan for reimbursement of medical care expenses are included in the taxpayer's gross income to the extent that the taxpayer previously deducted the expenses.[265]

(9) Payments Received Under Long-Term Care Insurance Contracts

Amounts received under a long-term care insurance contract generally are excludible as amounts received for personal injuries and sickness.[266] For per diem contracts, the exclusion is subject to a cap of $175 per day, or $63,875 annually.[267] If total periodic payments under all qualified long-term care contracts exceed the dollar cap for the period, the excess is excludible from gross income only to the extent of the individual's costs for long-term care during the period that are not compensated by insurance or otherwise reimbursed.[268] The dollar cap is indexed for inflation.[269] The inclusion in gross income of long-term care insurance contract reimbursements is discussed in 330 T.M., *Tax and ERISA Implications of Employer-Provided Medical and Disability Benefits* and in 528 T.M., *Income Tax Definition of Life Insurance and Annuity Contracts.*

[260] Rev. Rul. 79-427.
[261] Rev. Rul. 75-230.
[262] Rev. Rul. 75-230.
[263] §105(c).
[264] §105(f); Reg. §1.213-1(a)(3)(ii).
[265] §105(b).
[266] §7702B(a)(2).
[267] §7702B(d)(2), §7702B(d)(4).
[268] §7702B(d)(1).
[269] §7702B(d)(5). Amounts for recent years for periodic payments received under qualified long-term care insurance contracts or certain life insurance contracts are listed in the *Tables, Charts & Lists, Income Tax and Accounting, Medical, Dental, Etc., Expenses.*

4. Definition of Medical Care

a. In General

Under §213, a taxpayer is allowed to deduct only payments made for the "medical care" of the taxpayer, the taxpayer's spouse, or a dependent.[270] Payments made for medical care include payments for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.[271] However, "nothing in the statute or the underlying regulation requires that the treatments received by a taxpayer be furnished by an individual licensed to practice medicine in any particular discipline, or that the services or treatments be provided in person rather than remotely, or that the treatment be successful, or that the treatment be universally accepted as effective."[272]

Personal, family, or living expenses are not deductible as medical care if the expenses do not fall within the §213 definition. Expenditures that are merely beneficial to the general health of an individual will not be considered medical expenses because those expenses are personal in nature.[273] Personal expenses can be considered those for medical care if the taxpayer would not have incurred the expenses but for the taxpayer's disease or illness.[274] The Tax Court has provided some objective factors to consider when determining whether an expense that is typically personal in nature can be incurred by a taxpayer for medical care, including:[275]

- The taxpayer's motive or purpose for making the expenditure;
- A physician's diagnosis of a medical condition and recommendation of the item as treatment or mitigation;
- The relationship between the treatment and the illness;
- The treatment's effectiveness; and
- The proximity in time to the onset or recurrence of a disease.

In addition, payments for medical care include payments made for transportation primarily for and essential to medical care referred to in §213(d)(1)(A),[276] for qualified long-term care services,[277] and for insurance covering medical care and quali-

[270] §213(a).
[271] §213(d)(1)(A); Reg. §1.213-1(e)(1)(i). *See Morrissey*, 871 F.3d 1260 (11th Cir. 2017) (court rejects taxpayer argument that in vitro fertilization of surrogate gestational carrier was for the purpose of affecting a structure or function of homosexual male taxpayer's body).
[272] *Malev v. Commissioner*, No. 1282-16S (T.C. Mar. 1, 2017) (bench opinion) (citing *Tso v. Commissioner*, T.C. Memo 1980-399). *See also Crain v. Commissioner*, T.C. Memo 1986-138 (not limited to traditional medical procedures).
[273] *See* §262; Reg. §1.213-1(e)(1)(ii), §1.213-1(e)(1)(vi).
[274] *Jacobs v. Commissioner*, 62 T.C. 813, 819 (1974).
[275] *Havey v. Commissioner*, 12 T.C. 409, 412 (1949). *See, e.g.*, IRS Info. Letter 2019-0005 (factors to consider in determining §213 deductibility of monthly feminine care product costs include whether products are paid for treating, mitigating, or diagnosing taxpayer's disease; whether costs are merely beneficial to taxpayer's general health such that they might be considered a personal expense; and whether taxpayer would not have incurred that expense but for taxpayer's medical condition).
[276] §213(d)(1)(B); Reg. §1.213-1(e)(1)(i).
[277] §213(d)(1)(C).

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fied long-term care insurance.[278] However, for purposes of determining the amount of the deduction under §213, any payment or distribution out of a health savings account for qualified medical expenses is not treated as an expense paid for medical care.[279]

Note: Executive Order 13877, dated June 24, 2019, prescribes that by December 21, 2019, to the extent consistent with law, Treasury regulations be proposed that would treat expenses related to certain types of arrangements, which might include health care sharing ministries and direct primary care arrangements, as deductible medical care under §213(d).[280] Proposed regulations developed in response to the Order would be effective for tax years ending on or after the date the final rules are published in the Federal Register.

The proposed regulations[281] covering medical care arrangements would provide that payments to direct primary care arrangements qualify as payments for medical care under §213(d).[282] A direct primary care arrangement is a contract between an individual and one or more primary care physicians who perform medical care for a fixed annual or periodic fee without billing a third party.[283] A primary care physician is a physician who has a primary specialty designation of family medicine, internal medicine, geriatric medicine, or pediatric medicine.[284] For this purpose, a "physician" is defined by §1861(r)(1) of the Social Security Act. The proposed rules would be effective for tax years ending on or after the date the final rules are published in the Federal Register.[285] The impact of the proposed regulations on HRAs is discussed in 330 T.M., *Tax and ERISA Implications of Employer-Provided Medical and Disability Benefits.*

The regulations under §213 provide a nonexclusive list of the types of payments that qualify as medical care payments.[286] They include payments for hospital services, nursing services, medical, laboratory, surgical, dental, and other diagnostic and healing services, X-rays, medicine and drugs, artificial teeth or limbs, and ambulance hire.[287] Expenditures that merely improve general health, such as an expenditure for a vacation, are not considered payments for medical care.[288]

Consistent with this analysis, the IRS has ruled that the following tests or procedures qualify as medical care expenses because each is for medical diagnosis:[289]

- ankle brachial index;
- abdominal aortic aneurysm;
- carotid ultrasound scan;
- thyroid ultrasound scan;
- body composition;
- blood and pulse pressure;
- oxygen saturation;
- lung capacity screening test;
- hearing screening;
- vision screening;
- urine analysis;
- osteoporosis screening test (for women only);
- complete blood count with differential (blood study);
- chemistry panel (blood study);
- H. pylori screen (blood study);
- lipid panel (blood study);
- cholesterol screen (blood study);
- c-reactive protein (blood study);
- fibrinogen (blood study);
- homogysteine (blood study);
- thyroid stimulating hormone screen (blood study);
- T uptake, T4, T7 thyroid studies (blood studies);
- CEA test for pancreatic, liver, bladder, and colon cancer (blood study);
- CA-125 test (blood study);
- prostate cancer screen (PSA blood study);
- fasting glucose screen (blood study);
- hepatitis C screen (blood study);
- CT heart calcification scan;
- CT lung scan;
- nutrition panel and iron studies;
- diabetes hemoglobin Alc;
- lupus screen;
- lupus Level II (double stranded DNA);
- hemochromatosis;
- gout screen (uric acid);
- rheumatoid arthritis screen (rheumatoid factor);
- sickle cell disease;
- hormone blood studies package (estrogen (estradiol), follicle stimulating hormone (FSH), testosterone, luteinizing hormone, prolactin); and
- take-home screening kits that aid in the detection of conditions such as colon cancer, hepatitis C, and HIV.

In Rev. Rul. 2007-72, the IRS ruled that the following tests or procedures qualify as medical care even if the taxpayer has no symptoms of illness and even if they are undertaken without the recommendation of a physician:

- annual physical examinations;

278 §213(d)(1)(D).
279 §223(f)(6).
280 Improving Price and Quality Transparency in American Healthcare To Put Patients First, 84 Fed. Reg. 30,849 (June 27, 2019).
281 REG-109755-19, 85 Fed. Reg. 35,398 (June 10, 2020).
282 Prop. Reg. §1.213-1(e)(1)(v)(A).
283 Prop. Reg. §1.213-1(e)(1)(v)(A).
284 Prop. Reg. §1.213-1(e)(1)(v)(A).
285 Prop. Reg. §1.213-1(e)(1)(v)(B).
286 Reg. §1.213-1(e)(1)(ii). *See* III.A.4.k.(2), below.
287 Reg. §1.213-1(e)(1)(ii).
288 Reg. §1.213-1(e)(1)(ii).
289 PLR 200140017.

ISBN 978-1-55871-737-4

- full-body electronic scans; and
- pregnancy test kits.

Expenses incurred for some procedures and services may or may not be deductible, depending on the circumstances. For example, the IRS concluded that amounts paid for private umbilical cord blood banking services may be deductible medical expenses if the expenses are incurred to treat an existing or imminently probable disease, but expenses incurred to bank cord blood merely as a precaution to treat a disease that might possibly develop in the future are not deductible.[290]

The Third Circuit and the Tax Court have held that medical expenses do not include amounts paid by a man for obtaining anonymously donated eggs, in vitro fertilization of those eggs, or implantation of those eggs into unrelated surrogate mothers, nor the amounts paid to those women or for their pregnancy care.[291] In *Morrissey v. United States*, the Third Circuit examined whether such costs "were incurred for the purpose of materially influencing or altering (i.e., "affecting") an action for which the taxpayer's own body is specifically fitted, used, or responsible (i.e., his body's "function")" and concluded that, in the reproductive process, the male body's necessary function is to produce and provide healthy sperm to fertilize the female's egg and that obtaining donated eggs, the in vitro fertilization of the eggs, and the implantation of those eggs do not affect a function of the taxpayer's body in the reproductive process. The lower court in *Magdalin v. Commissioner*, also held that the IVF process did not "affect" the taxpayer's body's own structures and functions, which "remained the same before and after those processes,"[292] and the First Circuit affirmed, stating that the IVF process did not affect any structure or function of the taxpayer's body, but rather "affected the bodies of the gestational carriers … ."[293] However, the IRS has ruled that although the taxpayer could not take a §213 deduction for costs he paid related to the processes for IVF and surrogacy because those expenses were incurred by a third-party surrogate and not the taxpayer, he was permitted a §213 deduction for sperm donation and sperm freezing because those medical expenses were directly attributable to the taxpayer.[294]

b. Medicine, Drugs, and Supplies

(1) Prescription Items

A taxpayer may deduct amounts paid for medicine and drugs only if the medicine or drug is a prescribed drug or is insulin.[295] Under §213, a prescribed drug is a drug or biological that requires a prescription of a physician for its use by an individual.[296] A physician is a person who is a physician under §1861(r) of the Social Security Act.[297] Payments made for "over-the-counter" medications available without a doctor's prescription are not deductible as payments for medical care, even when recommended by a doctor.[298] Payments made for birth control pills that are prescribed by a physician qualify as payments for medical care.[299] Although the IRS originally ruled that payments made by a taxpayer for the drug laetrile qualified as payments for medical care if the drug was prescribed by a physician and was legal where prescribed and used,[300] it has changed its position, reasoning that judicial decisions under the Food, Drug and Cosmetic Act, which prohibits interstate commerce in laetrile, require it to conclude that laetrile cannot be legally procured within the meaning of Reg. §1.213-1(e)(2).[301] Similarly, because the Food and Drug Administration announced that it is illegal for individuals to import drugs from other countries, no deduction is allowable for the cost of drugs imported from Canada.[302] The IRS has also ruled that an amount paid to obtain a controlled substance, such as marijuana, for medical purposes, in violation of federal law, is not a deductible expense even if state law requires a prescription of a physician to obtain and use the controlled substance and the taxpayer obtains a prescription.[303]

(2) Nonprescription Items

The IRS has ruled that amounts paid for nonprescription medical equipment and supplies, such as bandages, crutches, thermometers, and blood sugar test kits, are considered for medical care only if they are "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."[304] The IRS has concluded that amounts paid for breast pumps and supplies that assist lactation are considered for medical care because they are for the purpose of affecting a structure or function of the body of the lactating woman.[305] In contrast, the cost of personal toiletries and hygienic supplies, such as toothpaste and toothbrushes, is not deductible.[306] The cost of cosmetic supplies, such as deodorant or hand cream, used for ordinary cosmetic purposes is also not deductible.[307]

Amounts paid for personal protective equipment (PPE) (for example, masks, hand sanitizer and sanitizing wipes) for

[290] IRS Info. Letter 2010-0017. For the "existing or imminently probable" standard, the IRS cited to *Jacobs v. Commissioner*, 62 T.C. 813 (1974), and *Stringham v. Commissioner*, 12 T.C. 580 (1949), *aff'd per curiam*, 183 F.2d 579 (6th Cir. 1950).

[291] *Morrissey v. United States*, 871 F.3d 1260 (11th Cir. 2017); *Magdalin v. Commissioner*, T.C. Memo 2008-293.

[292] T.C. Memo 2008-293, n.8.

[293] *Magdalin v. Commissioner*, 2009 BL 423700 (1st Cir. 2009).

[294] PLR 202114001.

[295] §213(b).

[296] §213(d)(3).

[297] §213(d)(4). *See* 42 U.S.C. §1395x(r).

[298] *See* §213(b); Rev. Rul. 2003-58.

[299] *See* Rev. Rul. 73-200. *See also* Notice 2024-71, providing that amounts paid for condoms will be treated as amounts paid for medical care under §213(d).

[300] *See* Rev. Rul. 78-325, *obsoleted by* Rev. Rul. 97-9.

[301] Rev. Rul. 97-9, *clarifying* Rev. Rul. 73-603.

[302] *See* IRS Info. Letter 2005-0011 (citing Pub. L. No. 108-173 §1121; FDA Traveler Alert).

[303] Rev. Rul. 97-9, *clarifying* Rev. Rul. 73-603.

[304] Rev. Rul. 2003-58. In PLR 201933005, the IRS determined that a taxpayer could allocate DNA collection kit expenses between ancestry services and health services, the latter of which must be allocated in value between nonmedical and medical items using a reasonable method. *See also* Notice 2024-71, providing tht amounts paid for condoms will be treated as amounts paid for medical care under §213(d).

[305] Announcement 2011-14, reversing the conclusion reached in IRS Info. Letter 2010-0173.

[306] Reg. §1.213-1(e)(2); *Russell v. Commissioner*, 12 T.C.M. 1276, 1277 (1953).

[307] Reg. §1.213-1(e)(2).

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the primary purpose of preventing the spread of COVID-19 are treated as amounts paid for medical care under §213(d).[308]

c. Special Diets

(1) In General

Generally, the cost of a special diet qualifies as a deductible medical expense only if the diet is prescribed by a physician as a supplement to the taxpayer's regular diet to treat a specific illness.[309] For example, the cost of a protein diet prescribed for a taxpayer who needed to consume twice as much protein as the average person is deductible.[310] However, only the portion of the taxpayer's cost which represents the cost of consuming more than the average amount of protein is deductible.[311]

The deduction is allowed only if the taxpayer can prove that the special diet is medically necessary.[312] No deduction is allowed if the special diet is merely a substitute for a regular diet that meets normal nutritional needs.[313] For example, the cost of special foods prescribed for a diabetic is a nondeductible personal expense if it is merely a substitute diet meeting normal nutritional needs and is not prescribed in addition to a regular diet.[314] Also, the IRS has ruled that baby formula is not medically necessary for a baby even if the reason that the baby is fed formula is the mother's inability to breast feed because of a double mastectomy.[315]

The cost of herbs prescribed by a doctor of naturopathy to cure an eye disease is deductible as long as the herb diet is prescribed to alleviate the specific illness and does not merely meet normal nutritional needs.[316]

Nutritional counseling and weight-loss programs are also medical expenses when treating a specific disease that is diagnosed by a physician.[317]

(2) Vitamins

The cost of vitamins consumed by a taxpayer pursuant to the taxpayer's own self-imposed plan is not deductible.[318] However, the cost of vitamins that are prescribed by a doctor as part of a treatment for a specific ailment, such as heart disease and arterial sclerosis, and that are not prescribed merely to meet normal nutritional requirements, is deductible.[319]

(3) Allergy Diets and Organic Foods

The cost of organic foods consumed by a taxpayer pursuant to the taxpayer's own self-imposed plan is not deductible.[320] However, a taxpayer is allowed to deduct the added cost of organic foods if they are medically necessary to alleviate severe allergic reactions to chemically treated or packaged foods.[321] The deduction is allowed only if the taxpayer can prove that there are specific medical problems caused by the taxpayer's food allergies, that the allergies can be cured only by an organic food diet, and that the cost of the diet exceeds the cost of comparable nonorganic food.[322]

(4) Salt-Free Diets

The cost of additional charges imposed by a restaurant to prepare medically necessary salt-free meals is a deductible medical expense.[323] However, the cost of renting a kitchen to prepare salt-free meals is not deductible.[324]

d. Insurance

(1) In General

Payments made by a taxpayer for insurance covering medical care qualify as payments for medical care under §213, as does the cost of a qualified long-term care insurance contract.[325] Premiums paid by a taxpayer for an insurance policy covering reimbursement of prescription drug costs qualify as payments for medical care.[326]

Premiums for the cost of a qualified long-term care insurance contract are deductible only to the extent they do not exceed an annual age-based limitation.[327] The statutory limitations are $200 for individuals who have attained age 40 before the end of the tax year, $375 for those more than 40 but not more than 50, $750 for those more than 50 but not more than 60, $2,000 for those more than 60 but not more than 70, and $2,500 for those more than 70.[328] For tax years beginning after 1997, these dollar limits are indexed for inflation, based on the medical care cost adjustment.[329] The medical care cost adjustment for a calendar year is the percentage by which the medical care component of the Chained Consumer Price Index[330] for August of the preceding calendar year exceeds the medical care component of the Consumer Price Index for August

[308] Announcement 2021-7. *See* Instructions for Schedule A (Form 1040), *Itemized Deductions.*

[309] *Von Kalb v. Commissioner*, 37 T.C.M. 1511, 1513 (1978). *See also* IRS FAQs, *Frequently asked questions about medical expenses related to nutrition, wellness, and general health,* https://www.irs.gov/individuals/frequently-asked-questions-about-medical-expenses-related-to-nutrition-wellness-and-general-health.

[310] 37 T.C.M. at 1513.

[311] 37 T.C.M. at 1514.

[312] *Webb v. Commissioner*, 30 T.C. 1202, 1213–14 (1958); *Flemming v. Commissioner*, 41 T.C.M. 676 (1980); *Kellner v. Commissioner*, 38 T.C.M. 534, 536 (1979); *Ford v. Commissioner*, 38 T.C.M. 507, 509 (1979).

[313] *Clark v. Commissioner*, 29 T.C. 196, 200 (1957), *acq.*, 1958-1 C.B. 4; *Massa v. Commissioner*, 77 T.C.M. 1484 (1999), *aff'd in unpub. op.*, 208 F.3d 226 (10th Cir. 2000); *Collins v. Commissioner*, 24 T.C.M. 1190, 1192 (1965); *Newman v. United States*, 68-1 USTC ¶9411 (W.D. Ark. 1968).

[314] *Harris v. Commissioner*, 46 T.C. 672 (1966).

[315] PLR 200941003.

[316] PLR 8134069. *See also* IRS Info. Letter 2010-0080.

[317] IRS FAQs, *Frequently asked questions about medical expenses related to nutrition, wellness, and general health,* https://www.irs.gov/individuals/frequently-asked-questions-about-medical-expenses-related-to-nutrition-wellness-and-general-health.

[318] *Lingham v. Commissioner*, 36 T.C.M. 649, 654 (1977).

[319] *Neil v. Commissioner*, 44 T.C.M. 1237, 1240–41 (1982).

[320] *Lingham*, 36 T.C.M. at 654.

[321] *Randolph v. Commissioner*, 67 T.C. 481, 485 (1976).

[322] *Becher v. Commissioner*, 53 T.C.M. 683, 684 (1987); *Taylor v. Commissioner*, 43 T.C.M. 727, 730–31 (1982).

[323] *Cohn v. Commissioner*, 38 T.C. 387, 391 (1962).

[324] *Cohn v. United States*, 240 F. Supp. 786, 790 (N.D. Ind. 1965).

[325] §213(d)(1)(D); Reg. §1.213-1(e)(4).

[326] Rev. Rul. 68-433.

[327] §213(d)(1) (flush language), §213(d)(10)(A).

[328] §213(d)(10)(A).

[329] §213(d)(10)(B)(i). The dollar limitations adjusted for inflation for recent years are available in *Tables, Charts & Lists, Income Tax and Accounting,* ***Medical, Dental, Etc., Expenses.***

[330] *See* §1(f)(6).

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of 1996 multiplied by the cost-of-living adjustment determined under §1(f)(3).[331] The IRS must consult with the Department of Health and Human Services to ascertain a more appropriate adjustment that shall apply in lieu of the Consumer Price Index adjustment.[332]

Note: Under §162(l), self-employed individuals are permitted to deduct a specified percentage of insurance premiums paid for insurance which constitutes medical care for the taxpayer, the taxpayer's spouse and the taxpayer's dependents.[333] Definitional and computational limitations apply to the deduction.[334] Any amount taken into account in computing the §162(l) deduction is not deductible under §213.[335] The §162(l) deduction is discussed in 505 T.M., *Trade or Business Expenses and For-Profit Activity Deductions.*

(2) Medical Care Insurance

A contract qualifies as an insurance contract covering medical care whether the benefits are payable in cash or in services.[336] Therefore, premiums paid for hospitalization insurance, for membership in an association furnishing cooperative or so-called free choice medical service, or for group hospitalization and clinical care qualify as expenses paid for medical care.[337]

Amounts paid as premiums under part B of title XVIII of the Social Security Act, relating to supplementary medical insurance for the aged, qualify as payments made for insurance for medical care.[338] Taxes paid to a governmental unit are not deductible as payments for medical care.[339]

Under certain circumstances, premiums paid by a taxpayer before the taxpayer reaches age 65 for medical care coverage for the taxpayer, the taxpayer's spouse, or the taxpayer's dependents after the taxpayer reaches age 65 are treated as deductible medical care payments for the tax year during which the payments are made.[340] The premium payments for the insurance must be payable on a level payment basis under the insurance contract for a period of 10 years or longer or until the year in which the taxpayer reaches age 65.[341] In no case, however, can the premium payments be payable for a period of less than five years.[342] Insurance premiums will be considered payable on a level payment basis if the total premium under the contract is payable in equal annual or more frequent installments.[343] If the taxpayer does not qualify for a deduction by meeting these requirements, the IRS will not issue an advance ruling addressing the current deductibility of payments for medical care extending substantially beyond the close of the tax year.[344]

Note: Proposed regulations would, if finalized provide that payments for health care sharing ministry memberships are §213(d)(1)(D) insurance where members share expenses for medical care as described under §213(d).[345] A health care sharing ministry is an organization: (1) that is described in §501(c)(3) and that is tax-exempt under section §501(a); (2) whose members share a common set of ethical or religious beliefs and share medical expenses according to those beliefs without regard to where members reside or are employed; (3) whose members retain membership even after developing a medical condition; (4) that either has been in existence at all times since December 31, 1999 (directly or via a predecessor), and members have shared medical expenses continuously and without interruption since at least that date; and (5) for which an annual audit is performed by an public accounting firm and made available to the public.[346] Proposed regulations would, if finalized, provide that payments for certain government-sponsored health care programs qualify as payments for §213(d)(1)(D) insurance (i.e., medical insurance), but any taxes imposed by a governmental unit that funds the program would not qualify as payments for medical insurance.[347] The proposed rules would apply to Medicare (including Parts A, B, C, and D), Medicaid programs, Children's Health Insurance Program (CHIP), medical coverage under 10 U.S.C. chapter 55 (including the TRICARE program), and veterans' health care programs under 38 U.S.C. chapter 17 or 18.[348] The proposed rules would be effective for tax years ending on or after the date the final rules are published in the Federal Register.[349]

In determining whether a contract constitutes an "insurance" contract under §213(d)(1)(D), it is irrelevant whether the benefits are payable in cash or in services under the proposed regulations.[350] For example, amounts paid for hospitalization insurance, group hospitalization and clinical care, association furnishing cooperative memberships, or health maintenance organization memberships (HMO) would be deductible medical insurance under the proposed regulations. Medical insurance would be deductible only to the extent that amounts paid were for insurance covering expenses of medical care referred to in Reg. §1.213-1(e)(1) or for any qualified long-term care insurance contract as defined in §7702B(b).[351] Amounts would be considered payable for other than medical insurance under a contract if the contract provides for the waiver of premiums upon the occurrence of an event.[352] For an insurance contract under which amounts are payable for other than medical insurance: (1) no amounts are deductible as medical insurance unless the charge for the insurance is either separately stated in the contract or in a separate statement furnished to the policyholder by the insurer; (2) the amount paid for the medical insurance does not exceed the charge; and (3) no amounts are

331 §213(d)(10)(B)(ii).
332 §213(d)(10)(B)(ii).
333 *See* §162(l).
334 *See* §162(l)(1), §162(l)(2), §162(l)(4). For tax years beginning in 2010 only, this deduction also may be taken into account for purposes of determining the taxpayer's net earnings from self-employment (consequently reducing the taxpayer's self-employment tax). Ordinarily, this deduction is allowed only against the taxpayer's regular income tax liability. §162(l)(4).
335 §162(l)(3).
336 Reg. §1.213-1(e)(4)(ii).
337 Reg. §1.213-1(e)(4)(ii).
338 §213(d)(1)(D); Reg. §1.213-1(e)(4)(i)(a).
339 Reg. §1.213-1(e)(4)(i)(a)(3).
340 §213(d)(7); Reg. §1.213-1(e)(4)(i)(b).
341 §213(d)(7); Reg. §1.213-1(e)(4)(i)(b).
342 §213(d)(7); Reg. §1.213-1(e)(4)(i)(b).
343 Reg. §1.213-1(e)(4)(i)(b).
344 Rev. Rul. 93-43, *amplifying* Rev. Proc. 93-3.
345 Prop. Reg. §1.213-1(e)(4)(i)(A)(2).
346 Prop. Reg. §1.213-1(e)(4)(i)(A)(2).
347 Prop. Reg. §1.213-1(e)(4)(i)(A)(3).
348 Prop. Reg. §1.213-1(e)(4)(i)(A)(3)(i)–§1.213-1(e)(4)(i)(A)(3)(v).
349 Prop. Reg. §1.213-1(e)(4)(i)(A)(4).
350 Prop. Reg. §1.213-1(e)(4)(i)(A)(1).
351 Prop. Reg. §1.213-1(e)(4)(i)(B).
352 Prop. Reg. §1.213-1(e)(4)(i)(B).

ISBN 978-1-55871-737-4

deductible as medical insurance if the amount specified in the contract (or furnished to the policyholder by the insurer in a separate statement) as the charge for the insurance is unreasonably large in relation to the total charges under the contract.[353] The relationship of the coverage under the contract together with all the facts and circumstances would be considered in determining whether a separately stated charge for insurance covering expenses of medical care is unreasonably large in relation to the total premium.

Premiums for indemnity insurance are not deductible medical expenses.[354] The cost to an employer of prepaid medical expense cards are not deductible under §213 because the cards, by not shifting any risk from the employee to the plan, do not constitute insurance.[355]

Note: Deducting the expense as a trade or business expense would prevent the employees from excluding the value of the cards from gross income. Trade or business expense deductions are discussed in 505 T.M., *Trade or Business Expenses and For-Profit Activity Deductions*. Gross income is discussed in 501 T.M., *Gross Income: Overview and Conceptual Aspects*.

(3) Qualified Long-Term Care Insurance Contract

A qualified long-term care insurance contract is any insurance contract that satisfies nine conditions as follows:[356]

- The contract must not provide for insurance protection other than coverage of qualified long-term care services.[357]
- The contract must not provide for the payment or reimbursement of expenses reimbursable under Medicare or that would be reimbursable but for a deductible or co-insurance limitation,[358] other than as a secondary payor[359] and except to the extent the contract coordinates its benefits with Medicare.[360]
- The contract must be guaranteed renewable.[361]
- The contract must not provide a cash surrender value or other money that can be paid, assigned, pledged as collateral for a loan, or borrowed.[362]
- The contract must apply all premium refunds, policyholder dividends, and similar amounts to reductions in future premiums or increases in future benefits.[363]
- The contract must meet §§7A, 7B, 7C, 7D, 7E, 8, 9 (other than 9F), 10, 11, 12, and 23 of the January 1993 version of the long-term care insurance model regulation promulgated by the National Association of Insurance Commissioners.[364]
- The contract must meet §§6C and 6D of the January 1993 version of the long-term care insurance model Act promulgated by the National Association of Insurance Commissioners.[365]
- The contract must disclose that it is intended to be a qualified long-term care insurance contract under §7702B(b).[366]
- If the contract is a level premium contract, it must make available to the policyholder, including any group policyholder,[367] an appropriately captioned[368] nonforfeiture provision that provides for a benefit available in the event of a default in the payment of any premiums,[369] that allows for adjustment of the benefit amount after it is initially granted only as necessary to reflect changes in claims, persistency, and interest as reflected in changes in rates for premium paying contracts approved by the appropriate state regulatory agency for the same contract form,[370] and that provides any one or more of reduced paid-up insurance, extended term insurance, shortened benefit period, or other similar offerings approved by the appropriate state regulatory agency.[371]

A payment does not fail to satisfy any of the nine conditions merely because it is made on a per diem or other periodic basis without regard to the expenses incurred during the period to which the payment relates.[372] The fifth condition does not apply to any refund on the insured's death or on a complete surrender or cancellation of the contract, but the refund is limited to the aggregate premiums paid under the contract.[373]

For purposes of the first condition, qualified long-term care services are necessary diagnostic, preventive, therapeutic, curing, treating, mitigating, and rehabilitative services, and maintenance or personal care services,[374] which are required by a chronically ill individual,[375] and that are provided pursuant to a plan of care prescribed by a licensed health care practitioner.[376] A chronically ill individual is any individual, other than a terminally ill individual, who has been certified by a licensed health care practitioner as meeting any one of three conditions.[377] First, the individual must be unable, due to a loss of functional capacity, to perform at least two activities of daily living (ADL) for a period of at least 90 days without substantial assistance from another individual,[378] taking into account

[353] Prop. Reg. §1.213-1(e)(4)(i)(B).

[354] *Garrison v. Commissioner*, 67 T.C.M. 2896 (1994), *aff'd*, 67 F.3d 299 (6th Cir. 1995).

[355] PLR 9814023.

[356] §7702B(b)(1).

[357] §7702B(b)(1)(A).

[358] §7702B(b)(1)(B).

[359] §7702B(b)(2)(B)(i).

[360] §7702B(b)(2)(B)(ii).

[361] §7702B(b)(1)(C).

[362] §7702B(b)(1)(D).

[363] §7702B(b)(1)(E).

[364] §7702B(b)(1)(F) (reference to §7702B(g)(2)(A)(i), §7702B(g)(2)(B)(i)). *See generally* Reg. §1.7702B-1.

[365] §7702B(b)(1)(F) (reference to §7702B(g)(2)(A)(ii), §7702B(g)(2)(B)(i)). *See generally* Reg. §1.7702B-1.

[366] §7702B(b)(1)(F) (reference to §7702B(g)(3) (reference to §4980C(d))). *See generally* Reg. §1.7702B-1.

[367] §7702B(b)(1)(F) (reference to §7702B(g)(4)(A)). *See generally* Reg. §1.7702B-1.

[368] §7702B(b)(1)(F) (reference to §7702B(g)(4)(B)(i)).

[369] §7702B(b)(1)(F) (reference to §7702B(g)(4)(B)(ii)).

[370] §7702B(g)(4)(B)(ii).

[371] §7702B(b)(1)(F) (reference to §7702B(g)(4)(B)(iii)).

[372] §7702B(b)(2)(A).

[373] §7702B(b)(2)(C).

[374] *See* §7702B(c)(1).

[375] §7702B(c)(1)(A).

[376] §7702B(c)(1)(B).

[377] §7702B(c)(2)(A).

[378] §7702B(c)(2)(A)(i).

ISBN 978-1-55871-737-4

at least five ADLs.[379] Second, the individual must have a level of disability similar to the level of disability described in the first condition, as determined under regulations prescribed by the IRS in consultation with the Secretary of Health and Human Services.[380] Third, the individual must require substantial supervision to be protected from threats to health and safety due to severe cognitive impairment.[381] For these purposes, each of the following is an ADL:[382] eating,[383] toileting,[384] transferring,[385] bathing,[386] dressing,[387] and continence.[388] An individual who otherwise is a chronically ill individual is not a chronically ill individual unless, within the preceding 12-month period, a licensed health care practitioner[389] has certified that such individual meets such requirements.[390]

Note: In Notice 97-31, the IRS labeled the first condition the ADL Trigger and provided two safe harbor definitions. Substantial assistance refers to hands-on assistance, which means physical assistance of a chronically ill person without which the ill person would be unable to perform the activity of daily living. Standby assistance means the presence of another person within arm's reach of the ill person as is necessary to prevent, by physical intervention, injury while the ill person is performing the activity of daily living, such as being ready to catch the ill person if he or she falls while getting in or out of the bathtub or being ready to remove food if the ill person chokes while eating. Notice 97-31 labeled the second condition the Similar Level Trigger but did not provide any guidance with respect to it. Notice 97-31 labeled the third condition the Cognitive Impairment Trigger and provided two safe harbor definitions. Severe cognitive impairment means a loss or deterioration in intellectual capacity that is both comparable to and includes Alzheimer's Disease and similar forms of irreversible dementia, and measured by clinical evidence and standardized tests that reliably measure impairment in the ill person's short-term or long-term memory, orientation to people, places or time, and deductive or abstract reasoning. Substantial supervision means continual supervision by another person that is necessary to protect the severely cognitively impaired person from threats to his or her health or safety, such as may result from wandering. The supervision may include verbal prompting, gestures, or other demonstrations.

(4) Medical Care Coverage Under Combined Policies

If a taxpayer pays premiums on a combined insurance policy under which amounts are payable for other than medical care, such as loss of earnings, then no amount of the premium constitutes a payment for medical care unless the cost of the medical care portion of the insurance contract is either separately stated in the contract or is furnished to the policy holder by the insurance company in a separate statement.[391] For example, a taxpayer cannot deduct the cost of a health and life insurance policy if there is no separate statement of the amount of the premium allocated to medical care coverage.[392] Likewise, an automobile insurance premium applicable to medical insurance covering all persons injured in or by a taxpayer's automobile is not deductible unless the portion of the premium allocable to medical care coverage for the taxpayer, the taxpayer's spouse, and the taxpayer's dependents is separately stated and distinguished from the portion of the premium allocable to medical care coverage for other individuals.[393]

In the case of a combined insurance contract, the amount deductible as a payment for medical care cannot exceed the amount charged for the medical care portion of the contract.[394] In addition, no amount of the premiums paid on such a contract will constitute payments for medical care if the amount charged by the insurance company for the medical care portion of the contract is unreasonably large in relation to the total amount of the premium under the contract.[395] In determining whether the stated charge for medical care coverage is unreasonably large in relation to the total premium, the relationship between the different coverages as well as all the relevant facts and circumstances will be taken into consideration.[396] If the policies do not separately state the portion of the premiums allocable to medical care coverage, the taxpayer has the burden of proving that the insurance company provided a separate statement that identified the medical insurance portion of the premiums.[397]

(5) Medicare and Social Security Payments

Premiums voluntarily paid for medical care coverage under part B of title XVIII of the Social Security Act qualify as payments for medical care.[398] Taxes paid pursuant to the Medicare Act for hospital insurance do not qualify as payments for medical care.[399] However, premiums voluntarily paid for hospital insurance benefits under Medicare, part A, by a taxpayer who is over age 65 and is not otherwise entitled to Social Security, do qualify as payments for medical care.[400]

(6) Private Death and Disability Policies

Premiums paid on a life insurance policy that does not provide medical care coverage are not considered payments for medical care.[401] Premiums paid on an insurance policy that pro-

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379 §7702B(c)(2)(B) (flush language).
380 §7702B(c)(2)(A)(ii).
381 §7702B(c)(2)(A)(iii).
382 *See* Notice 97-31.
383 §7702B(c)(2)(B)(i).
384 §7702B(c)(2)(B)(ii).
385 §7702B(c)(2)(B)(iii).
386 §7702B(c)(2)(B)(iv).
387 §7702B(c)(2)(B)(v).
388 §7702B(c)(2)(B)(vi).
389 *See* §7702B(c)(4).
390 §7702B(c)(2)(A) (flush language).

391 §213(d)(6)(A); Reg. §1.213-1(e)(4)(i)(a); *Porter v. Commissioner*, 38 T.C.M. 485, 490 (1979).
392 *Tratner v. Commissioner*, 33 T.C.M. 21, 23 (1974); *Fausner v. Commissioner*, 30 T.C.M. 1187, 1191 (1971), *aff'd per curiam on other issues*, 472 F.2d 561 (5th Cir. 1973).
393 Rev. Rul. 73-483.
394 §213(d)(6)(B); Reg. §1.213-1(e)(4)(i)(a).
395 §213(d)(6)(C); Reg. §1.213-1(e)(4)(i)(a).
396 Reg. §1.213-1(e)(4)(i)(a).
397 *Kirsch v. Commissioner*, 70 T.C.M. 768 (1995).
398 §213(d)(1)(D).
399 Rev. Rul. 66-216.
400 Rev. Rul. 79-175.
401 *Newi v. Commissioner*, 28 T.C.M. 686, 692 (1969), *aff'd on other issues*, 432 F.2d 998 (2d Cir. 1970).

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vides coverage for loss of income or loss of life, limb, or sight are not deductible as payments for medical care.[402]

(7) State Disability Funds

In Rev. Rul. 75-149[403] and Rev. Rul. 75-48,[404] the IRS ruled that amounts contributed by employees toward a state disability fund or a private substitute plan are not deductible as payments for medical care.[405]

Note: Those rulings were superseded by rulings that permit the deduction of the contributions as taxes.[406] Although the conclusion that the contributions are not deductible as medical expenses was not addressed, because the allowance of a deduction under §164 rendered the question moot, it is likely that the IRS would reach the same result if it were to address the issue.

The deductibility of taxes is discussed in 525 T.M., *State, Local, and Federal Taxes.*

e. Capital Expenditures

(1) In General

Generally, capital expenditures are nondeductible expenses.[407] However, certain medically necessary capital expenditures qualify as deductible medical expenses.[408] The treatment of capital expenditures generally is discussed in detail in 509 T.M., *Principles of Capitalization.*

Note: The IRS will not issue advance rulings or determination letters on the issue of whether a capital expenditure for an item that is ordinarily used for personal, living, or family purposes (e.g., a swimming pool) has as its primary purpose the medical care of the taxpayer or the taxpayer's spouse or dependent, or is related directly to such medical care.[409]

(2) Capital Expenditures Not Related to Permanent Improvement of Property

(a) In General

A capital expenditure, that otherwise qualifies as a payment for medical care and that is related to the needs of the sick person but is not related to the permanent improvement or betterment of property qualifies as a deductible medical expense.[410] Specific examples of such expenditures provided by the regulations include payments made for eye glasses, seeing-eye dogs, artificial limbs and teeth, wheelchairs, crutches, inclinators, and detachable air conditioning units.[411]

(b) Assistance for Seeing and Hearing

The cost of buying, training, and maintaining a seeing-eye dog, or a dog or cat to assist a deaf person is a deductible medical expense.[412] The cost of purchasing and maintaining such animals is a deductible medical expense and not a deductible business expense even if the animal is used to conduct business.[413] However, payments made by an employer to readers who aid blind employees are deductible business expenses and not medical expenses.[414]

The cost of special aids — such as tape recorders, special typewriters, projection lamps, and special lenses — purchased for a child who is suffering from progressive blindness, is a deductible medical expense.[415] The cost of purchasing books and magazines in Braille for a blind child is a deductible medical expense only to the extent that the cost exceeds the cost of similar regularly printed books and magazines.[416] The initial cost and repair costs of special equipment used to enable a deaf person to communicate over a regular telephone are deductible medical expenses.[417] The cost of a television set specially equipped to aid viewing by a deaf person is a deductible medical expense to the extent that its cost exceeds the cost of a regular television set.[418] The cost of installing a computerized visual alert system in a home to aid communication with a deaf person is a deductible medical expense.[419]

(c) Vehicles and Mobility Devices

The cost of purchasing, operating and maintaining a wheelchair or "autoette" for the primary purpose of alleviating sickness or disability is a deductible medical expense.[420] The cost of an automobile specifically equipped to accommodate a wheelchair driver or passenger is deductible to the extent that the cost exceeds the cost of a non-equipped automobile.[421] In addition, the cost of a mechanism purchased to lift a handicapped person into an automobile is deductible.[422] In contrast, the cost of installing power steering in an automobile is not a deductible medical expense.[423]

The purchase of a tractor and snow plow by a taxpayer suffering from back injuries is not deductible if the purchases would have been made regardless of the taxpayer's condition.[424] The cost of purchasing a van and equipping it with a bed, toilet, sink and refrigerator is not a deductible medical expense regardless of whether the van is purchased pursuant to a doctor's suggestion to buy the van to make travel more comfortable for a patient with back and bladder problems.[425]

(d) Equipment Affecting Health Environment

The cost of installing and operating detachable air conditioning units used to alleviate specific medical disorders is a

[402] *Siragusa v. Commissioner*, 39 T.C.M. 1196, 1209–10 (1980), *aff'd by unpub. op.*, 659 F.2d 1062 (2d Cir. 1981); *Barton v. Commissioner*, 38 T.C.M. 933, 935 (1979); *Weber v. Commissioner*, 37 T.C.M. 493, 495 (1978).

[403] *Superseded by*, Rev. Rul. 81-194.

[404] *Superseded by*, Rev. Rul. 81-193.

[405] Rev. Rul. 75-149; Rev. Rul. 75-48.

[406] Rev. Rul. 81-194; Rev. Rul. 81-193. *See* §164.

[407] §263.

[408] Reg. §1.213-1(e)(1)(iii).

[409] Rev. Proc. 2026-3, §3.01(48).

[410] Reg. §1.213-1(e)(1)(iii).

[411] Reg. §1.213-1(e)(1)(iii).

[412] Rev. Rul. 75-316; Rev. Rul. 68-295; PLR 8033038.

[413] Rev. Rul. 75-316.

[414] Rev. Rul. 75-316.

[415] Rev. Rul. 58-223.

[416] Rev. Rul. 75-318.

[417] Rev. Rul. 71-48, *amplified by* Rev. Rul. 73-53.

[418] Rev. Rul. 80-340.

[419] PLR 8250040.

[420] Rev. Rul. 67-76.

[421] Rev. Rul. 70-606; Rev. Rul. 66-80.

[422] Rev. Rul. 66-80.

[423] *Phares v. Commissioner*, 21 T.C.M. 1446, 1447 (1962).

[424] *Taylor v. Commissioner*, 54 T.C.M. 129, 132 (1987) (lawn care costs); *Lepson v. Commissioner*, 44 T.C.M. 19, 20 (1982).

[425] *Robb v. Commissioner*, 45 T.C.M. 218, 219 (1982).

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deductible medical expense.[426] The cost of air conditioners installed for the promotion of general health and comfort is not deductible.[427]

The installation and maintenance cost of a device, prescribed by a dentist, that adds fluoride into a home's water supply is a deductible medical expense.[428] However, the cost of purchasing distilled water to avoid drinking fluorinated water is not a deductible medical expense.[429]

The cost of providing "milieu therapy" that includes purchases of new clothing, furniture and appliances to treat a neurotic disorder is not deductible as a medical expense.[430]

(e) Medical Equipment

The cost of oxygen equipment and oxygen needed to aid a heart ailment is a deductible medical expense.[431] The cost of operating an iron lung as well as payments for equipment and nursing care made necessary by an attack of polio are deductible medical expenses.[432]

(f) Other Equipment Used for Medical Purposes

The purchase of a special reclining chair upon advice of a physician to alleviate or mitigate a physical infirmity is a deductible medical expense.[433] However, the cost of purchasing home exercise equipment not specifically recommended by a physician is not deductible.[434]

The cost of purchasing a wig, upon advice of a physician, is deductible if essential to mental health.[435] In contrast, the cost incurred to purchase maternity clothing is not deductible.[436] The cost of purchasing disposable diapers for a brain-damaged four-year-old child is a deductible medical expense if the diapers are necessary to alleviate the effects of a disease and are not purchased merely to promote general health.[437] However, the cost of purchasing pajamas to wear during therapeutic medical treatment is not a deductible medical expense because the use of the pajamas is not limited to medical care.[438]

The cost of installing a telephone in a personal residence to communicate with a physician is not a deductible medical expense.[439] However, the cost of long distance telephone calls to a physician may be deductible if the calls are primarily related to medical care and the distance between the home of the taxpayer and the physician's office makes travel difficult.[440] Likewise, the cost of a mobile telephone purchased by a wheelchair patient is not a deductible medical expense if the telephone number is listed in a public directory and the phone is used for personal calls.[441]

(g) Other Activities

Payments made to purchase a clarinet and clarinet lessons, upon advice of an orthodontist, to alleviate a congenital defect causing the malocclusion of teeth are deductible medical expenses.[442]

The cost of joining a public swimming pool as well as the costs of transporting a sick person to and from the pool are deductible medical expenses if swimming is prescribed by a doctor to mitigate or alleviate a disease such as rheumatoid arthritis.[443]

(h) Miscellaneous Items

Apartment rental payments made as an alternative to more expensive hospitalization costs and not for the purpose of convalescence are deductible medical expenses.[444] The costs of providing laundry, bath and skin oils, and portions of payments for utilities and rent concerning a doctor-recommended tub soaking treatment are not deductible medical expenses because they lack the proximate relationship to the claimed illness or treatment.[445]

(3) Capital Expenditures Related to Permanent Improvement of Property

(a) In General

A capital expenditure related to the permanent improvement or betterment of property may qualify as a deductible medical expense if it is directly related to medical care.[446] Such a capital expenditure is deductible to the extent that it exceeds any increase in the value of the property.[447] The cost of making repairs to a home, and rent paid for an apartment while those repairs were in progress, does not qualify as a medical expense if they are not proven to be reasonably and medically related to a medical condition but instead are undertaken to convert the home into an interior decorator's showroom.[448]

(b) Home Elevators

In *Hollander v. Commissioner*,[449] the Third Circuit held that the cost of installing an elevator to transport an individual who suffers from heart disease up and down the stairs in the individual's home qualifies as a medical care expense.[450] The

[426] Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *modified by* Rev. Rul. 58-280, *amplified by* Rev. Rul. 67-76.

[427] Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *modified by* Rev. Rul. 58-280, *amplified by* Rev. Rul. 67-76.

[428] Rev. Rul. 64-267.

[429] Rev. Rul. 56-19.

[430] *Rabb v. Commissioner*, 31 T.C.M. 476, 479 (1972).

[431] Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *modified by* Rev. Rul. 58-280, *amplified by* Rev. Rul. 67-76.

[432] *Id.*

[433] Rev. Rul. 58-155.

[434] *Disney v. United States*, 267 F. Supp. 1, 4 (C.D. Cal. 1967), *aff'd on other issues*, 413 F.2d 783 (9th Cir. 1969).

[435] Rev. Rul. 62-189.

[436] Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *modified by* Rev. Rul. 58-280, *amplified by* Rev. Rul. 67-76.

[437] PLR 8137085.

[438] *Montgomery v. Commissioner*, 51 T.C. 410, 415 (1970), *aff'd*, 428 F.2d 243 (6th Cir. 1970).

[439] *Phares v. Commissioner*, 21 T.C.M. 1446, 1447 (1962).

[440] PLR 8034087.

[441] *Womack v. Commissioner*, 34 T.C.M. 1009 (1975).

[442] Rev. Rul. 62-210.

[443] PLR 8326095.

[444] *Ungar v. Commissioner*, 22 T.C.M. 766, 769 (1963).

[445] *Jefferson v. United States*, 74-1 USTC ¶9205 (N.D. Ga. 1973).

[446] Reg. §1.213-1(e)(1)(iii); *Haines v. Commissioner*, 71 T.C. 644, 647 (1979); *Lipson v. Commissioner*, 50 T.C.M. 692, 694 (1985); *Beyers v. Commissioner*, 39 T.C.M. 29, 30 (1979); *Ross v. Commissioner*, 31 T.C.M. 488, 493 (1972).

[447] Reg. §1.213-1(e)(1)(iii).

[448] *Mitic v. Commissioner*, 79 T.C.M. 1947 (2000).

[449] 219 F.2d 934, 937 (3d Cir. 1955), *rev'g* 22 T.C. 646 (1954).

[450] 219 F.2d 934, 937 (3d Cir. 1955), *rev'g* 22 T.C. 646 (1954).

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cost of the installation is a deductible expense to the extent that it exceeds the increase, if any, in the value of the individual's home.[451] If there is no increase in the value of the home due to the installation of the elevator, the entire cost of its installation is a deductible medical expense.[452]

The *Hollander* court distinguished the facts of that case from those of *Estate of Hayne v. Commissioner*,[453] in which the Tax Court held that an expenditure for the installation of an elevator used to prevent the confinement of a paralyzed patient in one room was a nondeductible expense.[454] According to the *Hollander* court, the elevator in *Hayne* was installed merely for the convenience of the patient, in contrast to an elevator installed to mitigate an illness or prevent further medical damage to a patient.[455] In *Riach v. Frank*,[456] the Ninth Circuit held that the cost of installing an elevator to transport an individual suffering from heart disease is deductible even if the elevator is not necessary for the individual to perform an "essential living function."[457]

The cost of installing a home elevator may be deductible even if the elevator is not specifically prescribed by a physician.[458] The cost of installing a home elevator is not deductible, however, if it is installed merely to improve a patient's general health.[459]

(c) Swimming Pools and Hot Tubs

Under certain circumstances, a capital expenditure for the installation of a swimming pool may be deductible as a medical expense.[460] The installation of the pool must be directly related to medical care, as is a pool installed to provide hydro-therapeutic treatment for a victim of paralysis[461] or a person suffering from osteoarthritis.[462] The cost of installing a swimming pool is not a deductible medical expense if the pool is installed merely to improve a patient's general health.[463] In addition, any portion of the cost of installing a pool that is attributable to architectural and aesthetic compatibility is not a deductible medical expense.[464]

The amount of the deduction for the cost of installing a pool is limited to the amount by which the expenditure exceeds the increase in the value of the property.[465] Generally, if a taxpayer purchases a home with a pool due to medical necessity, the taxpayer is not allowed to deduct the portion of the purchase price allocable to the value of the pool because the purchase price paid represents the fair market value of the house with the pool and there is, therefore, no cost incurred in excess of the increase in the value of the property.[466]

In *Huff v. Commissioner*,[467] the Tax Court denied a medical expense deduction for the expenses of operating a hot tub on the grounds that the taxpayer did not demonstrate that the tub was medically necessary. Presumably, the same tests should apply to hot tub expenditures as are applied to swimming pool costs.

(d) Heating, Plumbing, and Central Air-Conditioning

The cost of installing a lavatory and washer is not deductible because those items do not mitigate, prevent, or treat illness.[468] The same conclusion must be reached with respect to the cost of installing a furnace.[469]

The cost of installing a central air conditioning unit or replacing a central air conditioner compressor is a deductible medical expense if the air conditioner is a medical necessity.[470] The cost of installing the unit or compressor is deductible only to the extent that it exceeds any increase in the value of the house.[471] For example, in *Gerard v. Commissioner*,[472] the Tax Court allowed a deduction for the cost of installing a central air conditioning unit to provide treatment for the taxpayer's daughter, who suffered with cystic fibrosis, to the extent that the cost of the unit exceeded the increase in the value of the home.[473]

(e) Attached Garage

In *Pols v. Commissioner*,[474] the Tax Court allowed a deduction for the cost of an attached garage, the primary purpose of which was to mitigate the taxpayer's disability from a bone fracture, to the extent that the cost of the garage exceeded the increase in the value of the home.[475]

(f) Lead Removal

The cost of removing lead-based paint, pursuant to a doctor's recommendation, from surfaces in a home that are in poor repair or that are readily accessible to a taxpayer's child who suffers from lead poisoning, is a deductible medical expense.[476] In addition, the cost of covering lead-based paint with plaster, wallboard, or paneling is also deductible to the extent that the cost exceeds the increase in the value of the home.[477] Any portion of the cost attributable to covering new wall surfaces or removing lead-based paint from surfaces in good repair or that

[451] Reg. §1.213-1(e)(1)(iii); *Berry v. Wiseman*, 174 F. Supp. 748 (W.D. Okla. 1958); *Post v. United States*, 150 F. Supp. 299 (N.D. Ala. 1956); *Alexander v. United States*, 57-1 USTC ¶9335 (W.D. Tenn. 1956).

[452] Reg. §1.213-1(e)(1)(iii).

[453] 22 T.C. 113 (1954).

[454] *Id.* at 123.

[455] 219 F.2d 934, 936 (3d Cir. 1955), *rev'g* 22 T.C. 646 (1954).

[456] 302 F.2d 374 (9th Cir. 1962), *rev'g* 61-1 USTC ¶9423 (W.D. Wash. 1961).

[457] 302 F.2d at 378.

[458] *Snellings v. United States*, 149 F. Supp. 825, 826 (E.D. Va. 1956).

[459] Rev. Rul. 54-57, *modified by* Rev. Rul. 83-33.

[460] *Mason v. United States*, 57-2 USTC ¶10,012 (D. Haw. 1957).

[461] *Mason v. United States*, 57-2 USTC ¶10,012 (D. Haw. 1957).

[462] Rev. Rul. 83-33. *See also* PLR 8208128.

[463] *Evanoff v. Commissioner*, 44 T.C.M. 1394, 1396 (1982); Rev. Rul. 54-57, *modified by* Rev. Rul. 83-33 (1983).

[464] *Ferris v. Commissioner*, 582 F.2d 1112, 1117–18 (7th Cir. 1978), *rev'g* 36 T.C.M. 765 (1977).

[465] *Polacsek v. Commissioner*, 42 T.C.M. 1289, 1292 (1981).

[466] *Robbins v. Commissioner*, 44 T.C.M. 1254, 1260 (1982); *Lerew v. Commissioner*, 44 T.C.M. 918, 919–20 (1982).

[467] T.C. Memo 1995-200.

[468] *Culmo v. Commissioner*, 62 T.C.M. 678 (1991). *See Culmo v. Commissioner*, 65 T.C.M. 1719 (1993).

[469] *Id.*

[470] *Blackburn v. Commissioner*, 44 T.C.M. 1124, 1126 (1982); PLR 8019050.

[471] *Hagerty v. Commissioner*, 34 T.C.M. 356, 360 (1975).

[472] 37 T.C. 826 (1962).

[473] 37 T.C. at 829–30.

[474] T.C. Memo 1965-222.

[475] T.C. Memo 1965-222.

[476] Rev. Rul. 79-66.

[477] Rev. Rul. 79-66.

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are not accessible to such a child is not deductible as a medical expense.[478]

(g) Accommodations to Principal Residence of Disabled Person

The cost of accommodating a personal residence to meet the needs of a physically disabled person is a deductible medical expense.[479] Such accommodations include the acquisition and installation of special plumbing fixtures.[480] In Rev. Rul. 87-106, the IRS provided a nonexclusive list of deductible costs related to accommodating a personal residence for a disabled taxpayer, spouse, or dependent, including the construction of entrance ramps and the widening of doorways to allow the use of wheelchairs.[481] The capital expenditures enumerated in the revenue ruling are deductible in full and are treated as not increasing the value of the home.[482] In *Zipkin v. United States*,[483] the court held that the cost of building a home designed in ways that accommodated occupancy by a taxpayer with multiple chemical sensitivity syndrome was deductible as a medical expense in the year the house became habitable.

(h) Fallout Shelters

In *Daniels v. Commissioner*,[484] the Tax Court denied a deduction for the cost of constructing a fallout shelter.[485] According to the court, the purpose of the shelter is preventative and the danger of radiation is remote.[486]

(i) Home Office

The cost of constructing or maintaining a home office at the principal residence of a college professor who is severely allergic to smoke but is afforded office space on campus is not a deductible medical expense.[487]

(4) Operation and Maintenance of Capital Assets

The cost of operating or maintaining a capital improvement is deductible as a medical expense if the operation or maintenance is directly related to medical care.[488] Generally, if a capital expenditure qualifies as a deductible medical expense, the cost of operating or maintaining the capital asset will also qualify unless the medical necessity no longer exists.[489] The entire cost of operation or maintenance of a capital asset related to medical care is deductible even if none or only a portion of the original capital expenditure qualified as deductible.[490] The cost of a capital improvement that qualifies as a medical expense may not be depreciated in lieu of the deduction allowable in the year the expense is paid or incurred.[491]

[478] Rev. Rul. 79-66.
[479] Rev. Rul. 70-395.
[480] Rev. Rul. 70-395.
[481] Rev. Rul. 87-106.
[482] Rev. Rul. 87-106.
[483] 2000-2 USTC ¶50,863 (D. Minn. 2000).
[484] 41 T.C. 324 (1963).
[485] 41 T.C. at 327.
[486] 41 T.C. at 329.
[487] *Lipp v. Commissioner*, 42 T.C.M. 279, 281 (1981).
[488] Reg. §1.213-1(e)(1)(iii). *See Cherry v. Commissioner*, 46 T.C.M. 1031, 1033, 1037 (1983).
[489] Reg. §1.213-1(e)(1)(iii).
[490] Reg. §1.213-1(e)(1)(iii).

f. Funeral and Burial Expenses

The cost of funeral and burial expenses, including gravestones, is not a deductible medical expense.[492]

g. Child Care Expenses

(1) Day Care Centers

The cost of sending a child to a day care center so that the parents of the child can work is not a deductible medical expense.[493]

Note: The cost may qualify for the dependent care credit, discussed in III.D., below.[494]

(2) Baby Nurses

The cost of hiring a practical nurse to help care for a normal, healthy infant who needs no specialized medical care is not a deductible medical expense.[495] The cost of a baby nurse for a healthy infant is not deductible even if the mother of the baby dies in childbirth.[496]

(3) Babysitting Needed to Aid Sick Person

The cost of child care necessary to enable a parent to visit a physician for medical diagnosis or treatment or to recover from an illness is not a deductible medical expense.[497] The cost of hiring domestic help to care for children in order for a parent to rest pursuant to a doctor's orders is not a deductible medical expense.[498] A portion of the cost may be deductible, however, if the hired help renders nursing services directly to the patient.[499]

h. Cosmetic Surgery

The cost of purely cosmetic surgery or a similar procedure that is not medically necessary is not a deductible medical expense.[500] If the cost of cosmetic surgery does not qualify as a deductible medical expense, then amounts paid for insurance covering such surgery are also not deductible under §213.[501]

Cosmetic surgery is any procedure that is directed at improving the patient's appearance but does not meaningfully promote the proper function of the body or prevent or treat illness or disease.[502] The IRS ruled that a teeth-whitening procedure performed by a dentist is nondeductible because it does not affect the function of the teeth.[503] The Tax Court has held

[491] *Henderson v. Commissioner*, 80 T.C.M. 517 (2000).
[492] *Carr v. Commissioner*, 39 T.C.M. 253, 257 (1979); *Libby v. Commissioner*, 14 T.C.M. 699, 700 (1955).
[493] *Kennedy v. Commissioner*, 33 T.C.M. 577, 579 (1974); *Kennedy v. Commissioner*, 32 T.C.M. 52, 56–57 (1973); *Demor v. Commissioner*, 27 T.C.M. 1496, 1505 (1968).
[494] §21.
[495] *Kohen v. Commissioner*, 44 T.C.M. 1518, 1519 (1982); *Estate of Grobart v. Commissioner*, 20 T.C.M. 629, 641 (1961).
[496] *Wendell v. Commissioner*, 12 T.C. 161, 162–63 (1949).
[497] *Ochs v. Commissioner*, 17 T.C. 130, 135 (1951), *aff'd*, 195 F.2d 692 (2d Cir. 1952); Rev. Rul. 78-266.
[498] *McVicker v. United States*, 194 F. Supp. 607, 608 (S.D. Cal. 1961); Rev. Rul. 58-339.
[499] Rev. Rul. 58-339.
[500] §213(d)(9)(A).
[501] H.R. Rep. No. 101-964, at 1033.
[502] §213(d)(9)(B).
[503] Rev. Rul. 2003-57.

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that gender identity disorder is a disease and hormone therapy and sex reassignment surgery costs are deductible medical care expenses, but breast augmentation surgery that did not treat gender identity disorder was cosmetic surgery.[504] The IRS has acquiesced in the Tax Court's holding, reversing CCA 200503025, which had advised that the cost of gender reassignment surgery is nondeductible cosmetic surgery in the absence of unequivocal expression of Congressional intent to the contrary.[505]

Cosmetic surgery is considered medically necessary and, therefore, qualifies as medical care, only if the surgery or procedure is necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or a disfiguring disease.[506] Thus, for example, the cost of breast reconstruction surgery following a mastectomy due to cancer, and the cost of laser eye surgery to correct vision, are deductible medical expenses.[507] The IRS has ruled that the cost of cosmetic treatments to correct a facial deformity caused by previous surgery to ameliorate congenital abnormalities are deductible medical expenses.[508]

Note: In addition, the amount of any reimbursement for the cost of the nondeductible surgery is included in gross income.[509]

i. Transportation

(1) In General

Under §213, the term "medical care" includes amounts paid for transportation primarily for and essential to the diagnosis, cure, mitigation, or prevention of disease, or for the purpose of affecting any structure or function of the body.[510]

Observation: Transportation for qualified long-term care services is not included in this list.

Transportation expenses incurred traveling to and from local doctors' offices, hospitals, and clinics are deductible medical expenses.[511] These expenses include use of an automobile, cab fares, bus or train fares, and similar expenses.[512]

The cost incurred by a vacationing taxpayer to return, by airplane, from Europe to the United States because of a medical emergency is deductible to the extent that the airplane fare exceeds the cost of return by ship.[513] The expenses of transporting a patient in a wheelchair to and from school for psychotherapeutic reasons, upon the advice of a physician, are deductible.[514]

Travel costs to and from Alcoholics Anonymous meetings are deductible if attendance at the meetings is recommended for treatment of the excessive use of alcohol.[515] Expenses incurred by a taxpayer transporting a child to and from a swimming pool, upon advice of a physician, to treat rheumatoid arthritis, are deductible.[516]

(2) Automobile Expenses

(a) Auto Standard Rate

Instead of calculating the amount spent on automobile expenses, such as fuel and oil, a taxpayer may calculate medical transportation expenses by using the standard mileage rate, discussed in detail in 519 T.M., *Travel, Transportation, Entertainment, Meal, and Gift Expenses.*

(b) Depreciation

The amount of depreciation on an automobile used for medical purposes is not a deductible medical expense.[517] Depreciation represents a decrease in the value of the automobile and not an expense.[518]

(3) Distant Travel

In *Commissioner v. Bilder*,[519] the Supreme Court held that the cost of transporting an individual suffering from heart disease to Florida, to live in a warmer climate, is a deductible medical expense if the trip is a medically necessary one prescribed by a physician.[520] However, if a doctor recommends moving to a warmer climate and the taxpayer moves back and forth between the north and the south according to climate and the time of year, the expenses are not deductible.[521] The cost of moving to a warmer climate is not deductible unless the move is primarily related to medical care and is not merely to improve general health.[522] The cost of traveling is not deductible if the primary purpose is personal pleasure.[523] Costs incurred by a mental patient trying to locate a more congenial place to live upon the advice of a physician are not deductible medical expenses.[524] The IRS has ruled that the transportation costs of an ocean cruise recommended by a physician are not deductible medical expenses because those costs are not primarily for or essential to medical treatment.[525]

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[504] *O'Donnabhain v. Commissioner*, 134 T.C. 34 (2010), *acq.* 2011-47 I.R.B.

[505] *See* AOD 2011-03.

[506] §213(d)(9)(A).

[507] Rev. Rul. 2003-57.

[508] PLR 200344010.

[509] PLR 200344010.

[510] §213(d)(1)(B). *See* Reg. §1.213-1(e)(1)(iv).

[511] *Blackburn v. Commissioner*, 44 T.C.M. 1124, 1127 (1982); Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *modified by* Rev. Rul. 58-280, *amplified by* Rev. Rul. 67-76.

[512] Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *amplified by* Rev. Rul. 58-280, *amplified by* Rev. Rul. 67-76.

[513] *Meister v. Commissioner*, 18 T.C.M. 899, 902 (1959).

[514] Rev. Rul. 65-255.

[515] Rev. Rul. 63-273.

[516] PLR 8326095.

[517] *Weary v. United States*, 510 F.2d 435, 437 (10th Cir. 1975); *Elwood v. Commissioner*, 72 T.C. 264, 266 (1979); *Gordon v. Commissioner*, 37 T.C. 986, 987 (1962); *Pfersching v. Commissioner*, 46 T.C.M. 424, 425 (1983); *Calafut v. Commissioner*, 23 T.C.M. 1431, 1433 (1964).

[518] *Gordon*, 37 T.C. at 987; *Pfersching*, 46 T.C.M. at 425.

[519] 369 U.S. 499 (1962).

[520] *Id.* at 502. *See Cohn v. Commissioner*, 38 T.C. 387, 390 (1962); *Stringham v. Commissioner*, 12 T.C. 580, 585–86 (1949); *Cohn v. United States*, 240 F. Supp. 786 (N.D. Ind. 1965); *Watkins v. Commissioner*, 13 T.C.M. 320, 324 (1954); Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *modified by* Rev. Rul. 58-280, *amplified by* Rev. Rul. 67-76.

[521] *Rodgers v. Commissioner*, 241 F.2d 552, 555 (8th Cir. 1957), *aff'g* 25 T.C. 254 (1955).

[522] *Hoffman v. Commissioner*, 17 T.C. 1380, 1385–86 (1952); *Dobkin v. Commissioner*, 15 T.C. 886, 888 (1950); *Havey v. Commissioner*, 12 T.C. 409, 412–13 (1949); *Armour v. Commissioner*, 28 T.C.M. 1268, 1271 (1969); Rev. Rul. 56-474. *See Mizl v. Commissioner*, 40 T.C.M. 552, 554–55 (1980).

[523] *Kellner v. Commissioner*, 38 T.C.M. 534, 536 (1979); *Horvat v. Commissioner*, 37 T.C.M. 679, 683 (1978).

[524] *Erickson v. Commissioner*, 13 T.C.M. 1045, 1046 (1954).

[525] Rev. Rul. 76-79.

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The cost of traveling round-trip from California to New York for annual medical exams by a physician who was the taxpayer's trusted physician before the taxpayer's move is a deductible medical expense.[526] The cost of airfare to another state to receive chemotherapy treatment unavailable in the taxpayer's local area is deductible,[527] as are the expenses of travel to another city for hospital and orthopedic treatment[528] and the costs of transporting disabled children to a special school.[529] The cost of transporting a kidney donor and a prospective donor, by airplane to and from a hospital, is a deductible medical expense.[530] The expenses of admission and transportation to a medical conference addressing a chronic disease of the taxpayer's dependent are deductible but the cost of meals and lodging are not.[531]

The cost of a trip to a religious shrine for the purpose of seeking spiritual aid after a cancer operation and not for the purpose of obtaining medical care is not deductible.[532] The cost of traveling to Samoa to obtain treatment through the use of massage and herbs and prayer is not deductible if the treatment is not related to the medical problem and is not recommended by a physician.[533] Scientology auditing and processing costs are not deductible medical expenses[534] and, therefore, related travel costs are also not deductible.[535]

The cost of traveling to and from a health spa for the purpose of weight loss is not a deductible medical expense.[536] However, the IRS has suggested that health club membership fees incurred primarily for the purpose of preventing or alleviating obesity may in some cases be deductible as a medical expense.[537] The cost of traveling to a golf course is not a deductible medical expense even if playing golf is recommended by a physician.[538] The cost of traveling to a resort and participating in a reconditioning program is a nondeductible personal expense.[539] If, however, the expense is paid by the taxpayer's employer, the employer may be able to deduct the amount paid as additional compensation.[540]

(4) Lodging

Amounts paid for certain lodging away from home are treated as payments for medical care.[541] To qualify as payments for medical care, the payments must be for lodging while away from home primarily to receive medical care from a physician in a licensed hospital or in a medical care facility which is related to, or is the equivalent of, a licensed hospital.[542] In order for such expenditure to be deductible, there can be no significant element of personal pleasure, recreation, or vacation in the travel.[543] In addition, the lodging cannot be lavish or extravagant under the circumstances and in no case can the deductible amount exceed $50 per night, per individual.[544] If the medical treatment requires a certain number of days, lodging for the same number of nights qualifies as a medical expense but lodging for additional nights does not.[545]

Under §213(d)(2), lodging expenses are deductible if they are primarily for and essential to medical care, but they are not deductible if the purpose of the lodging is to alleviate a medical problem by exposure to a warmer climate.[546] For example, in the *Bilder* case, discussed above, the cost of transporting the patient to Florida was held to be deductible, but the cost of renting an apartment in which to live in Florida was held to be nondeductible.[547] Similarly, although expenses for admission and transportation to a medical conference addressing a chronic disease of the taxpayer's dependent are deductible medical expenses, the cost of the meals and lodging are not.[548]

The costs of renting an apartment and operating an automobile incurred by a mental patient who is no longer treated on an inpatient basis are nondeductible expenses if the apartment is not specially equipped to provide medical care and the car is used for personal purposes.[549] The cost of operating an automobile but not the cost of purchasing the automobile is a deductible expense if operation of the automobile is specifically prescribed by a physician.[550]

(5) Companions

If the transportation and lodging costs incurred by an ill person for medical care purposes qualify as deductible medical expenses, then similar costs incurred by a companion whose presence is medically necessary are also deductible.[551] If the companion's presence is not medically necessary, the companion's costs are not deductible.[552] For example, if it is medically necessary for one member of a family to move to a warmer climate, the cost of transporting that family member to the new location is deductible, but the costs of transporting other members of the family are not deductible medical expenses.[553] The cost of transporting personal belongings and releasing a tenan-

[526] *Winderman v. Commissioner*, 32 T.C. 1197, 1199 (1959); *Armes v. Commissioner*, 37 T.C.M. 1114, 1117 (1978).
[527] PLR 8335036.
[528] *Schafler v. Commissioner*, 75 T.C.M. 1897 (1998).
[529] *Estate of Baer v. Commissioner*, 26 T.C.M. 170, 173 (1967); *Olson v. Commissioner*, 23 T.C.M. 2008, 2010 (1964).
[530] Rev. Rul. 73-189.
[531] Rev. Rul. 2000-24.
[532] *Ring v. Commissioner*, 23 T.C. 950, 954 (1955).
[533] *Tautolo v. Commissioner*, 34 T.C.M. 1198, 1200 (1975).
[534] *Brown v. Commissioner*, 62 T.C. 551, 556 (1974), *aff'd per curiam*, 523 F.2d 365 (8th Cir. 1975); Rev. Rul. 78-190.
[535] *Brown v. Commissioner*, 62 T.C. at 556.
[536] *Murray v. Commissioner*, 43 T.C.M. 1377, 1380–81 (1982).
[537] IRS Info. Letter 2002-0077.
[538] *Altman v. Commissioner*, 53 T.C. 487, 490 (1969).
[539] Rev. Rul. 57-130.
[540] Rev. Rul. 57-130.
[541] §213(d)(2).
[542] §213(d)(2)(A); *Urbauer v. Commissioner*, 63 T.C.M. 2492 (1992).
[543] §213(d)(2)(B).
[544] §213(d)(2).
[545] *Schafler v. Commissioner*, 75 T.C.M. 1897 (1998).
[546] *Polyak v. Commissioner*, 94 T.C. 337, 345 (1990).
[547] *Commissioner v. Bilder*, 369 U.S. 499, 500 (1962), *rev'g* 289 F.2d 291 (3d Cir. 1961).
[548] Rev. Rul. 2000-24.
[549] *Levine v. Commissioner*, 695 F.2d 57, 59–61 (2d Cir. 1982), *aff'g* 42 T.C.M. 763 (1981), *cert. denied*, 462 U.S. 1132 (1983); *Volwiler v. Commissioner*, 57 T.C. 367, 370–71 (1971).
[550] *Bordas v. Commissioner*, 29 T.C.M. 458, 459 (1970).
[551] *Cohn v. Commissioner*, 38 T.C. 387, 390 (1962); *Rodgers v. Commissioner*, 25 T.C. 254, 262 (1955), *aff'd*, 241 F.2d 552 (8th Cir. 1957); *Embry's Estate v. Gray*, 143 F. Supp. 603, 605 (W.D. Ky. 1956); PLR 8321042.
[552] *Mizl v. Commissioner*, 40 T.C.M. 552, 554 (1980).
[553] *Commissioner v. Bilder*, 369 U.S. 499, 504 (1962), *rev'g* 289 F.2d 291 (3d Cir. 1961); *Phares v. Commissioner*, 21 T.C.M. 1446, 1447 (1962); *Prem v. Commissioner*, 21 T.C.M. 873, 874 (1962).

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cy on a former home are also not deductible medical expenses.[554]

The costs incurred by parents visiting a mentally ill child in a situation where visits are part of the medical treatment for the child are deductible medical expenses.[555] However, the cost of visiting a sick child in situations where the visit is not medically necessary and the parent serves no medical function is not a deductible medical expense.[556]

In Rev. Rul. 75-317, the IRS provided examples of situations in which costs, including travel expenses, meals and lodging, incurred by handicapped persons to employ related and unrelated individuals to aid them on business trips qualify as deductible medical expenses.[557]

(6) Commuting Expenses

The IRS takes the position that commuting expenses incurred by handicapped persons traveling to and from work are not deductible medical expenses.[558] The cost of purchasing or operating a special automobile or "autoette" equipped to accommodate a handicapped person is deductible only if the automobile or "autoette" is used primarily for medical care and not for commuting to and from work.[559]

If, upon the advice of a physician, a taxpayer obtains employment that is for the purpose of occupational therapy, expenses incurred traveling to and from work may be deductible as a medical expense.[560] If the particular employment is not prescribed as therapy, the commuting expenses are not deductible.[561]

(7) Pre-Employment Expenses

Costs incurred while a taxpayer seeks new employment in an area to which his family must move for the benefit of a family member's health are not deductible medical expenses.[562] The expenses do not fit within the definition of payments made for medical care.[563]

(8) Loss on Sale of Home

The amount of any loss on the sale of a home precipitated by the need to move an ill member of the family to a different location is not a deductible medical expense.[564]

j. Personal Attendant and Nursing Services

The cost of hiring a personal attendant to perform in-home medical services for a taxpayer, spouse, or dependent is a deductible medical expense.[565] The deductible cost of hiring an attendant includes wages paid, and, if the attendant lives in the home, the out-of-pocket costs for meals as well as lodging costs that are in excess of the normal costs of maintaining the home.[566] In addition, the taxpayer may deduct the amount of social security taxes paid on the private attendant's wages.[567]

The personal attendant need not be a nurse or a practical nurse.[568] The deductibility of the cost of hiring an attendant depends on the nature of the services performed and not on the qualifications of the person performing them.[569] For example, in *Estate of Dodge v. Commissioner*,[570] the Tax Court allowed a taxpayer to deduct payments made to the taxpayer's daughter, who was not a medical professional, to provide medical care for the taxpayer's wife.[571]

Note: If the payments in *Estate of Dodge* had been made after 1996 and would otherwise be qualified long-term care services, no deduction would be allowed because §213(d)(11) disallows deductions for payments made to relatives of the chronically ill individual.

Amounts paid after 1996 for qualified long-term care services are deductible as medical care expenses.[572] Qualified long-term care services are discussed in III.A.4.d.(3), above. If payment for a qualified long-term care service is made directly or indirectly through a partnership, corporation, or other entity to the chronically ill person's spouse or relative, no deduction is allowed unless the service is performed by a person professionally licensed to perform the services.[573] Nor is a deduction allowed for payments for a service rendered by a corporation or partnership related[574] to the chronically ill individual.[575] For these purposes, a relative is a person who satisfies the relationship test applicable to identifying a taxpayer's dependents,[576] as discussed in III.B.3.d.(2), below.

If the amounts are not expended for qualified long-term care services and the personal attendant performs only personal services unrelated to medical care, such as household work, the cost of compensating the attendant is not a deductible medical expense.[577] If the personal attendant performs both personal services and deductible medical services, only the costs allocable

[554] *Finlay v. Commissioner*, 44 T.C.M. 123, 124 (1982); *Phares*, 21 T.C.M., at 1447.

[555] *Urbauer v. Commissioner*, 63 T.C.M. 2492 (1992); Rev. Rul. 58-533.

[556] *Rose v. Commissioner*, 52 T.C. 521, 531 (1969), *aff'd per curiam*, 435 F.2d 149 (5th Cir. 1970), *cert. denied*, 402 U.S. 907 (1971); *Fitzgerald v. Commissioner*, 49 T.C.M. 530, 533–34 (1985); *Rose v. Commissioner*, 32 T.C.M. 1, 4 (1973), *aff'd per curiam*, 485 F.2d 581 (5th Cir. 1973); Rev. Rul. 2000-24.

[557] Rev. Rul. 75-317.

[558] Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *modified by* Rev. Rul. 58-280, *amplified by* Rev. Rul. 67-76.

[559] *Donnelly v. Commissioner*, 28 T.C. 1278, 1279–80 (1957), *aff'd*, 262 F.2d 411 (2d Cir. 1959); Rev. Rul. 67-76; Rev. Rul. 66-80.

[560] *Misfeldt v. Kelm*, 52-2 USTC ¶9495 (D. Minn. 1951).

[561] *Ginsberg v. United States*, 237 F. Supp. 968, 970 (S.D.N.Y. 1964).

[562] *Prem v. Commissioner*, T.C. Memo 1962-157.

[563] *Prem v. Commissioner*, T.C. Memo 1962-157.

[564] *Harding v. Commissioner*, 46 T.C. 502, 504 (1966); Rev. Rul. 68-319.

[565] *Estate of Dodge v. Commissioner*, 20 T.C.M. 1811, 1814 (1961).

[566] Rev. Rul. 76-106.

[567] Rev. Rul. 57-489.

[568] *Estate of Dodge*, 20 T.C.M. at 1814; *see, e.g.*, *Estate of Baral v. Commissioner*, 137 T.C. 1 (2011).

[569] *Estate of Marantz v. Commissioner*, 39 T.C.M. 516, 517 (1979); *Bye v. Commissioner*, 31 T.C.M. 238, 240 (1972); *Frier v. Commissioner*, 30 T.C.M. 345, 346 (1971); *Lane v. Commissioner*, 26 T.C.M. 240, 241 (1967); *Ungar v. Commissioner*, 22 T.C.M. 766, 769 (1963); *Estate of Dodge*, 20 T.C.M. at 1814; *Estate of Hentz v. Commissioner*, 12 T.C.M. 368, 369–70 (1953).

[570] *Estate of Dodge* 20 T.C.M. at 1811.

[571] *Id.* at 1814. *See also*, *Estate of Baral v. Commissioner*, 137 T.C. 1 (2011) (caregivers were not licensed health care providers and were not relatives).

[572] §213(d)(1)(C). *See, e.g.*, *Estate of Baral v. Commissioner*, 137 T.C. 1 (2011).

[573] §213(d)(11)(A).

[574] *See* §267(b), §707(b).

[575] §213(d)(11)(B).

[576] §213(d)(11) (flush language).

[577] *Westbrook v. Commissioner*, 49 T.C.M. 981 (1985); *Hires v. Commissioner*, 40 T.C.M. 342, 346–47 (1980); *Van Vechten v. Commissioner*, 32 T.C.M. 1363, 1365 (1973); *Borgmann v. Commissioner*, 28 T.C.M. 678, 680–81 (1969), *aff'd per curiam*, 438 F.2d 1211 (9th Cir. 1971); *Duckworth v. Commissioner*, 21 T.C.M. 756, 759 (1962).

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to the performance of medical services can qualify for the medical expense deduction.[578]

The cost of hiring a person to serve as a guide for a blind child throughout the child's day at school is a deductible medical expense.[579] Similarly, the cost of hiring a "note taker" for a deaf child at college is a deductible medical expense.[580] The cost of buying, training, and maintaining a service animal to assist an individual with mental disabilities may be a medical care expense if the taxpayer can establish that the taxpayer is using the service animal primarily for medical care to alleviate a mental defect or illness and that the taxpayer would not have paid the expenses but for the disease or illness.[581]

k. Specific Medical Services

(1) Nature of Provider

Payments for services rendered by licensed or unlicensed chiropractors or osteopaths are deductible medical expenses.[582] The Tax Court has held that payments for services rendered by a naturopathic doctor for treatment of a disease through use of natural substances and certain physical means are deductible medical expenses.[583] Payments for services rendered by psychotherapists, psychologists, or psychiatrists are deductible medical expenses.[584] Payments for therapy related to sexual problems are deductible medical expenses also.[585]

Payments made to a Christian Science practitioner for medical care rendered are deductible medical expenses.[586] However, payments made to religious science practitioners for spiritual guidance and counseling are not deductible medical expenses.[587] Amounts paid by a taxpayer to a clergyman associated with a counseling center for marriage counseling services also are not deductible medical expenses.[588]

The cost of joining a gym is not a deductible medical expense if the purpose in joining is to lose weight to improve general health.[589] However, the IRS has suggested that health club membership fees incurred primarily for the purpose of preventing or alleviating obesity may in some cases be deductible as a medical expense.[590] The IRS has also suggested that the cost of home exercise equipment used to treat obesity diagnosed by a physician may be deductible.[591]

Although the IRS originally ruled that the cost of participating in a program to stop smoking is not deductible if the purpose is to improve general health,[592] it reversed itself 20 years later, based on the rationale that efforts to stop smoking are no different from deductible efforts to treat alcoholism or drug addiction, because all three activities harm a person's health.[593] Generally, fees paid to health institutes are not deductible medical expenses.[594] However, if treatment at a health institute is specifically prescribed and substantiated by a physician as medically necessary, the fees are deductible.[595] Similarly, the IRS has ruled that amounts paid by individuals for participation in a weight-loss program as treatment for a specific disease or diseases — such as obesity, diagnosed by a physician — are deductible medical care expenses.[596]

Payments for treatments administered by an unlicensed practitioner may qualify as deductible medical expenses if medical care is rendered and the treatment is legal.[597] For example, the IRS has ruled that payments made to an unlicensed practitioner who administered "patterning" exercises for a mentally retarded child qualify as payments for medical care.[598]

Note: Payments for qualified long-term care services rendered by a spouse or relative who is not professionally licensed to render the services do not qualify for the medical expense deduction,[599] as discussed in III.A.4.j., above.

(2) Type of Care

Payments made for acupuncture services are deductible medical expenses.[600] In contrast, the costs of obtaining a tattoo or piercing ears are not deductible medical expenses.[601] Payments made for inpatient treatment at a treatment center for alcoholism are deductible medical expenses.[602] Payments for yoga classes and stress management are not deductible.[603]

Observation: Payments made for inpatient treatment at a treatment center for drug abuse also should be deductible.

The cost of deprogramming a child after exposure to a religious cult, upon the recommendation of a psychiatrist, is not a deductible medical expense.[604] Payments made for illegal operations or treatments are not deductible medical expenses.[605]

The cost of a vasectomy, tubal ligation, or legal abortion are deductible medical expenses even if the operations are performed at the taxpayer's own request and not as the result of medical necessity.[606] This conclusion rests in part on the premise that these procedures are not illegal under federal law.[607] The cost of laser or radial keratotomy eye surgery to cor-

[578] Rev. Rul. 76-106.
[579] Rev. Rul. 64-173.
[580] *Estate of Baer v. Commissioner*, 26 T.C.M. 170, 173 (1967).
[581] IRS Info. Letter 2010-0129.
[582] Rev. Rul. 63-91; Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *amplified by* Rev. Rul. 67-76.
[583] *Dickie v. Commissioner*, 77 T.C.M. 1916 (1999).
[584] Rev. Rul. 63-91; Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *amplified by* Rev. Rul. 67-76; Rev. Rul. 143.
[585] Rev. Rul. 75-187.
[586] Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *modified* Rev. Rul. 58-280, *amplified by* Rev. Rul. 67-76.
[587] *Miller v. Commissioner*, 40 T.C.M. 243, 247 (1980).
[588] Rev. Rul. 75-319.
[589] *Peacock v. Commissioner*, 37 T.C.M. 177, 184 (1978), *appeal dismissed* (9th Cir. 1980); Rev. Rul. 79-151.
[590] IRS Info. Letter 2002-0077.
[591] IRS Info. Letter 2003-0202.
[592] Rev. Rul. 79-162, *revoked by* Rev. Rul. 99-28.
[593] Rev. Rul. 99-28, *revoking* Rev. Rul. 79-162.
[594] Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *modified by* Rev. Rul. 58-280, *amplified by* Rev. Rul. 67-76.
[595] Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *modified by* Rev. Rul. 58-280, *amplified by* Rev. Rul. 67-76.
[596] Rev. Rul. 2002-19.
[597] Rev. Rul. 70-170.
[598] Rev. Rul. 63-91.
[599] *See* §213(d)(11).
[600] *Huff v. Commissioner*, 69 T.C.M. 2551 (1995); Rev. Rul. 72-593.
[601] Rev. Rul. 82-111.
[602] Rev. Rul. 73-325.
[603] *Huff*, 69 T.C.M. at 2551.
[604] TAM 8021004.
[605] Reg. §1.213-1(e)(1)(ii).
[606] Rev. Rul. 73-603, *clarifying* Rev. Rul. 73-201.
[607] Rev. Rul. 97-9, *clarifying* Rev. Rul. 73-201.

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rect myopia is a medical expense, because the operation affects the function of the body and corrects a physical defect.[608]

The IRS has explained that medical expenses paid for a surrogate mother and the unborn child are not deductible as a medical expense.[609] In contrast, the IRS has ruled that the unreimbursed expenses of obtaining an egg donor, the agency fee, the egg donor's medical and psychological testing expenses, the insurance for post-procedure medical or psychological assistance to the egg donor, and the cost of preparing the legal contract between the taxpayer and the egg donor are deductible medical expenses.[610] The Tax Court has held that medical expenses do not include amounts paid by a man for obtaining anonymously donated eggs, in vitro fertilization of those eggs, and implantation of those eggs into unrelated surrogate mothers, nor the amounts paid to those women or for their pregnancy care.[611] Amounts paid by organ donors and potential organ donors for surgical expenses, hospital bills, and laboratory fees, are amounts paid for medical care.[612]

When requested to rule on whether the cost of DNA collection and storage for use when medical tests are developed to identify genetic predispositions to conditions such as breast cancer and Alzheimer's and Parkinson's disease, the IRS demurred, explaining that the collection and storage of DNA is not in and of itself medical care, and that because the taxpayer requesting the ruling did not indicate when, if ever, the DNA would be used for medical diagnosis it could not determine whether the collection and storage was primarily for the prevention or alleviation of a physical or mental defect or illness.

(3) Other Situations

The cost of procuring a divorce that is recommended by a psychiatrist is not a deductible medical expense.[613] The value of self-treatment is not a deductible medical expense.[614]

In *Gerstacker v. Commissioner*,[615] the Sixth Circuit reversed the Tax Court and held that legal fees incurred to obtain a guardianship over a mental patient to voluntarily commit the patient for medical treatment are deductible medical expenses.[616] The IRS has since decided to follow *Gerstacker*.[617] Thus, the IRS has explained that legal fees and mileage expenses incurred to establish a guardianship for a spouse afflicted with Alzheimer's disease are medical expenses because the commitment proceeding was necessary to provide the medical care and a direct relationship existed between those expenses and the medical care.[618] Nonlegal fees paid to a lawyer to act as a surrogate parent for a mental patient are not deductible medical expenses.[619] Legal fees paid to protect a taxpayer and his children from a mentally ill wife are not deductible medical expenses.[620]

The cost of books that discuss nutrition or health care is not a deductible medical expense, because the books do not constitute care.[621] In contrast, childbirth classes constitute medical care and the costs associated with the classes are medical expenses.[622] The expenses for admission and transportation to attend a medical conference relating to the chronic disease of the taxpayer's dependent are deductible because they are primarily for, and essential to, the medical care of the dependent.[623]

l. Education Expenses

(1) College Tuition

College tuition payments qualify as deductible medical expenses only to the extent that the payment is allocable to medical care costs.[624] Therefore, to qualify for the deduction, a taxpayer must obtain a breakdown of costs from the college indicating what portion of tuition covers medical care.[625]

(2) Special Education

The cost of attending a special school for mentally or physically handicapped persons is a deductible medical expense if the principal reason for attending the school is to alleviate the person's handicap.[626] For instance, if a handicapped person or a child with learning disabilities attends a school designed to compensate for or overcome the handicap or disability, the cost is deductible.[627] Examples of such institutions include schools that specialize in teaching Braille or lip reading.[628] The deductible costs of attending such a school include meals, lodging, and the expenses for ordinary education furnished by the school which is incidental to the special services performed.[629] However, no deduction is allowed for legal fees paid in an attempt to obtain reimbursement for education expenses related to private school attendance by a child with learning disabilities.[630]

The cost of sending a handicapped individual to a school that does not specialize in treating the handicap and does not offer special instruction or therapy is not a deductible medical expense.[631] For example, the cost of sending a dyslexic child to

[608] Rev. Rul. 2003-57 (laser eye surgery to correct myopia); PLR 9625049 (RK eye surgery to correct myopia).

[609] IRS Info. Letter 2002-0291.

[610] PLR 200318017; IRS Info. Letter 2005-0102.

[611] *Magdalin v. Commissioner*, 96 T.C.M. 491 (2008); *Morrissey v. United States*, 871 F.3d 1260 (11th Cir. 2017) (male taxpayer may not deduct in vitro fertilization expenses for surrogate gestational carrier; court rejects taxpayer argument that it was medically necessary to involve third parties to enable his own body to fulfill its reproductive function, stating that taxpayer mistakes the entire reproductive process for his own body's function within that process).

[612] Rev. Rul. 73-189.

[613] *Jacobs v. Commissioner*, 62 T.C. 813, 820 (1974).

[614] *Doody v. Commissioner*, 32 T.C.M. 547, 548 (1973).

[615] 414 F.2d 448 (6th Cir. 1969), *rev'g* 49 T.C. 522 (1968).

[616] 414 F.2d at 452.

[617] Rev. Rul. 71-281.

[618] IRS Info. Letter 2008-0033.

[619] *Levine v. Commissioner*, 695 F.2d 57, 61 (2d Cir. 1982), *aff'g* 42 T.C.M. 763 (1981), *cert. denied*, 462 U.S. 1132 (1983).

[620] *Smith v. Commissioner*, 44 T.C.M. 672, 673–74 (1982).

[621] *Garrison v. Commissioner*, 67 T.C.M. 2896 (1994), *aff'd*, 67 F.3d 299 (6th Cir. 1995).

[622] PLR 8919009.

[623] Rev. Rul. 2000-24.

[624] Rev. Rul. 54-457.

[625] Rev. Rul. 54-457.

[626] Reg. §1.213-1(e)(1)(v)(a); *Greisdorf v. Commissioner*, 54 T.C. 1684, 1690–91 (1970); *Donovan v. Campbell*, 61-1 USTC ¶9357 (N.D. Tex. 1961); Rev. Rul. 58-280.

[627] Reg. §1.213-1(e)(1)(v)(a); *Lenn v. Commissioner*, 75 T.C.M. 1892 (1998); Rev. Rul. 78-340; Rev. Rul. 69-607; PLR 200729019, PLR 200704001, PLR 200521003, PLR 8401024.

[628] Reg. §1.213-1(e)(1)(v)(a); Rev. Rul. 55-261, *modified by* Rev. Rul. 58-5, *amplified by* Rev. Rul. 67-76.

[629] Reg. §1.213-1(e)(1)(v)(a); Rev. Rul. 58-280.

[630] *See Lenn*, 75 T.C.M. at 1892.

[631] *Fay v. Commissioner*, 76 T.C. 408, 414 (1981); *Ripple v. Commissioner*, 54 T.C. 1442, 1447–48 (1970); *Grunwald v. Commissioner*, 51 T.C. 108,

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a small school that does not specialize in dyslexia or provide medical treatment for dyslexia is not a deductible medical expense.[632]

If, however, a handicapped individual attends an institution that is not a special school but the institution provides some medical services or special programs to aid the individual, the amount of the cost allocable to those services or programs is deductible.[633] In addition, under limited circumstances, the cost of sending a handicapped child to a nonspecialized school is deductible if, for example, there is a special curriculum for the child,[634] or the child receives special attention that improves or alleviates the handicap in a situation where previous attendance at a special school did not.[635]

(3) Regular Education

The cost of sending an emotionally maladjusted child away from home to a school that does not specialize in dealing with emotional problems is not a deductible medical expense even if the school is recommended by a physician.[636] The cost of sending a child to dancing lessons is not a deductible expense even if recommended by a physician.[637] The cost of sending a child to summer camp is not a deductible medical expense.[638]

m. Inpatient Care

(1) Hospitals

The total cost of inpatient hospital care, including the cost of meals and lodging, is a deductible medical expense.[639]

(2) Institutions Other than Hospitals

The deductibility of the cost of care in an institution other than a hospital depends on the condition of the individual and the nature of the services provided, not on the nature of the institution itself.[640] If an individual is in an institution for the principal reason of obtaining available medical care, and meals and lodging are provided as a necessary part of that care, then the entire cost of the stay is a deductible medical expense.[641] For example, the costs of placing a mentally handicapped child at a special home or therapeutic center to aid the child's adjustment from life in a mental hospital to community living are deductible medical expenses.[642] The cost of placing a dependent parent who requires constant supervision in a nursing home is a deductible medical expense.[643] The cost of the dependent parent's meals and lodging also is deductible.[644]

If an individual is in an institution primarily for reasons other than the availability of medical care, then only the portion of the cost allocable to medical care, if any, is deductible.[645] For example, the costs of placing a dependent parent in a home for the aged because of personal or family considerations are deductible only to the extent that the costs are allocable to medical care provided for the parent.[646] The costs of the parent's meals and lodging are not deductible.[647]

(3) Life-Care Residences

Taxpayers who pay monthly fees, lump-sum payments, founder's fees, or entrance fees for life-care residence at retirement homes may deduct only the portion of the payment allocable to medical care for the home's residents.[648] The Tax Court has held that taxpayers may use a percentage method, rather than an actuarial method, to determine the portions of monthly service fees for a lifetime residence in a retirement community that are allocable to medical care and deductible as medical expenses.[649] The portion of a lump-sum payment or founder's fee paid to a retirement home allocable to construction of medical facilities is not a deductible medical expense.[650] Amounts paid for use of a pool, spa, or exercise facilities at the retirement community are not deductible medical expenses.[651]

5. Timing of Deduction

a. In General

Generally, a taxpayer is allowed to deduct medical expenses in the tax year in which the expenses are actually paid.[652] This rule applies regardless of when the medical services were rendered and regardless of whether the individual is a cash method or accrual method taxpayer.[653] Thus, insurance premiums that

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114–15 (1968); *Atkinson v. Commissioner*, 44 T.C. 39, 53 (1965); *Lichterman v. Commissioner*, 37 T.C. 586, 597 (1961); *Coyne v. Commissioner*, 43 T.C.M. 1351, 1352 (1982); *Barnes v. Commissioner*, 37 T.C.M. 1408, 1410 (1978); *Martin v. Commissioner*, 34 T.C.M. 1564, 1568 (1975), *aff'd per curiam*, 548 F.2d 633 (6th Cir. 1977); *Shidler v. Commissioner*, 30 T.C.M. 529, 533 (1971); *Weinberg v. Commissioner*, 28 T.C.M. 10, 12 (1969); *Feinberg v. Commissioner*, 25 T.C.M. 777, 780 (1966); *Glaze v. Commissioner*, 20 T.C.M. 1276, 1278 (1961); *Rowe v. Commissioner*, 18 T.C.M. 446, 447 (1959); *Kaufman v. United States*, 76-1 USTC ¶9182 (S.D.N.Y. 1975).

[632] *Coyne*, 43 T.C.M. at 1352.

[633] *Fay*, 76 T.C., at 416; *Fischer v. Commissioner*, 50 T.C. 164, 175–76 (1968); *Hendrick v. Commissioner*, 35 T.C. 1223, 1237–38 (1961); *Sims v. Commissioner*, 39 T.C.M. 700, 708–09 (1979); PLR 9852015.

[634] Rev. Rul. 70-285.

[635] *Estate of Baer v. Commissioner*, 26 T.C.M. 170, 173 (1967).

[636] *Pfeifer v. Commissioner*, 37 T.C.M. 816, 818 (1978), *aff'd*, 79-2 USTC ¶9518 (10th Cir. 1979); *Dreifus v. Commissioner*, 36 T.C.M. 368, 370 (1977). *See also Pascal v. Commissioner*, 15 T.C.M. 434, 437 (1956); *Newkirk v. United States*, 77-1 USTC ¶9452 (S.D. Ohio 1977).

[637] *France v. Commissioner*, 690 F.2d 68, 69 (6th Cir. 1982); *Adler v. Commissioner*, 330 F.2d 91, 92 (9th Cir. 1964), *aff'g* 22 T.C.M. 965 (1963); *Thoene v. Commissioner*, 33 T.C. 62, 65 (1959); *Ende v. Commissioner*, 34 T.C.M. 1096, 1102 (1975).

[638] *Garrison v. Commissioner*, 67 T.C.M. 2896 (1994), *aff'd*, 67 F.3d 299 (6th Cir. 1995).

[639] Reg. §1.213-1(e)(1)(v).

[640] Reg. §1.213-1(e)(1)(v).

[641] Reg. §1.213-1(e)(1)(v)(a).

[642] Rev. Rul. 69-499; Rev. Rul. 58-533; PLR 7714016.

[643] *Counts v. Commissioner*, 42 T.C. 755, 765–66 (1964).

[644] 42 T.C. at 766.

[645] Reg. §1.213-1(e)(1)(v)(b).

[646] Reg. §1.213-1(e)(1)(v)(b); *Estate of Smith v. Commissioner*, 79 T.C. 313, 321–22 (1982); *Robinson v. Commissioner*, 51 T.C. 520, 540–41 (1968), *aff'd in part per curiam*, 422 F.2d 873 (9th Cir. 1970); *Ball v. Commissioner*, 37 T.C.M. 1573, 1574 (1978); *Matles v. Commissioner*, 23 T.C.M. 1489, 1497 (1964); IRS Info. Letter 2002-0169.

[647] Reg. §1.213-1(e)(1)(v)(b); IRS Info. Letter 2002-0169.

[648] Rev. Rul. 76-481; Rev. Rul. 75-302, *clarified by* Rev. Rul. 93-72; Rev. Rul. 67-185; PLR 8630005. *See also Finzer v. United States*, 496 F. Supp. 2d 954 (N.D. Ill. 2007) (taxpayer cannot deduct portion of entrance fee for villa in lifetime care facility).

[649] *Baker v. Commissioner*, 122 T.C. 143 (2004).

[650] Rev. Rul. 76-481; Rev. Rul. 68-525.

[651] *Baker*, 122 T.C. at 143.

[652] §213(a); Reg. §1.213-1(a)(1).

[653] Reg. §1.213-1(a)(1).

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qualify as medical care expenses are deductible in the year paid.[654]

b. Payments Made with Borrowed Money

In Rev. Rul. 78-39, the IRS ruled that if a taxpayer charges medical expenses on a credit card, the expenses are deductible in the year charged, regardless of when the amount charged is actually paid by the taxpayer.[655] In Rev. Rul. 78-173, the IRS ruled that a taxpayer is allowed to deduct medical expenses paid by the taxpayer's parent in exchange for a promissory note issued by the taxpayer to the parent.[656] The taxpayer may deduct the expenses in the year the parent pays them.[657]

The Tax Court has held that amounts paid in one tax year on a bank loan that was borrowed and used in the previous year to pay off a hospital loan are not deductible.[658] However, the amount paid on the hospital loan is deductible in the year paid.[659]

Observation: In all three situations, the taxpayer is treated as having received the proceeds of the borrowed money and as having transmitted them back to the creditor for payment of the medical expenses by the creditor who is acting as the taxpayer's agent. Thus, the taxpayer's repayment of the borrowed money is not deductible.

c. Prepayment

(1) In General

Generally, a prepaid expense for future medical care is not deductible in the year paid.[660] The IRS has ruled, however, that advance payments made to institutions required as a condition for future acceptance of a handicapped child for lifetime care if the parents become unable to care for the child are deductible in the year paid.[661] However, if the payment is for care that is not lifetime care but extends substantially beyond the end of the tax year in which the payment is made, the deduction is treated as a prepaid expense and is deductible in the tax year in which the care is provided.[662] Thus, for example, a lump-sum payment made by retired employees for four years of medical coverage under a health care plan is deductible on a prorated basis during the four-year period.[663]

Note: Under the tax benefit rule, a refund of this type of advance payment is included in the taxpayer's gross income in the year it is received.[664] The tax benefit rule is discussed in detail in 502 T.M., *Gross Income: Tax Benefit, Claim of Right and Assignment of Income.*

(2) Exception

Under §213(d)(7), a taxpayer who has not yet reached age 65 may deduct, in the year paid, health insurance premiums for medical care coverage for the taxpayer, spouse, or dependents after the taxpayer reaches age 65.[665] To qualify under this exception, the premiums must be payable, on a level payment basis, for a period of 10 or more years or until the taxpayer reaches age 65.[666] Regardless of the age of the taxpayer, the premiums cannot be payable for a period of less than five years.[667] The deduction of qualifying prepaid insurance premiums is subject to the general rules governing the deductibility of medical insurance discussed in III.A.4.d., above.

d. Reimbursements

(1) Reimbursements of Expenses Deducted in Previous Year

Under the tax benefit rule, if a taxpayer receives a reimbursement for a medical expense paid in a previous tax year, the taxpayer must include the reimbursement in gross income for the tax year in which it is received to the extent that the reimbursement is attributable to, and not in excess of, the previously deducted expense.[668] If the taxpayer did not claim a deduction for the previously paid medical expense, the subsequent reimbursement is not included in gross income.[669] If the amount of the subsequent reimbursement is less than or equal to the amount of the previously deducted medical expense, the entire amount of the reimbursement is included in gross income.[670] If the amount of the subsequent reimbursement exceeds the amount of the previously deducted medical expense, the portion of the reimbursement received that is equal in amount to the deduction taken in the prior year is considered attributable to that deduction and is includible in gross income.[671] The tax benefit rule is discussed in detail in 502 T.M., *Gross Income: Tax Benefit, Claim of Right and Assignment of Income.*

(2) Reimbursements Received in Year Expenses Are Paid

Reimbursements for medical expenses received by the taxpayer in the year the expenses are paid are subtracted from the amount of the expenses and, therefore, reduce the amount of the §213 deduction.[672] These types of reimbursements are discussed in greater detail in III.A.3.d., above.

6. Substantiation

A taxpayer claiming a deduction under §213 must provide the IRS with the name and address of each person to whom a payment for medical expenses was made and the amount and

[654] *Dick v. Commissioner*, 27 T.C.M. 149, 151 (1968), *aff'd per curiam*, 408 F.2d 378 (2d Cir. 1969); *Johnson v. Commissioner*, 21 T.C.M. 106, 109 (1962).

[655] Rev. Rul. 78-39.

[656] Rev. Rul. 78-173.

[657] Rev. Rul. 78-173.

[658] *Granan v. Commissioner*, 55 T.C. 753, 755 (1971).

[659] 55 T.C. at 755.

[660] *Rose v. Commissioner*, 52 T.C. 521, 532 (1969), *aff'd per curiam*, 435 F.2d 149 (5th Cir. 1970), *cert. denied*, 402 U.S. 907 (1971); *Bassett v. Commissioner*, 26 T.C. 619, 621 (1956); *Hunt v. Commissioner*, 31 T.C.M. 1119, 1123 (1972).

[661] Rev. Rul. 75-303, *clarified by* Rev. Rul. 93-72.

[662] Rev. Rul. 93-72, *clarifying* Rev. Rul. 75-303.

[663] PLR 9435011. *Cf.* PLR 9435012 (opposite result for employee whose election to participate in plan made before Oct. 14, 1993).

[664] PLR 8309011.

[665] §213(d)(7); Reg. §1.213-1(e)(4)(i)(b).

[666] §213(d)(7); Reg. §1.213-1(e)(4)(i)(b).

[667] §213(d)(7); Reg. §1.213-1(e)(4)(i)(b).

[668] Reg. §1.213-1(g)(1).

[669] Reg. §1.213-1(g)(2).

[670] Reg. §1.213-1(g)(3)(i).

[671] Reg. §1.213-1(g)(3)(ii).

[672] §213(a).

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date of each payment.[673] If the taxpayer made a payment for medical services in kind, that fact must be reported.[674] When requested by the IRS, medical expense deductions must be substantiated by a statement or itemized invoice from the individual or entity to which payment for medical services was made.[675] The document must show the nature of the service rendered, the person to or for whom the service was rendered, the nature of any item of expense, the person for whom the expense was incurred, the specific purpose for which the expense was incurred, the amount paid, the date of payment, and any other information the IRS deems necessary.[676] The taxpayer is also required to provide information concerning reimbursement of medical expenses.[677]

The Tax Court has allowed a taxpayer to deduct medical expenses without proof of substantiation in a situation in which the IRS lost the taxpayer's records and the costs for medical care were reasonable.[678] The Tax Court has estimated the amount of a taxpayer's medical expenses based on records of a medical services provider, even though the taxpayer was unable to provide much else in the way of substantiation.[679] In contrast, no deduction is available if the taxpayer fails to provide any documentation or other credible proof,[680] provides fragmentary evidence that does not prove the particulars of the claimed expenses,[681] or provides forged documentation.[682]

The Tax Court denied the medical expense deduction for a taxpayer who refused to substantiate the deduction unless granted immunity from criminal prosecution.[683] Similarly, a taxpayer who claims that substantiation of medical expenses is an invasion of privacy and refuses to produce the requisite information will find that the Tax Court will uphold IRS denial of the deduction.[684] Proof that the taxpayer paid medical expenses requires more than invoices, because invoices alone do not prove that the taxpayer, and not someone else, paid the medical bill.[685]

[673] Reg. §1.213-1(h).

[674] Reg. §1.213-1(h).

[675] Reg. §1.213-1(h).

[676] Reg. §1.213-1(h); *Gibbs v. Commissioner*, 56 T.C.M. 459, 463 (1988); *Davis v. Commissioner*, 56 T.C.M. 455, 457 (1988); *Hicks v. Commissioner*, 51 T.C.M. 1257, 1259 (1986); *Crain v. Commissioner*, 51 T.C.M. 806, 808 (1986); *Hayden v. Commissioner*, 46 T.C.M. 1515, 1519 (1983); *Bryson v. Commissioner*, 44 T.C.M. 602, 604–05 (1982); *Albertini v. Commissioner*, 42 T.C.M. 1518, 1519 (1981); *Powers v. Commissioner*, 37 T.C.M. 1304, 1306 (1978); *Dodov v. Commissioner*, 36 T.C.M. 1459, 1461 (1977); *Gaines v. Commissioner*, 35 T.C.M. 1415, 1420 (1976); *Sampson v. Commissioner*, 29 T.C.M. 927, 928 (1970), *aff'd per curiam*, 444 F.2d 530 (6th Cir. 1971); *Stokes v. Commissioner*, 29 T.C.M. 887, 888 (1970); *DeFontes v. Commissioner*, 27 T.C.M. 401, 402–03 (1968); *Lingham v. Commissioner*, 26 T.C.M. 1158, 1160 (1967), *aff'd per curiam*, 410 F.2d 754 (2d Cir. 1969); *Joffe v. Commissioner*, 24 T.C.M. 996, 998 (1965); *Harris v. Commissioner*, 12 T.C.M. 42, 43 (1953); *Flagg v. United States*, 84-1 USTC ¶9310 (S.D. Iowa 1984).

[677] *E.g.*, *Merker v. Commissioner*, 73 T.C.M. 3087 (1997); *Hamdi v. Commissioner*, 65 T.C.M. 1835 (1993).

[678] *Jackson v. Commissioner*, 34 T.C.M. 1315, 1321 (1975).

[679] *Nwachukwu v. Commissioner*, 79 T.C.M. 1411 (2000).

[680] *E.g.*, *Joseph v. Commissioner*, 90 T.C.M. 26 (2005).

[681] *E.g.*, *Jackson v. Commissioner*, 89 T.C.M. 1516 (2005).

[682] *E.g.*, *Prowse v. Commissioner*, 91 T.C.M. 1253 (2006).

[683] *Roldan v. Commissioner*, 39 T.C.M. 1240, 1240–41 (1980).

[684] *Gasparutti v. Commissioner*, 76 T.C.M. 726 (1998).

[685] *See Oji v. Commissioner*, 95 T.C.M. 1333 (2008).

B. Personal and Dependency Exemptions

1. Deduction After 2017

Under §151, the personal and dependency exemption deductions are zero after 2017,[686] except for a temporary senior deduction[687] and when determining an allowable deduction or whether a taxpayer is entitled to a deduction.[688]

2. Tax Years Before 2018

a. Personal Exemptions

(1) Taxpayer

(a) In General

For tax years beginning before 2018, each taxpayer is allowed one personal exemption.[689] Personal exemptions not used in a tax year because the taxpayer's gross income was insufficient to require an income tax return cannot be carried forward.[690]

(b) Exception

If a dependency exemption with respect to the taxpayer is allowable to another person for a tax year beginning in the taxpayer's tax year, the taxpayer's exemption amount is zero, effectively barring the taxpayer from deducting a personal exemption.[691]

(2) Spousal

(a) In General

For tax years beginning before 2018, a taxpayer was allowed one personal exemption for his or her spouse if three conditions were satisfied.[692] First, the taxpayer and the spouse must not have filed a joint return.[693] Second, the spouse must not have had gross income for the calendar year in which the taxpayer's tax year begins.[694] Third, the spouse must not have been the dependent of another taxpayer.[695]

Under regulations, a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which

[686] §151(d)(5), amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70103.

[687] §151(d)(5)(C). See III.B.5., below.

[688] §151(d)(5)(B). See III.B.4., below.

[689] §151(b), §151(d)(5), amended by the OBBBA, §70103. *See* Reg. §1.151-1(b).

[690] *Henrietta v. Commissioner*, 8 T.C.M. 605, 606 (1949).

[691] §151(d)(2).

[692] §151(b); Reg. §1.151-1(b). *See, e.g.*, *Schmidt v. Commissioner*, 57 T.C.M. 235, 236 (1989), *aff'd*, 891 F.2d 283 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1785 (1990).

[693] §151(b); Reg. §1.151-1(b). *See Turner v. Commissioner*, 88 T.C.M. 412 (2004).

[694] §151(b); Reg. §1.151-1(b). *See Lee v. Commissioner*, 41 T.C.M. 747, 751 (1981), *aff'd on other issues*, 723 F.2d 1424 (9th Cir. 1984); *Jamieson v. Commissioner*, 353 F.2d 1, 2 (7th Cir. 1965), *aff'g* 23 T.C.M. 2091, 2094 (1964).

[695] §151(b); Reg. §1.151-1(b). *E.g.*, *Coleman v. Commissioner*, 13 T.C.M. 1179 (1954); *Williams v. Commissioner*, 11 T.C.M. 729, 730 (1952).

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the marriage is entered into, regardless of the married couple's place of domicile.[696]

The spousal personal exemption, though available to married taxpayers but not unmarried taxpayers, does not violate any federal constitutional provision.[697]

(b) Gross Income

A taxpayer is not allowed a personal exemption for his or her spouse if the spouse has any gross income, even if the amount includible in the spouse's gross income is insufficient to require the spouse to file an income tax return.[698] Also, no exemption is allowed to the taxpayer for the spouse even if the spouse's gross income is completely offset by deductions.[699]

The fact that the spouse's gross income is entirely attributable to alimony received from the taxpayer that is includible in the spouse's gross income does not allow the taxpayer a spousal personal exemption.[700] The same is true of amounts received by the spouse from the taxpayer under a decree of support.[701] The spousal personal exemption is also not available to a taxpayer to whose spouse is attributed, under community property laws, a portion of the taxpayer's earnings.[702]

(c) Proof

The taxpayer has the burden of proving that a spousal personal exemption is allowable.[703] Thus, the taxpayer has the burden of proving that the spouse has no gross income.[704] Doing so is impossible if the taxpayer offers no evidence[705] or has knowledge of the spouse's gross income.[706] Evidence can be sufficient even if it is sketchy,[707] and in at least one case the taxpayer's testimony that his wife had no gross income was accepted as determinative.[708] The taxpayer also has the burden of proving that the spouse is not the dependent of another taxpayer.[709] The taxpayer does not meet the burden of proof simply because the IRS does not prove that the spouse had gross income or was the dependent of another taxpayer.[710]

(d) Joint Return

If spouses file a joint return, they are entitled to claim two personal exemptions, one for each of them.[711] However, a taxpayer who is filing a separate return cannot escape the limitations on the claiming of a spousal personal exemption by purporting to file a joint return.[712] If the spouse intended to file a joint return, the spouse's personal exemption can be claimed on that return.[713]

3. Dependency Exemptions Before 2018

a. In General

An individual taxpayer is allowed one personal exemption for each dependent.[714] Generally, a dependent is an individual who is either a qualifying child or a qualifying relative of the taxpayer.[715]

The imposition of limitations on the availability of the dependency exemption does not violate any federal constitutional provision.[716]

b. Exceptions

(1) Dependents of Other Taxpayers

A taxpayer who is the dependent of another person for any tax year of that other person is treated as having no dependents for any tax year of the taxpayer that begins in the calendar year in which the tax year of the other person begins.[717]

> *Example:* J is the dependent of K for K's tax year that begins on March 1, Year 1, and ends on February 28, Year 2. J is a calendar year taxpayer. No one can be a dependent of J for Year 1, because Year 1 is the calendar year in which K's tax year begins.

(2) Dependents Filing Joint Returns

No dependency exemption is allowed with respect to a dependent who files a joint return[718] for a tax year beginning in the calendar year in which the taxpayer's tax year begins.[719] A return filed by a dependent and spouse merely to obtain a refund, and on which there is no income tax liability, is not a joint return but instead is a joint claim for refund.[720]

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[696] Reg. §301.7701-18(b)(1).

[697] *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112 (1916); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 6 (1916).

[698] Reg. §1.151-1(b).

[699] *Lewis v. Commissioner*, 9 T.C.M. 32, 34 (1950).

[700] Rev. Rul. 56-418.

[701] *E.g., Frazier v. Commissioner*, 32 T.C.M. 74, 75–76 (1973), *dismissed by unpub. op.* (2d Cir. 1973), *cert. denied*, 416 U.S. 990 (1974).

[702] *Trolinger v. Commissioner*, 55 T.C.M. 1387, 1389 (1988), *aff'd by unpub. op.* (9th Cir. 1990).

[703] *Blackburn v. Commissioner*, 44 T.C.M. 1121, 1122–23 (1982).

[704] *E.g., Breland v. United States*, 323 F.2d 492, 497 (5th Cir. 1963), *rev'g* 62-1 USTC ¶9318 (S.D. Miss. 1962); *Stephenson v. Commissioner*, 79 T.C. 995, 1004 (1982), *aff'd per curiam, on other issues*, 748 F.2d 331 (6th Cir. 1984); *Girard v. Commissioner*, 68 T.C.M. 1148 (1994); *Gudenschwager v. Commissioner*, 56 T.C.M. 1010, 1015 (1989); *Smith v. Commissioner*, 49 T.C.M. 1516, 1518–19 (1985); *Grace v. Commissioner*, 42 T.C.M. 1536, 1537 (1981); *Kolb v. Commissioner*, 34 T.C.M. 1171, 1175 (1975); *Dennehy v. Commissioner*, 12 T.C.M. 800, 801 (1953).

[705] *See Link v. Commissioner*, 92 T.C.M. 23 (2006).

[706] *See, e.g., Boland v. Commissioner*, 19 T.C.M. 1030, 1034 (1960).

[707] *See, e.g., Cummings v. Commissioner*, 27 T.C.M. 273 (1968), *rev'd on other issues*, 410 F.2d 675 (5th Cir. 1969).

[708] *See Shinault v. Commissioner*, 91 T.C.M. 1239 (2006).

[709] *See, e.g., Girard v. Commissioner*, 68 T.C.M. 1148 (1994); *Gudenschwager*, 56 T.C.M. 1010 at 1015; *Porter v. Commissioner*, 33 T.C.M. 1365, 1367 (1974).

[710] *Mandeville v. Commissioner*, 94 T.C.M. 443 (2007).

[711] *See* Reg. §1.151-1(b). *See, e.g., Estate of Felt v. Commissioner*, 54 T.C.M. 528, 533 (1987).

[712] *Roden v. Commissioner*, 33 T.C.M. 654 (1974).

[713] *Frank v. Commissioner*, 43 T.C.M. 1149, 1156 (1982).

[714] §151(c).

[715] §152(a).

[716] *Graff v. Commissioner*, 32 T.C.M. 494, 495 (1973).

[717] §152(b)(1); Prop. Reg. §1.152-1(a)(2)(i).

[718] *See* §6013.

[719] §152(b)(2); Prop. Reg. §1.152-1(a)(2)(ii). *E.g., Sengpiehl v. Commissioner*, 75 T.C.M. 1604 (1998); *Link v. Commissioner*, 42 T.C.M. 1547, 1548 (1981), *aff'd by unpub. op.*, 697 F.2d 292 (2d Cir. 1982); *Donohue v. Commissioner*, 29 T.C.M. 864, 866 (1970); *Eason v. Commissioner*, 26 T.C.M. 241, 242 (1967). *See Lowe v. Commissioner*, 33 T.C.M. 652, 654 (1974); *Etersque v. Commissioner*, 21 T.C.M. 1411, 1412 (1962).

[720] Prop. Reg. §1.152-1(a)(2)(ii); Rev. Rul. 65-34, *aff'g* Rev. Rul. 54-567; *Martino v. Commissioner*, 71 T.C. 456, 460 (1978).

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It does not matter that the dependent's joint return is filed inadvertently.[721] It also does not matter that the dependent and spouse cannot revoke their joint return because the impact on the taxpayer's dependency exemption is not discovered until after the date by which the election to file separate returns must be made.[722]

(3) Citizenship

(a) In General

An individual is not a dependent unless the individual is a citizen or national of the United States, or a resident of the United States or of a country contiguous to the United States (Canada or Mexico).[723] This requirement does not apply to any child of the taxpayer legally adopted by the taxpayer if three conditions are satisfied.[724] First, for the taxpayer's tax year, the child must have the same principal place of abode as the taxpayer.[725] A taxpayer and the child have the same principal place of abode for the taxpayer's tax year if the taxpayer and child have the same principal place of abode for the entire portion of the tax year following the placement of the child with the taxpayer.[726] Second, for the taxpayer's tax year, the child must be a member of the taxpayer's household.[727] Third, the taxpayer must be a citizen or national of the United States.[728]

Thus, no dependency exemption is allowed for children who are British subjects and residents of the United Kingdom,[729] or for children who are citizens and residents of Poland,[730] nor is one allowed for an alien parent residing abroad.[731]

(b) Citizen

There are two sources of citizenship: birth and naturalization.[732] A child may obtain derivative citizenship by virtue of the status of his parent or grandparent as a U.S. citizen.[733] For example, children who have at least one U.S. citizen parent and who are born and regularly reside outside the U.S. may qualify for naturalization under 8 U.S.C. §1433, which requires the U.S. citizen parent to meet certain physical presence tests and to make an application for naturalization on behalf of his or her child, among other things.[734]

The adopting parents of a child born in a foreign country must look to the parentage of the child at the time of its birth in determining whether the child is a citizen.[735]

(c) Constitutionality

The citizenship requirement does not violate the U.S. Constitution.[736] The requirement is not unreasonable or arbitrary and does not involve a suspect classification;[737] nor does it violate the Fifth Amendment or the Helsinki Accords.[738]

c. Qualifying Child

(1) In General

A qualifying child, with respect to any taxpayer for any tax year, is an individual who satisfies five conditions.[739] First, the individual must bear a qualifying child relationship to the taxpayer.[740] Second, the individual must have the same principal place of abode as does the taxpayer for more than one-half of the tax year.[741] Third, the individual must meet the age requirements.[742] Fourth, the individual must not have provided more than one-half of his or her own support for the calendar year in which the tax year of the taxpayer begins.[743] Fifth, the individual must not file a joint return, other than a joint return filed solely as a claim for refund of estimated or withheld taxes, with the individual's spouse for the tax year beginning in the calendar year in which the tax year of the taxpayer begins.[744]

The IRS has taken the position that an individual is not a qualifying child of any other taxpayer if the individual's parent — or any other person with respect to whom the individual is a qualifying child — is not required to file an income tax return and either does not file a return or files a return solely to obtain a refund.[745]

(2) Qualifying Child Relationship Requirement

A qualifying child relationship exists if the individual is any of the following:

[721] *Sengpiehl*, 75 T.C.M. at 1604; *Tamary v. Commissioner*, 33 T.C.M. 166, 168 (1974).

[722] *Scott v. Commissioner*, 35 T.C.M. 1562, 1563 (1976).

[723] §152(b)(3)(A). *See* Reg. §1.152-2(a)(1); Prop. Reg. §1.152-1(a)(2)(iii). *E.g.*, *Barr v. Commissioner*, 51 T.C. 693, 694 (1969); *Zand v. Commissioner*, 71 T.C.M. 1758 (1996), *aff'd on other issues*, 143 F.3d 1393 (11th Cir. 1998). *See Carlebach v. Commissioner*, 139 T.C. 1 (2012) (even though children became U.S. citizens in 2007 (year returns were filed), dependency exemption disallowed for petitioners' children who were not naturalized during tax years at issue (2004 through 2006)).

[724] §152(b)(3)(B); Reg. §1.152-2(a)(2)(iii); Prop. Reg. §1.152-1(a)(2)(iii).

[725] §152(b)(3)(B)(i); Prop. Reg. §1.152-1(a)(2)(iii).

[726] Prop. Reg. §1.152-1(a)(2)(iii).

[727] Prop. Reg. §1.152-1(a)(2)(iii).

[728] §152(b)(3)(B)(ii); Prop. Reg. §1.152-1(a)(2)(iii).

[729] *Hoyle v. Commissioner*, 29 T.C.M. 760, 761 (1970).

[730] *Fila v. Commissioner*, 55 T.C.M. 1, 2 (1988).

[731] *Habeeb v. Commissioner*, 559 F.2d 435, 437 (5th Cir. 1977), *aff'g* 35 T.C.M. 1134 (1976); *Wexler v. Commissioner*, 33 T.C.M. 560, 562 (1974), *aff'd*, 507 F.2d 843 (6th Cir. 1974).

[732] *Carlebach v. Commissioner*, 139 T.C. 1 (2012).

[733] *Carlebach v. Commissioner*, 139 T.C. 1 (2012).

[734] *Carlebach v. Commissioner*, 139 T.C. 1 (2012) (while children may have derived their citizenship from status of their mother and grandparents as citizens, they did not become citizens until they were in U.S. in 2007 and 2008 and fulfilled conditions of 8 U.S.C. §1433).

[735] Rev. Rul. 55-413.

[736] *Tseng v. Commissioner*, 67 T.C.M. 2501 (1994), *aff'd in unpub. op.*, 79 F.3d 1154 (9th Cir. 1996); *Dumdeang v. Commissioner*, 739 F.2d 452, 454 (9th Cir. 1984), *aff'g* 46 T.C.M. 1237 (1983); *Habeeb v. Commissioner*, 559 F.2d 435, 437 (5th Cir. 1977), *aff'g* 35 T.C.M. 1134 (1976); *Wexler v. Commissioner*, 33 T.C.M. 560, 561–62 (1974), *aff'd*, 507 F.2d 843 (6th Cir. 1974); *Barr v. Commissioner*, 51 T.C. 693, 696 (1969); *Bakler v. Commissioner*, 33 T.C.M. 607, 609 (1974).

[737] *Hsu v. Commissioner*, 43 T.C.M. 446, 447 (1982).

[738] *Pike-Biegunski v. Commissioner*, 48 T.C.M. 219, 221 (1984).

[739] §152(c)(1); Prop. Reg. §1.152-2(a).

[740] §152(c)(1)(A); Prop. Reg. §1.152-2(b).

[741] §152(c)(1)(B); Prop. Reg. §1.152-2(c).

[742] §152(c)(1)(C); Prop. Reg. §1.152-2(d).

[743] §152(c)(1)(D); Prop. Reg. §1.152-2(e). *See Kho v. Commissioner*, T.C. Summ. Op. 2019-18 (foster children who did not have same place of abode as the taxpayer for more than one half of tax year, and for whom taxpayer did not provide more than one half of support for calendar year in which tax year begins were not eligible qualifying children or qualifying relatives).

[744] §152(c)(1)(E); Prop. Reg. §1.152-2(f).

[745] Notice 2008-5. *See also* Prop. Reg. §1.152-1(a)(2)(i), which would adopt the rule in Notice 2008-5.

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- a child of the taxpayer;
- a descendant of a child of the taxpayer;
- a brother, sister, stepbrother, or stepsister of the taxpayer; or
- a descendant of a brother, sister, stepbrother, or stepsister of the taxpayer.[746]

Qualification as a "child" for purposes of the dependency exemption is discussed in detail at III.B.3.f., below.

(3) Age Requirement

The age requirements is met if an individual satisfies any one of three tests, so long as the taxpayer claiming the individual as a qualifying child is older than the child.[747] The first test is met if the individual has not attained the age of 19 as of the close of the calendar year in which the tax year of the taxpayer begins.[748] The second test is met if the individual is a student who has not attained the age of 24 as of the close of the calendar year in which the tax year of the taxpayer begins.[749] The third test is met if the individual is permanently and totally disabled[750] at any time during the calendar year in which the tax year of the taxpayer begins.[751] The IRS has ruled that, for these purposes, a child attains a particular age on the child's birthday.[752] In addition to satisfying one of the three tests above, a taxpayer claiming the individual as a qualifying child must also be older than the child.[753]

Example (1) — A is a calendar-year taxpayer whose child turns 18 years of age on January 2, 20X6. The child is not a student. Assuming that the other dependency exemption requirements are met and that the exemption is available for 20X6, A is able to claim the child as a dependent for that tax year.

Example (2) — A is a calendar-year taxpayer whose child turns 19 years of age on January 2, 20X6. The child is not a student. A is not able to claim the child as a dependent for 20X6 because the child turned 19 as of the close of the calendar year (December 31, 20X6) in which the tax year begins.

Example (3) — A is a calendar-year taxpayer whose child turns 19 years of age on January 2, 20X6. The child is a student. Assuming that the other dependency exemption requirements are met and that the exemption is available for 20X6, A is able to claim the child as a dependent for that tax year.

[746] §152(c)(2); Prop. Reg. §1.152-2(b).
[747] §152(c)(3); Prop. Reg. §1.152-2(d).
[748] §152(c)(3)(A)(i).
[749] §152(c)(3)(A)(ii).
[750] *See* §22(e)(3).
[751] §152(c)(2)(B).
[752] Rev. Rul. 2003-72.
[753] §152(c)(3).

(4) Same Principal Place of Abode (Residency Requirement)

To meet the residency requirement, the individual must have the same principal place of abode as does the taxpayer for more than one-half of the tax year. A person's "principal place of abode" is the primary or main home or dwelling where the person resides. Proposed regulations issued in 2017, which taxpayers may apply in any open tax years pending the issuance of final regulations, would clarify that a person's principal place of abode may change during the tax year and may be temporary lodging, such as a homeless shelter or disaster relief shelter.[754]

The taxpayer and a child have the same principal place of abode despite a temporary absence by either person because of special circumstances.[755] The 2017 proposed regulations would provide that an absence is temporary if the person would have resided at the place of abode but for the absence and, under the facts and circumstances, it is reasonable to assume that the person will return to reside at the place of abode. For example, a temporary failure to occupy the abode because of illness, education, business, vacation, military service, institutionalized care for a child who is totally and permanently disabled, or incarceration may be treated as a temporary absence because of special circumstances. If an infant must remain in a hospital for a period of time after birth and would have resided with the taxpayer during that period but for the hospitalization, the infant is treated as having the same principal place of abode as the taxpayer during the period of hospitalization.[756]

Under the proposed regulations an individual would be treated as having the same principal place of abode as the taxpayer for more than one-half of the tax year if the individual resides with the taxpayer for at least 183 nights during the taxpayer's tax year or for at least 184 nights during the taxpayer's tax year that includes a leap day (residing for more than one-half of the tax year).[757] The proposed regulations would further provide that an individual resides with the taxpayer for a night if the individual sleeps (1) at the taxpayer's residence, or (2) in the company of the taxpayer when the individual does not sleep at the taxpayer's residence (for example, when the parent and the child are on vacation). Under the proposed regulations, for purposes of determining whether an individual resides with the taxpayer for more than one-half of the tax year, an individual would reside with a taxpayer for a night if the individual sleeps (1) at the taxpayer's principal place of abode, whether or not the taxpayer is present; or (2) in the company of the taxpayer when the individual does not sleep at the taxpayer's principal place of abode (for example, when the taxpayer and the individual are on vacation). If an individual resides with a taxpayer for a night that extends over two tax years, that night would be allocated to the tax year in which the night begins. If, in a calendar year, because of a taxpayer's nighttime work schedule, an individual resides for at least 183 days, or 184 days if the tax year includes a leap day, but not nights with the taxpay-

[754] Prop. Reg. §1.152-4(c)(1).
[755] Reg. §1.152-1(b); Prop. Reg. §1.152-4(c)(2). Taxpayers may apply the proposed regulations in any open tax years pending the issuance of revised final regulations.
[756] Prop. Reg. §1.152-4(c)(2).
[757] Prop. Reg. §1.152-4(c)(3)(i).

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er, the individual would be treated as residing with the taxpayer for more than one-half of the tax year. An individual who does not reside with a taxpayer for a night because of a temporary absence as described above would be treated as residing with the taxpayer for that night if the individual would have resided with the taxpayer for that night but for the absence.[758]

Example 1: B and C are the divorced parents of Child. In a given tax year, Child sleeps at B's principal place of abode for 210 nights and at C's principal place of abode for 155 nights. Child resides with B for at least 183 nights during the tax year and has the same principal place of abode as B for more than one-half of the tax year.[759]

Example 2: D and E are the divorced parents of Child, and Grandparent is E's parent. In a given tax year, Child resides with D for 140 nights, with E for 135 nights, and with Grandparent for the last 90 nights of the year. None of these periods is a temporary absence. Child does not have the same principal place of abode as D, E, or Grandparent for more than one-half of the tax year.[760]

Example 3: The facts are the same as in Example 2, except that, for the 90-day period that Child lives with Grandparent, E is temporarily absent on military service. Child would have lived with E if E had not been absent during that period. Child is treated as residing with E for 225 nights in the tax year and, therefore, Child has the same principal place of abode as E for more than one-half of the tax year.[761]

Example 4: The facts are the same as in Example 2, except that, for the last 90 days of the year Child, who is 18, moves into Child's own apartment and begins full-time employment. Because Child's absence is not temporary, Child is not treated as residing with D or E for the 90 nights. Child does not have the same principal place of abode as D or E for more than one-half of the tax year.[762]

Example 5: F and G are the divorced parents of Child. In a given tax year, Child sleeps at F's principal place of abode for 170 nights and at G's principal place of abode for 170 nights. Child spends 25 nights of the year away from F and G at a summer camp. Child would have spent those nights with F if Child had not gone to summer camp. Child is treated as residing with F for 195 nights and, therefore, Child has the same principal place of abode as F for more than one-half of the tax year.[763]

Example 6: H and J are the divorced parents of Child. In a given tax year, Child sleeps at H's principal place of abode for 180 nights and at J's principal place of abode for 180 nights. For 5 nights during that year, Child sleeps at Grandparent's abode or at the house of a friend. Child would have spent all 5 nights at H's house if Child had not slept at Grandparent's or a friend's house. Child is treated as residing with H for 185 nights and, therefore, Child has the same principal place of abode as H for more than one-half of the tax year.[764]

Under the proposed regulations, if a child is born or dies during a taxpayer's tax year, the residency requirement for a qualifying child would be treated as met if the taxpayer and the child have the same principal place of abode for more than one-half of the portion of the tax year during which the child is alive. If a child is born or dies during a taxpayer's tax year, the relationship requirement for a qualifying relative who is a member of the taxpayer's household would be treated as met if the taxpayer and the child have the same principal place of abode for the entire portion of the tax year during which the individual is alive.[765]

If, during a taxpayer's tax year, the taxpayer adopts a child, a child is lawfully placed with a taxpayer for legal adoption by that taxpayer, or an eligible foster child is placed with a taxpayer, the residency requirement for a qualifying child and the residency requirement for a child who is not a citizen or national of the United States would be treated as met if the taxpayer and the child have the same principal place of abode for more than one-half of the portion of the tax year as required for a qualifying child, or for the entire tax year as required for a noncitizen, following the placement of the child with the taxpayer.[766]

A qualified kidnapped child is treated as having the same principal place of abode as the taxpayer.[767] A qualified kidnapped child is a child of the taxpayer who satisfies two conditions.[768] First, the child must be presumed by law enforcement authorities to have been kidnapped by someone who is not a member of the child's family or the taxpayer's family.[769] Second, the child must have had, for the tax year in which the kidnapping occurred, the same principal place of abode as did the taxpayer for more than one-half of the portion of the year before the date of the kidnapping.[770] This treatment ends as of the taxpayer's first tax year beginning after the earlier of the calendar year in which there is a determination that the child is dead or the calendar year in which the child would have attained age 18.[771]

[758] Prop. Reg. §1.152-4(c)(3)(ii).
[759] Prop. Reg. §1.152-4(c)(4) *Ex. 1.*
[760] Prop. Reg. §1.152-4(c)(4) *Ex. 2.*
[761] Prop. Reg. §1.152-4(c)(4) *Ex. 3.*
[762] Prop. Reg. §1.152-4(c)(4) *Ex. 4.*
[763] Prop. Reg. §1.152-4(c)(4) *Ex. 5.*
[764] Prop. Reg. §1.152-4(c)(4) *Ex. 6.*
[765] Prop. Reg. §1.152-4(d)(1).
[766] Prop. Reg. §1.152-4(d)(2).
[767] §152(f)(6)(A) (flush language); Prop. Reg. §1.152-4(e)(1).
[768] §152(f)(6)(A).
[769] §152(f)(6)(A)(i).
[770] §152(f)(6)(A)(ii).
[771] §152(f)(6)(D).

ISBN 978-1-55871-737-4

(5) *Two or More Taxpayers Eligible to Claim Qualifying Child (Tiebreaker Rules)*

A group of special tiebreaker rules apply if an individual is a qualifying child of two or more taxpayers for purposes of determining which taxpayer can claim the child as a dependent.[772]

Note: A parent means a biological or adoptive parent of an individual. It does not include a stepparent unless the stepparent has adopted the individual.[773]

Under these tiebreaker rules:

1. If the taxpayers who claim the child are parents of the child and the parents do not file a joint return, then the parent with whom the child lived for the longer portion of the year is entitled to the exemption.[774]

2. If the taxpayers who claim the child are parents of the child, the parents do not file a joint return, and the child lived with each one for an equal amount of time during the year, then the parent with the highest AGI for the year is entitled to the exemption.[775]

3. If only one of the taxpayers who can claim the child is a parent of the child, then the claiming parent is entitled to the exemption.[776]

4. If one or more parents can claim the child but do not, and two or more nonparent taxpayers can claim the child, then the nonparent taxpayer with the highest AGI for the year is entitled to the exemption if his or her AGI is higher than the highest AGI of any parent who can claim the child.[777]

5. If no parent can claim the child but two or more nonparent taxpayers can claim the child, the taxpayer with the highest AGI is entitled to the exemption.[778]

Subject to the operation of the tiebreaker rules, the taxpayers may decide among themselves which one of them will treat the child as a qualifying child.[779] For a detailed discussion, see III.B.3.h.(4), below.

Comment: A child is a qualifying child of the selected taxpayer not only for purposes of the dependency exemption deduction, but also for purposes of the child tax credit, determination of qualification for head of household filing status, the child and dependent care credit, and the earned income tax credit.[780] It is impermissible for one taxpayer to claim the child as a qualifying child for dependency exemption deduction purposes and for another taxpayer to claim the child for other purposes (outside of the §152(e) exception for divorced or separated parents, which may peel off the dependency exemption and child tax credit for the noncustodial parent).[781] In contrast, if two or more children are qualifying children with respect to two or more taxpayers, the taxpayers can choose to have one child be the qualifying child of one taxpayer for all purposes, the second child to be the qualifying child of the second taxpayer for all purposes, and so on.[782]

> *Example 1:* C, a nine-year old, resides for the entire year with M, her divorced mother, G, her grandmother, the mother of M, and U, her uncle, the brother of M. C satisfies the age requirement condition. C does not provide more than one-half of her own support. C satisfies the qualifying child relationship condition with respect to M because she is the child of M, with respect to G because she is a descendant of G's child, and with respect to U because she is the child of U's sister. G and U have adjusted gross incomes higher than M's adjusted gross income. M, G and U may agree among themselves which of them will treat C as his or her qualifying child and claim the dependency exemption deduction.[783]

> *Example 2:* Refer to *Example 1.* Assume that G's adjusted gross income is lower than M's adjusted gross income. G is not permitted to claim C as a qualifying child.

> *Example 3:* Refer to *Example 1.* Ignore *Example 2.* Assume M, G, and U do not reach an agreement and that each one claims a dependency exemption deduction with respect to C. M's deduction would be upheld and those claimed by G and U would be disallowed.

> *Example 4:* Refer to *Example 1.* Ignore *Example 2* and *Example 3.* Assume M does not claim a dependency exemption with respect to C, and that G and U fail to agree among themselves which of them will treat C as his or her qualifying child and claim the dependency exemption deduction. Assume that U's adjusted gross income is higher than G's adjusted gross income. U's deduction would be upheld and the one claimed by G would be disallowed.

> *Example 5:* Refer to *Example 1.* Ignore *Example 2* through *Example 4.* Assume that D, M's seven-year old child, also resides with M, G, and U for the entire year. D satisfies the age requirement condition. D does not provide more

[772] §152(c)(4); Prop. Reg. §1.152-2(g).
[773] Prop. Reg. §1.152-1(b)(4).
[774] Prop. Reg. §1.152-2(g)(1)(i), §1.152-4(c)(3).
[775] Prop. Reg. §1.152-2(g)(1)(i).
[776] Prop. Reg. §1.152-2(g)(1)(iii).
[777] Prop. Reg. §1.152-2(g)(1)(ii).
[778] Prop. Reg. §1.152-2(g)(1)(iv). The proposed regulations, which taxpayers may apply to any open tax years pending issuance of final regulations, would change the interpretation in IRS Pub. 501, *Dependents, Standard Deduction, and Filing Information*, regarding a taxpayer's adjusted gross income on a joint return. Under Prop. Reg. §1.152-2(g)(2), in applying the §152(c)(4) tiebreaker rules that treat an individual as the qualifying child of the eligible taxpayer with the higher or highest adjusted gross income, the adjusted gross income of a taxpayer who files a joint tax return is the total adjusted gross income shown on the return. Prop. Reg. §1.152-2(g)(2). This interpretation is consistent with other Code sections that require the filing of a joint return to claim a benefit and the calculation of income based on the entire amount shown on the joint return.
[779] *See* H.R. Rep. No. 696, 108th Cong., 2d Sess. 64–65 (2004) (Conf. Rep.); IRS Pub. 17, *Your Federal Income Tax.*
[780] Prop. Reg. §1.152-2(g)(3).
[781] Notice 2006-86; Prop. Reg. §1.152-2(g)(3).
[782] Notice 2006-86.
[783] See Prop. Reg. §1.152-2(g)(4) for additional examples illustrating the determination of who may claim the dependency exemption where a child is eligible to be claimed as a qualifying child by more than one taxpayer. Taxpayers may apply the proposed regulations to any open tax years pending the issuance of final regulations.

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than one-half of her own support. D satisfies the qualifying child relationship condition with respect to M because she is the child of M, with respect to G because she is a descendant of G's child, and with respect to U because she is the child of U's sister. M, G, and U may agree, for example, that M will claim a dependency exemption with respect to C and that U will claim one with respect to D.

d. Qualifying Relative

(1) In General

A qualifying relative, with respect to any taxpayer for any tax year, is an individual who satisfies four conditions.[784] First, the individual must bear a qualifying relative relationship to the taxpayer.[785] Second, the individual's gross income for the calendar year in which the taxpayer's tax year begins must be less than the exemption amount.[786] Third, more than one-half of the individual's support for the calendar year in which the taxpayer's tax year begins must be provided by the taxpayer.[787] Fourth, the individual must not be a qualifying child of the taxpayer or of any other taxpayer for any tax year beginning in the calendar year in which the taxpayer's tax year begins.[788] For purposes of the fourth condition, the IRS does not treat an individual as a qualifying child of another taxpayer if that other taxpayer is not required to file an income tax return, a position described with approval by the Tax Court.[789]

Note: A taxpayer who claims an individual as a qualifying relative, but not as a qualifying child, may not use that individual for purposes of claiming the earned income tax credit because that credit requires the taxpayer's dependent to be a qualifying child. The same conclusion and reasoning apply to the child tax credit. Likewise, the taxpayer may not file as a head of household unless the individual has the required familial relationship to the taxpayer. The taxpayer may not claim the qualifying relative for purposes of the dependent care credit unless the qualifying relative is physically or mentally disabled.[790]

(2) Qualifying Relative Relationship

(a) In General

A qualifying relative relationship exists if the individual is any of the following:

- a child of the taxpayer;
- a descendant of a child of the taxpayer;
- a brother, sister, stepbrother, or stepsister of the taxpayer;
- the father or mother of the taxpayer;
- an ancestor of the father or mother of the taxpayer;
- a stepfather or stepmother of the taxpayer;
- a son or daughter of a brother or sister of the taxpayer;
- a brother or sister of the father or mother of the taxpayer;
- a son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer; or
- an individual who meets the household test, described in III.B.3.d.(2)(d), below.[791] [792]

Observation: An individual who is a taxpayer's child, but who is not a qualifying child of the taxpayer or of any other taxpayer is a qualifying relative of the taxpayer if the gross income and support conditions are satisfied. This situation can arise, for example, if the child is not a qualifying child because he or she does not satisfy the principal place of abode condition test or the age requirement condition.

A qualified kidnapped child is treated as a qualifying relative of the taxpayer for all tax years ending during the period that the child is kidnapped.[793] A qualified kidnapped child is also treated as a qualifying relative of the taxpayer in the year of the child's return if the child is a qualifying relative of the taxpayer for the portion of the tax year following the date of the child's return.[794] A qualified kidnapped child is a child of the taxpayer who satisfies two conditions.[795] First, the child must be presumed by law enforcement authorities to have been kidnapped by someone who is not a member of the child's family or the taxpayer's family.[796] Second, the child must otherwise have been a qualifying relative of the taxpayer for the portion of the tax year before the date of the kidnapping.[797] This treatment ends on the taxpayer's first tax year beginning after the earlier of the calendar year in which there is a determination that the child is dead or the calendar year in which the child would have attained age 18.[798]

Once a relationship is established by affinity, it is not terminated by divorce or death of the spouse with respect to whom the relationship condition was satisfied by the individual.[799] But if the relationship did not come into existence during the joint lifetime of the spouses, it cannot come into existence thereafter.[800]

Example (1): H and W are married and file joint returns. In a given tax year, H provided all of the support for W's sister, S, and her husband, T, both of whom are citizens and neither of whom have gross income. S and T are in their fifties, and thus are not qualifying children of H. In that same tax year, W and S are killed in an automobile accident. H continues to provide all of the support for T. In an applicable tax year, H is allowed to claim a dependency

[784] §152(d)(1); Prop. Reg. §1.152-3(a).
[785] §152(d)(1)(A); Prop. Reg. §1.152-3(b).
[786] §152(d)(1)(B); Reg. §1.151-2(a); Prop. Reg. §1.152-3(c)(1). *See, e.g., Douglas v. Commissioner*, 86 F.3d 1161 (9th Cir. 1996), *aff'g* 68 T.C.M. 963 (1994).
[787] §152(d)(1)(C); Prop. Reg. §1.152-3(d).
[788] §152(d)(1)(D); Prop. Reg. §1.152-3(e).
[789] *See* Notice 2008-5; Reg. §1.152-3(e)(1); *Leonard v. Commissioner*, T.C. Summ. Op. 2008-141.
[790] CCA 200812024.
[791] §152(d)(2); Prop. Reg. §1.152-3(b).
[792] §152(d)(2)(H); Prop. Reg. §1.152-3(b)(8).
[793] §152(f)(6)(C) (flush language); Prop. Reg. §1.152-4(e)(2).
[794] Prop. Reg. §1.152-4(e)(2).
[795] §152(f)(6)(C); Prop. Reg. §1.152-4(e)(2).
[796] §152(f)(6)(C); Prop. Reg. §1.152-4(e)(2).
[797] §152(f)(6)(C); Prop. Reg. §1.152-4(e)(2).
[798] §152(f)(6)(D); Prop. Reg. §1.152-4(e)(3).
[799] Reg. §1.152-2(d); Prop. Reg. §1.152-4(b)(2).
[800] Rev. Rul. 71-72.

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exemption for T, even though T was W's brother-in-law, but is not H's brother-in-law, because T is a qualifying relative, having satisfied the relationship, gross income, support and not a qualifying child conditions.

Example (2): H and W marry in Year 1 and file joint returns. In Year 2, W dies, and W's sister S marries T, a citizen who is 45 years old. In Year 3, S dies. In Year 4, H provides all of the support for T, who has no gross income. Because T is 45 years old, T is not a qualifying child. T is not a qualifying relative because T was never the brother-in-law of H or W. Thus, H is not allowed to claim a dependency exemption for T.

(b) Dependents of Spouses

Observation: Under the law applicable before the 2004 legislation changed the definition of dependent, in the case of a joint return, it did not matter that an individual satisfied the relationship condition with respect to one spouse and the support condition with respect to the other spouse.[801] Presumably, therefore, a person can be a qualifying relative even if the relationship condition is satisfied with respect to one spouse and the support condition is satisfied with respect to the other spouse.

Comment: The pre-2004 case law that presumably continues to apply provides that if the spouses file separate returns, they can agree to divide the dependency exemptions between themselves.[802] If the spouses are entitled to dependency exemptions, one spouse may claim them if the other spouse has failed to do so.[803]

(c) Determination of Particular Relationships

A brother or a sister includes a brother or sister by the half-blood.[804] Although a half-sister is treated as a sister, when the IRS produces documentation from a state that lists different parents for the purported half-sister than those identified for the taxpayer, the taxpayer cannot treat the alleged half-sister as a sister, nor that person's children as descendants of a sister, if the taxpayer's only evidence is undocumented hearsay that the taxpayer and the other person were children of the same father, the taxpayer's birth certificate does not name a father, and the alleged half-sister's birth certificate does not name parents.[805]

A parent means a biological or adoptive parent of an individual. It does not include a stepparent unless the stepparent has adopted the individual.[806]

In determining whether a qualifying relative relationship exists, a legally adopted child of an individual, or a person who is lawfully placed with an individual for legal adoption by the individual, is treated as a child of the individual by blood.[807] However, the cousin of the taxpayer's wife is not the taxpayer's sister-in-law merely because the cousin's parents informally adopted the taxpayer's wife.[808]

An individual who does not meet the household test does not satisfy the qualifying relative relationship condition if the individual is a cousin,[809] the spouse of a stepchild,[810] the child of a stepchild,[811] a foster parent,[812] the child of a nephew,[813] the child of a niece,[814] the nephew or niece of a spouse,[815] the spouse of an aunt or uncle,[816] the aunt or uncle of a spouse,[817] a fiancée,[818] the unadopted children of a girlfriend,[819] the unadopted children of a fiancée,[820] the unadopted children of a former live-in partner,[821] or some other person not a relative.[822] An organization can never be a dependent.[823]

The Tax Court has held that individuals are not treated as the taxpayer's parents-in-law or stepchildren if they are related through a second marriage and the divorce terminating the first marriage is invalid under state law.[824] The Second Circuit, though, reversed the Tax Court in one of the cases in which it so held, and treated the state court determination of the invalidity of the divorce decree as not binding for federal tax purposes.[825]

(d) Household Test

(i) In General

To be a qualifying relative, an individual must, among other requirements, be a member of the taxpayer's household for the taxpayer's tax year.[826] The individual must be a member of the taxpayer's household for the entire year.[827] An individual is a member of a taxpayer's household if the individual and the taxpayer reside in the same living quarters and the taxpayer

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[801] *See* Reg. §1.152-2(d); Prop. Reg. §1.152-4(b).

[802] *See Rakosi v. Commissioner*, 55 T.C.M. 578, 581 (1988), *aff'd by unpub. op.* (9th Cir. 1990).

[803] *Haseltine v. Commissioner*, 38 T.C.M. 1259, 1264 (1979).

[804] §152(f)(4); Prop. Reg. §1.152-1(b)(3).

[805] *Redmond v. Commissioner*, 96 T.C.M. 414 (2008).

[806] Prop. Reg. §1.152-1(b)(4).

[807] §152(f)(1)(B); Prop. Reg. §1.152-1(b)(1)(ii).

[808] *Bidinian v. Commissioner*, 28 T.C.M. 747, 748 (1969).

[809] *Feldman v. Commissioner*, 26 T.C.M. 444, 446 (1967); *Pettigrew v. Commissioner*, 24 T.C.M. 745, 747 (1965); *Brown v. Commissioner*, 13 T.C.M. 1115, 1116 (1954). *See Keegan v. Commissioner*, 74 T.C.M. 1183 (1997).

[810] *Barbetti v. Commissioner*, 9 T.C. 1097, 1098 (1947).

[811] *Barbetti v. Commissioner*, 9 T.C. 1097, 1098 (1947).

[812] *Bentley v. Commissioner*, 56 T.C.M. 215 (1988), *aff'd by unpub. op.* (9th Cir. 1990); *Frank v. Commissioner*, 15 T.C.M. 1233, 1234 (1956); *Doty v. Commissioner*, 11 T.C.M. 1088, 1089 (1952).

[813] *Bye v. Commissioner*, 31 T.C.M. 238, 239 (1972); *Tilney v. Commissioner*, 182 F.2d 1009 (5th Cir. 1950) (per curiam).

[814] *Bye*, 31 T.C.M. at 239; *Herbert v. Commissioner*, 12 T.C.M. 82, 83 (1953).

[815] *Grossman v. Commissioner*, 26 T.C. 234, 236 (1956); *McCann v. Commissioner*, 12 T.C. 239, 241 (1949).

[816] *Koester v. Commissioner*, 23 T.C. 515 (1954).

[817] *Bates v. Commissioner*, 15 T.C.M. 47, 59 (1956).

[818] *Beale v. Commissioner*, 79 T.C.M. 2001 (2000).

[819] *Butler v. Commissioner*, 76 T.C.M. 601 (1998).

[820] *Butler v. Commissioner*, 76 T.C.M. 601 (1998).

[821] *See Merriweather v. Commissioner*, 84 T.C.M. 294 (2002).

[822] *Aruai v. Commissioner*, 91 T.C.M. 1165 (2006); *White v. Commissioner*, 37 T.C.M. 1147, 1152 (1978); *Ford v. Commissioner*, 8 T.C.M. 238, 239 (1949).

[823] *Tranquilli v. Commissioner*, 39 T.C.M. 874, 877 (1980).

[824] *Estate of Borax v. Commissioner*, 40 T.C. 1001, 1010 (1963), *rev'd*, 349 F.2d 666 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966); *Estate of Buckley v. Commissioner*, 37 T.C. 664, 673 (1962).

[825] *Estate of Borax*, 349 F.2d at 670.

[826] §152(d)(2)(H); Reg. §1.152-3(b)(8).

[827] *Douglas v. Commissioner*, 86 F.3d 1161 (9th Cir. 1996), *aff'g* 68 T.C.M. 963 (1994); *Trowbridge v. Commissioner*, 30 T.C. 879, 880 (1958), *aff'd per curiam*, 268 F.2d 208 (9th Cir. 1959); Rev. Rul. 76-35.

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maintains the household, in part, for the benefit of the individual. An individual is a member of a taxpayer's household despite a temporary absence due to special circumstances, but is not a member of the taxpayer's household if, at any time during the taxpayer's tax year, the relationship between the individual and the taxpayer violates local law.[828]

It is not necessary that the taxpayer and the individual be related.[829] It does not matter whether the taxpayer or the individual owns the home,[830] but the home must be maintained as the taxpayer's household.[831]

(ii) Occupation and Maintenance

The household test is not met unless the taxpayer both maintains and occupies the household.[832] The taxpayer and the individual are treated as occupying the household for the entire tax year, notwithstanding temporary absences from the household due to special circumstances.[833] A nonpermanent failure to occupy the household because of illness, education, business, vacation, military service, or a custody agreement under which the individual is absent for less than six months during the taxpayer's tax year, is considered a temporary absence due to special circumstances.[834] Indefinite confinement to a nursing home because of illness requiring constant medical care also constitutes a temporary absence due to special circumstances.[835]

Note: Under proposed regulations issued in 2017, the "less than six months" requirement is eliminated and replaced with a "reasonable to assume the person will return" requirement. That is, under the proposed rule, a taxpayer and an individual have the same principal place of abode despite a temporary absence by either person due to special circumstances, and the absence is temporary if, based on the facts and circumstances, the person would have resided with the taxpayer but for the temporary absence and it is reasonable to assume the person will return to reside with the taxpayer.[836]

An individual who dies during the taxpayer's tax year meets the household test if the individual meets the household test for the entire portion of the tax year before death.[837] An individual who is born during the taxpayer's tax year meets the household test if the individual meets the household test for the entire portion of the tax year after being born.[838] A child who becomes a member of the taxpayer's household during the tax year does not fail to meet the household test solely because the child is required to remain in a hospital for a period following its birth if the child otherwise would meet the household test.[839]

(iii) Exceptions

(A) Spouse

An individual who at any time during the tax year was the taxpayer's spouse without regard to the marital status rules of §7703 cannot meet the household test.[840] This exception has been applied to a man and a married and undivorced woman living together as husband and wife.[841] It also has been applied to a person who was not the taxpayer's spouse because the marriage was invalid, but who lived with the taxpayer as a spouse.[842]

(B) Relationship Violating Local Law

An individual is not considered to be a member of the taxpayer's household if at any time during the tax year of the taxpayer the relationship between the taxpayer and the individual violates local law.[843] Although the taxpayers in several Tax Court cases were not allowed to claim a dependency exemption for live-in companions, because the state did not recognize common law marriage and prohibited unmarried intimate relationships,[844] in *Burrell v. Commissioner*,[845] the Tax Court allowed dependency exemptions for the taxpayer's live-in girlfriend and her two children. A bankruptcy court reached the same conclusion as was reached in *Burrell*.[846] In *Kieffer v. Commissioner*,[847] the Tax Court allowed the taxpayer to claim a dependency exemption for his ex-wife, holding that she was not an employee, as the IRS contended, because she and the taxpayer had another child after she moved in.

(C) Employees

An individual who resides in the taxpayer's residence to provide services is not a member of the taxpayer's household.[848]

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[828] Prop. Reg. §1.2-2(c) (incorporated by reference in Prop. Reg. §1.152-3(b)(8)).

[829] Reg. §1.152-1(b); Prop. Reg. §1.2-2(c) (incorporated by reference in Prop. Reg. §1.152-3(b)(8)).

[830] Rev. Rul. 64-41.

[831] *Bombarger v. Commissioner*, 31 T.C. 473, 476 (1958).

[832] Reg. §1.152-1(b); Prop. Reg. §1.2-2(c) (incorporated by reference in Prop. Reg. §1.152-3(b)(8)).

[833] Reg. §1.152-1(b); Prop. Reg. §1.2-2(c) (incorporated by reference in Prop. Reg. §1.152-3(b)(8)).

[834] Reg. §1.152-1(b), §1.152-2(a)(2)(ii); Prop. Reg. §1.152-4(c)(2). *E.g., Dollar v. Commissioner*, 30 T.C.M. 752, 755 (1971).

[835] Rev. Rul. 66-28.

[836] Prop. Reg. §1.152-4(c)(2).

[837] Reg. §1.152-1(b); Prop. Reg. §1.152-4(d)(1).

[838] Reg. §1.152-1(b); Prop. Reg. §1.152-4(d)(1).

[839] Reg. §1.152-1(b); Prop. Reg. §1.152-4(c)(2).

[840] §152(d)(2)(H); Reg. §1.152-1(b). *See Jamieson v. Commissioner*, 33 T.C.M. 964, 966 (1974), *aff'd by unpub. op.* (7th Cir. 1975), *cert. denied*, 423 U.S. 1009 (1975) (reaching same result before enactment of statute expressly so providing).

[841] *Turnipseed v. Commissioner*, 27 T.C. 758, 760 (1957); *Davis v. Commissioner*, 23 T.C.M. 1099, 1100 (1964).

[842] *Untermann v. Commissioner*, 38 T.C. 93, 97 (1962); *Estate of Buckley v. Commissioner*, 37 T.C. 664, 673 (1962).

[843] §152(f)(3); Reg. §1.152-1(b); Prop. Reg. §1.2-2(c) (incorporated by reference in Prop. Reg. §1.152-3(b)(8)).

[844] *Peacock v. Commissioner*, 37 T.C.M. 177, 182 (1978), *appeal dismissed* (9th Cir. 1980); *Ensminger v. Commissioner*, 36 T.C.M. 934, 935 (1977), *aff'd*, 610 F.2d 189 (4th Cir. 1979), *cert. denied*, 446 U.S. 941 (1980); *Martin v. Commissioner*, 32 T.C.M. 656, 658 (1973); *Eichbauer v. Commissioner*, 30 T.C.M. 581, 582 (1971). *See Jund v. Commissioner*, 22 T.C.M. 334, 336 (1963). *But see Woolsey v. Commissioner*, T.C. Summ. Op. 2017-62, where the court held that taxpayers could not claim dependency exemptions for their daughter or her three children, despite providing over half of their support and housing for the tax year in question because the court found, under Texas law, that the daughter was in a common-law marriage and had filed a tax return with filing status of married filing jointly claiming her children as dependents.

[845] 59 T.C.M. 507 (1990).

[846] *In re Shackelford*, 80-1 USTC ¶9276 (D. Mo. 1980).

[847] 53 T.C.M. 681 (1987).

[848] *Hamilton v. Commissioner*, 34 T.C. 927, 929 (1960); *Newsom v. Commissioner*, 33 T.C.M. 1188, 1189 (1974).

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(3) Gross Income Condition

(a) In General

(i) Definition

For purposes of determining if the gross income condition is satisfied, a person's gross income is determined in the same manner as it is for any taxpayer. Gross income is discussed in 501 T.M., *Gross Income: Overview and Conceptual Aspects.*

(ii) Specific Types for Dependency Exemption Purposes

Gross income includes such items as interest,[849] rental income,[850] gain from the sale of the dependent's property,[851] lottery prizes,[852] pensions,[853] nonexcludible pension plan distributions,[854] annuity payments exceeding the contributions of the purchaser,[855] and trust income.[856] Gross income from rents equals gross rents, not net rents.[857] Gross income includes trust income includible in the person's income even if it is not distributed by the trust.[858] Gross income does not include garbage collected by the person to feed hogs kept by the person for food.[859]

(iii) Sources

The gross income of a person who is a partner in a partnership is the person's share of the partnership gross income.[860] Gross income received by a tenant in common cannot be reattributed to other tenants in common.[861]

A person does not satisfy the gross income condition, and thus cannot be claimed as a qualifying relative, if there is attributed to the person under community property laws a portion of the earnings of the person's spouse that exceeds the exemption amount.[862]

(iv) Cost of Goods Sold and Deductions

Gross income is determined with regard to cost of goods sold, if the person's business is a manufacturing, merchandising, or mining business.[863] Gross income is determined without deductions for depreciation.[864]

(b) Income of Handicapped Persons

(i) In General

In determining whether the gross income of a person is less than the exemption amount, sheltered workshop gross income is disregarded.[865] Sheltered workshop gross income is the gross income of a permanently and totally disabled individual attributable to services performed by the individual at a sheltered workshop if two conditions are satisfied.[866] First, the availability of medical care at the workshop must be the principal reason for the individual's presence there.[867] Second, the income must arise solely from activities at the workshop incident to the medical care.[868]

(ii) Sheltered Workshop

A sheltered workshop is a school that satisfies two conditions.[869] First, the school must provide special instruction or training designed to alleviate the disability of the individual.[870] Second, the school must be operated by a §501(c)(3) tax-exempt organization or by a state, a U.S. possession, a political subdivision of a state or U.S. possession, the United States, or the District of Columbia.[871]

(iii) Permanently and Totally Disabled

An individual is permanently and totally disabled if he or she is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months.[872] An individual is not considered to be permanently and totally disabled unless proof of the existence of the impairment is provided to the IRS, in the form and manner required for purposes of the credit for the permanently and totally disabled.[873]

(c) Proof

The taxpayer has the burden of proving that the person's gross income does not exceed the exemption amount.[874] If the taxpayer fails to satisfy that burden, the dependency exemption is disallowed.[875] The taxpayer's burden of proof is not satisfied if the stipulated facts do not establish that the person's gross in-

[849] *Carito v. Commissioner*, 54 T.C. 1614, 1616 n. 3 (1970); *Shemerdiak v. Commissioner*, 22 T.C.M. 1194, 1195 (1963).

[850] *Bonkowski v. Commissioner*, 29 T.C.M. 1645, 1651 (1970), *aff'd on other issues*, 458 F.2d 709 (7th Cir. 1972), *cert. denied*, 409 U.S. 874 (1972).

[851] *Estate of Schenck v. Commissioner*, 20 T.C.M. 1252, 1264 (1961); *Snyder v. United States*, 321 F. Supp. 661, 663 (D. Col. 1970), *aff'd per curiam*, 445 F.2d 319 (10th Cir. 1971).

[852] *Solomon v. Commissioner*, 25 T.C. 936, 939 (1956).

[853] *McDermid v. Commissioner*, 54 T.C. 1727, 1729 (1970); *Carito*, 54 T.C. at 1616; *Kincheloe v. Commissioner*, 30 T.C.M. 154 (1971).

[854] Rev. Rul. 55-460.

[855] *Esposito v. Commissioner*, 29 T.C.M. 1389 (1970).

[856] *Lemmon v. Commissioner*, 27 T.C.M. 503 (1968).

[857] *Gooch v. Commissioner*, 21 T.C. 481, 484 (1954).

[858] *Ledman v. Commissioner*, 29 T.C.M. 301, 302 (1970).

[859] *Hutchins v. Commissioner*, 9 T.C.M. 11, 12 (1950).

[860] *Clark v. Commissioner*, 29 T.C. 196, 198 (1957), *acq.*, 1958-1 C.B. 4; *McIntyre v. Commissioner*, 16 T.C.M. 1102, 1103 (1957).

[861] *Hahn v. Commissioner*, 22 T.C. 212, 214–15 (1954), *dismissed*, 216 F.2d 954 (1954).

[862] *Estate of Brimm v. Commissioner*, 54 T.C.M. 1521, 1528–29 (1988); *Taylor v. Commissioner*, 29 T.C.M. 610, 611 (1970); *Gatlin v. Commissioner*, 19 T.C.M. 131, 132–33 (1960).

[863] *Hahn v. Commissioner*, 30 T.C. 195, 198 (1958), *aff'd per curiam*, 271 F.2d 739 (5th Cir. 1959).

[864] *Cohen v. Commissioner*, 12 T.C.M. 1065, 1066 (1953).

[865] §152(d)(4); Prop. Reg. §1.152-3(c)(2).

[866] §152(d)(4)(A).

[867] §152(d)(4)(A)(i).

[868] §152(d)(4)(A)(ii).

[869] §152(d)(4)(B).

[870] §152(d)(4)(B)(i).

[871] §152(d)(4)(B)(ii) (reference to §501(a)).

[872] §152(d)(4)(A) (reference to §22(e)(3)).

[873] §22(e)(3).

[874] *E.g., Rensler v. Commissioner*, 9 T.C.M. 12, 13 (1950).

[875] *E.g., Counts v. Commissioner*, 42 T.C. 755, 761 (1964); *Alo v. Commissioner*, 35 T.C.M. 1795, 1798 (1976); *Hunt v. Commissioner*, 31 T.C.M. 1119, 1123 (1972); *Smith v. Commissioner*, 10 T.C.M. 306 (1951); *Manning v. United States*, 78-1 USTC ¶9426 (N.D. Ga. 1978).

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come did not exceed the exemption amount.[876] The court will not assume that a person does not have gross income.[877]

It is not sufficient to prove that the person's gross income for a portion of the tax year was less than the exemption amount;[878] nor is it sufficient to demonstrate that the person ceased receiving gross income during the tax year if the person had already received gross income during the tax year that exceeded the exemption amount.[879]

In some cases, the courts have accepted the taxpayer's contention that the person's gross income did not exceed the exemption amount, even though the taxpayer presented little in the way of satisfactory evidence.[880] The taxpayer's evidence is accepted if there is no evidence to the contrary.[881]

Thus, if the taxpayer establishes that a person is of school age, attends school for 32 weeks, and attends summer camp, the burden shifts to the IRS to demonstrate that the person's gross income exceeds the exemption amount.[882] Similarly, if there is insufficient evidence that the person was obligated on a debt, the dependent does not have cancellation of indebtedness gross income.[883]

e. Support Conditions

(1) In General

To be a qualifying child, a person must not provide more than one-half of his or her own support.[884] To be a qualifying relative of a taxpayer, the person must be provided with more than one-half of his or her support by the taxpayer for the calendar year in which the taxpayer's tax year begins.[885] The one-half is measured against actual support and not the average cost of support for a child living in the area.[886]

The more than one-half test applies to the amount of support and not to the period of time for which support is provided.[887] However, time may be a factor in determining who provided more than half of an individual's support.[888]

(2) Provided by Taxpayer

(a) Amount Taxpayer Obligated to Provide

Support is not considered provided by the taxpayer merely because the taxpayer has an obligation to provide support.[889] A court order requiring the taxpayer to pay support does not prove that the support has been paid.[890] The value of lodging that the taxpayer is morally obligated to provide to the individual but that is not used by the individual is not support provided by the taxpayer.[891] Amounts that the taxpayer has promised to provide for an individual's support but that are not paid are not amounts provided by the taxpayer for the individual's support.[892] The placement of a lien on the taxpayer's property by the state in amounts equal to foster care payments made by the state on behalf of the taxpayer's child are not amounts provided by the taxpayer to the child as support.[893]

(b) Amounts Provided by Others

Subject to the exceptions described below, governmental payments and subsidies, such as Payments of Temporary Assistance for Needy Families (TANF), low-income housing assistance, Supplemental Nutrition Assistance Program benefits (food stamps), Supplemental Security Income payments, foster care maintenance payments, and adoption assistance payments, are considered support provided by the government, not support provided by the taxpayer.[894] Thus, welfare payments received by the individual are not considered support provided by the taxpayer, even if the taxpayer is obligated to support the individual.[895] Governmental payments based on a taxpayer's earnings and contributions to the Social Security system (e.g., Social Security old age benefits) are support provided by the individual for whose benefit the payments are made, to the extent those payments are used for that individual's support. Social Security survivor and disability insurance benefits paid to, or for the benefit of, the child of a deceased or disabled parent are treated as support provided by the child to the extent those payments are used for the child's support.[896]

Proposed regulations issued in 2017, which taxpayers may apply to any open tax years pending the issuance of final regulations, would provide an exception to the general rule. Under this exception, if the recipient uses a governmental payment to support another individual, that amount would be support of that other individual provided by the recipient. Similarly, the recipient's use of governmental payments intended to support both the recipient and others to support another individual would be support of that other individual provided by the recipient, whereas any part of such a payment used for the support of the recipient would be support of the recipient by a third party.[897]

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[876] *Pietrowski v. Commissioner*, 12 T.C.M. 442, 443 (1953).

[877] *Davis v. Commissioner*, 9 T.C.M. 306, 308 (1950).

[878] *Ala'ilima v. Commissioner*, 20 T.C.M. 1096, 1098 (1961).

[879] *Sewell v. Commissioner*, 32 T.C.M. 1184, 1185 (1973).

[880] *E.g.*, *Blackwell v. Commissioner*, 15 T.C.M. 962, 981–82 (1956).

[881] *Kozeneski v. Commissioner*, 9 T.C.M. 753 (1950).

[882] *Henderson v. Commissioner*, 12 T.C.M. 643 (1953).

[883] *Rodman v. Commissioner*, 32 T.C.M. 1307, 1320 (1973), *aff'd in part and rev'd in part on other issues*, 542 F.2d 845 (2d Cir. 1976).

[884] §152(c)(1)(D).

[885] §152(d)(1)(C). *E.g.*, *Jewell v. Commissioner*, 69 T.C. 791, 802 (1978), *acq.*, 1978-1 C.B. 2; *Dillard v. Commissioner*, 47 T.C.M. 919 (1984); *Narain v. Commissioner*, 47 T.C.M. 402, 405 (1983); *Marlowe v. Commissioner*, 26 T.C.M. 80, 82 (1967). *See Von Tersch v. Commissioner*, 47 T.C. 415, 422 (1967); *Kincheloe v. Commissioner*, 30 T.C.M. 154 (1971); *Williamson v. Commissioner*, 28 T.C.M. 749 (1969); *Emmons v. Commissioner*, 20 T.C.M. 1513, 1515 (1961).

[886] *Laidlaw v. Commissioner*, 29 T.C.M. 743, 744 (1970).

[887] *Darmer v. Commissioner*, 20 T.C. 822, 825 (1953); *Thompson v. Commissioner*, 12 T.C.M. 348, 350 (1953).

[888] *See Faust v. Commissioner*, 20 T.C.M. 1035, 1036 (1961).

[889] *Donner v. Commissioner*, 25 T.C. 1043, 1044 (1956); *Nevel v. Commissioner*, 8 T.C.M. 25 (1949).

[890] *Kennedy v. Commissioner*, 339 F.2d 335, 337 (7th Cir. 1964); *Seese v. Commissioner*, 21 T.C.M. 601, 602 (1962).

[891] *Chandler v. Commissioner*, 29 T.C.M. 263, 264 (1970).

[892] Rev. Rul. 67-61, *clarifying* Rev. Rul. 58-404.

[893] *Gestrich v. Commissioner*, 74 T.C. 525, 528 (1980), *aff'd by unpub. op.*, 681 F.2d 805 (3d Cir. 1982).

[894] H.R. Rep. No. 108-696, issued in connection with the Working Families Tax Relief Act of 2004, Pub. L. No. 108-311; Prop. Reg. §1.152-4(a)(3)(i). Taxpayers may apply the 2017 proposed regulations to any open tax years pending the issuance of revised final regulations.

[895] *Johnson v. Commissioner*, 33 T.C.M. 659, 660 (1974).

[896] Prop. Reg. §1.152-4(a)(3)(ii). Taxpayers may apply these proposed regulations to any open tax years pending the issuance of final regulations.

[897] Prop. Reg. §1.152-4(a)(3)(iii). Thus, the IRS will no longer assert the position that it took (successfully) in *Lutter v. Commissioner*, 61 T.C. 685

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Support of a child provided by the spouse of the child's parent who remarried (i.e., support provided by a stepparent) is treated as support provided by the parent.[898]

Example: Mother and Father married and had Child. Child is a minor. Shortly after Child was born, Father died. Two years later, Mother married Stepfather. Support provided to Child by Stepfather is treated as support provided to Child by Mother.

Comment: If a foster child is not a qualifying child because he or she does not satisfy the age requirement or the residency (same principal place of abode) requirement, and thus is not anyone's dependent unless he or she is a qualifying relative of someone, the determination of who provides more than one-half of the child's support arguably takes into account a case decided under pre-2005 law, holding that a taxpayer whose child was placed with foster parents was not treated as providing support if the taxpayer did not make payments to the foster parents or to the state as reimbursement for the payments made by the state to the foster parents.[899]

(c) Amounts Not Support Provided by Taxpayer

Board and lodging furnished as compensation are not items of support provided by the taxpayer.[900] Amounts provided as loans are not support provided by the taxpayer.[901] Amounts paid to a former spouse to settle property rights are not support provided by the taxpayer for the children.[902] For divorce or separation instruments executed before January 1, 2019, a payment to a spouse includible in that spouse's gross income under §71 (alimony and separate maintenance payments) or §682 (income of an estate or trust in the case of divorce) is not treated as a payment by the payor spouse for the support of any individual.[903] For divorce or separation instruments executed after December 31, 2018, or for instruments executed before then, or if the instrument is modified after December 31, 2018 and the modification expressly provides that the changes made by the act apply, payments to a spouse of alimony or separate maintenance payments are not treated as a payment by the payor spouse for the support of any dependent.[904]

In computing the amount of support provided by the taxpayer to the individual, a reduction must be made for lodging or other support provided by the individual to the taxpayer.[905]

(d) Timing

The determination of whether the taxpayer has provided more than half of an individual's support is made with respect to amounts expended during the calendar year, regardless of when the taxpayer pays debts incurred to make those expenditures.[906] Payments in a calendar year that are reimbursements of amounts provided in earlier years by the state are not treated as amounts provided for support in the year paid.[907]

A lump sum amount prepaid for support by the taxpayer is allocated proportionately over the years to which it applies, and the amount so determined is treated as having been paid by the taxpayer in each of those years.[908] An amount paid in a calendar year that cannot be used for support until the following calendar year is not treated as support provided in the year paid.[909]

(e) Child Support Arrearages and Prepayments

Current regulations provide that a child support payment that represented an arrearage payment for a previous calendar year's unpaid liability is not treated as paid during either the year of payment[910] or the year in which the liability arose.[911] Arrearage payments for unpaid child support liability arising earlier in the year in which paid are not subject to this limitation.[912] Child support paid in the calendar year and used for support is not reduced by outstanding arrearages if the arrearages remain unreduced by the amounts paid.[913]

Current regulations further provide that child support payments made before the calendar year for which the child support liability arises, whether or not made in the form of a lump sum settlement of the parent's child support liabilities, are not treated as made during the year paid.[914] However, under those regulations, payments made from amounts set aside in trust in a previous year are treated as made during the calendar year in which paid.[915]

In contrast, under proposed regulations issued in 2017, which taxpayers may apply to any open tax years pending the issuance of final regulations, for purposes of determining the amount of support provided in a calendar year, all of the following would be treated as paid in the year of payment, not in the year the payment is due: (1) a child support payment that represents an arrearage payment for a previous calendar year's

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(1974), *aff'd per curiam*, 514 F.2d 1095 (7th Cir. 1975), that governmental payments provided to a parent to aid a family with dependent children and used by the parent for support of her children was support of the children provided by the government, and not support provided by the parent.

[898] §152(d)(5)(A)(ii) (previously §152(d)(5)(B)); Prop. Reg. §1.152-3(d)(3).

[899] *Gulvin v. Commissioner*, 42 T.C.M. 1056, 1057 (1981).

[900] *Limpert v. Commissioner*, 37 T.C. 447, 450 (1961); *Hamilton v. Commissioner*, 34 T.C. 927, 929 (1960); *Protiva v. Commissioner*, 29 T.C.M. 1318, 1321 (1970); *Angstadt v. Commissioner*, 27 T.C.M. 693 (1968).

[901] *Spencer v. Commissioner*, 51 T.C.M. 155, 158 (1985); *Gatling v. Commissioner*, 18 T.C.M. 1074, 1091 (1959), *aff'd on other issues*, 286 F.2d 139 (4th Cir. 1961).

[902] *Banzhaf v. Commissioner*, 12 T.C.M. 998, 999–1000 (1953); *Tatum v. Commissioner*, 10 T.C.M. 602, 604 (1951); *Cagle v. Commissioner*, 8 T.C.M. 1039 (1949).

[903] Former §152(d)(5)(A); Reg. §1.152-2(b).

[904] §152(d)(5)(A)(i); Reg. §1.152-2(b)(1), T.D. 9913, 85 Fed. Reg. 64,383 (Oct. 13, 2020), applicable to tax years beginning on or after the date the regulations are published in the federal register.

[905] *Hahn v. Commissioner*, 22 T.C. 212, 215 (1954), *dismissed*, 216 F.2d 954 (1954).

[906] *Seraydar v. Commissioner*, 50 T.C. 756, 761 (1968); Rev. Rul. 58-404, *clarified on other issues*, Rev. Rul. 67-61.

[907] *Donner v. Commissioner*, 25 T.C. 1043, 1044–45 (1956).

[908] Rev. Rul. 58-303.

[909] *McKay v. Commissioner*, 34 T.C. 1080, 1083 (1960).

[910] Reg. §1.152-1(a)(2)(iii)(a). *See also Lovett v. Commissioner*, 18 T.C. 477, 478 (1952), *acq.*, 1952-2 C.B. 2; *Bower v. Commissioner*, 33 T.C.M. 875, 876 (1974).

[911] Reg. §1.152-1(a)(2)(iii)(a). *See also Casey v. Commissioner*, 60 T.C. 68, 72–73 (1973); Rev. Rul. 220.

[912] Reg. §1.152-1(a)(2)(iii)(a).

[913] *Gajda v. Commissioner*, 44 T.C. 783, 786 (1965).

[914] Reg. §1.152-1(a)(2)(iii)(b).

[915] Reg. §1.152-1(a)(2)(iii)(b).

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unpaid liability; (2) a prepayment of support; and (3) a payment of a liability from amounts set aside in trust in a prior year.[916]

Comment: The principles applicable to child support remain relevant for those infrequent instances where a child fails to satisfy the age or principal place of abode conditions, and thus must be a qualifying relative to be a dependent.

(3) More than One-Half

(a) In General

Note: A list of items included in, and excluded from, support is provided in III.B.3.e.(4), below.

In determining whether the taxpayer has provided more than one-half of the individual's support, there is taken into account the amount of support received from the taxpayer as compared to the entire amount of support that the individual received from all sources.[917] If a person is supported by the community income of a married couple who file separate returns, then neither spouse is entitled to claim a dependency exemption because each has provided exactly one-half of the person's support and neither has provided more than one-half of the persons support.[918] The rental value of a residence owned by a married couple is treated as provided equally by each spouse to the support of the potential qualifying relative.[919]

(b) Support Provided by the Individual

Note: A list of items included in, and excluded from, support is provided in III.B.3.e.(4), below.

Support supplied by the individual is included in the entire amount of support received by the individual.[920] This is so even if it is provided from income that is excluded from the individual's gross income.[921] The individual's income is not treated as support supplied by the individual unless it is actually used for support.[922]

Thus, social security benefits used by the individual for support are treated as support supplied by the individual.[923] The same principle applies to welfare benefits[924] and to social services payments made by a state to adoptive parents for the support and maintenance of adopted children.[925] However, proposed regulations issued in 2017, which taxpayers may apply to any open tax year pending the issuance of final regulations, would modify this rule. Under the 2017 proposed regulations, governmental payments and subsidies (such as welfare benefits and payments made by a state to adoptive parents for the support and maintenance of adopted children) that are used by the recipient (or intended beneficiary) to support another person would be treated as support of that other person provided by the recipient (or intended beneficiary) of the governmental payment.[926]

Medicare benefits received by or on behalf of an individual are disregarded in computing support.[927] There is no distinction between basic and supplementary Medicare.[928] Medicaid payments likewise are disregarded.[929]

Support supplied by the individual includes lodging provided by the individual.[930] If the taxpayer and the individual are co-owners of the lodging, a proportionate part of the fair rental value is treated as provided by each.[931] However, a residence that is owned by the individual but cannot be rented without substantial renovations and cannot be occupied without maintenance provided by the taxpayer is not treated as lodging provided by the individual.[932]

Support supplied by the individual includes education for the individual for which the individual pays.[933] It also includes education obtained by the individual through the proceeds of student loans for which the individual is obligated for repayment.[934] If the individual receives more than one-half of support from earned tuition credits and veterans benefits, the individual is not a dependent of any other person.[935]

(c) Support Provided to the Individual

Note: A list of items included in, and excluded from, support is provided in III.B.3.e.(4), below.

The value of care provided to an individual by an institution is included in the entire amount of support received by the individual.[936] This applies to care provided by the state or

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[916] Prop. Reg. §1.152-4(a)(2).

[917] Reg. §1.152-1(a)(2)(i); Prop. Reg. §1.152-4(a)(1). *See also DeVere v. Commissioner*, 35 T.C.M. 28, 29 (1976).

[918] *See Jones v. Commissioner*, 38 T.C.M. 599, 601 (1979) (as applied to child); *Bruce v. Commissioner*, 29 T.C.M. 1786, 1787 (1970) (same).

[919] *Schmidt v. Commissioner*, 54 T.C.M. 867, 869 (1987), *aff'd in part and vacated in part by unpub. op.* (10th Cir. 1989), *on remand*, 62 T.C.M. 1330 (1991) (as applied to child).

[920] Reg. §1.152-1(a)(2)(i); Prop. Reg. §1.152-4(a)(1); *DeVere v. Commissioner*, 35 T.C.M. 28 (1976).

[921] Reg. §1.152-1(a)(2)(ii); Prop. Reg. §1.152-4(a)(1); *Stang v. Commissioner*, 19 T.C.M. 289 (1960).

[922] *Dick v. United States*, 218 F. Supp. 839, 840 (E.D. Wis. 1963).

[923] Prop. Reg. §1.152-4(a)(3)(ii); *Patch v. Commissioner*, 39 T.C.M. 880, 884 (1980); *Taylor v. Commissioner*, 30 T.C.M. 1229, 1230 (1971); *Byram v. United States*, 81-2 USTC ¶9592 (N.D. Ala. 1980); Rev. Rul. 64-222, *clarified by* Rev. Rul. 72-591; Rev. Rul. 58-419, *modified by* Rev. Rul. 64-222, *clarified by* Rev. Rul. 72-591; Rev. Rul. 57-344. *See* Rev. Rul. 74-543. Prop. Reg. §1.152-4(a)(3), which will obsolete Rev. Rul. 57-344 and Rev. Rul. 74-543 when finalized.

[924] *Binns v. Commissioner*, T.C. Summ. Op. 2016-90 (taxpayer unable to show he provided more than one-half of support received by individual where individual also received welfare benefits); *Latter v. Commissioner*, 61 T.C. 685, 690 (1974), *aff'd per curiam*, 514 F.2d 1095 (7th Cir. 1975), *cert. denied*, 423 U.S. 931 (1975); *Carter v. Commissioner*, 55 T.C. 109, 112 (1970); *Leggett v. Commissioner*, 35 T.C.M. 21, 23 (1976); *Morrison v. Commissioner*, 34 T.C.M. 376, 377 (1975); *Johnson v. Commissioner*, 33 T.C.M. 659, 660 (1974); *Beck v. Commissioner*, 29 T.C.M. 659, 660 (1970); Rev. Rul. 71-468. *See Batchelor v. Commissioner*, 29 T.C.M. 69, 70 (1970).

[925] Rev. Rul. 74-153. Prop. Reg. §1.152-4(a)(3), will obsolete Rev. Rul. 74-153 when finalized. Social security received by a married couple is allocated equally between them for these purposes. *Abel v. Commissioner*, 21 T.C.M. 1044, 1045 (1962).

[926] Prop. Reg. §1.152-4(a)(3)(iii).

[927] Prop. Reg. §1.152-4(a)(4); Rev. Rul. 79-173. Prop. Reg. §1.152-4(a) will obsolete Rev. Rul. 79-173 when finalized.

[928] Prop. Reg. §1.152-4(a)(4); *Turecamo v. Commissioner*, 554 F.2d 564, 571 (2d Cir. 1977), *aff'g* 64 T.C. 720 (1975).

[929] *Archer v. Commissioner*, 73 T.C. 963, 968 (1980).

[930] *Harris v. Commissioner*, 23 T.C.M. 998, 999–1000 (1964); *Stang v. Commissioner*, 19 T.C.M. 289, 290 (1960); *Bradley v. Commissioner*, 13 T.C.M. 207, 210 (1954). *See Linthicum v. Commissioner*, 27 T.C.M. 440 (1968).

[931] *Livingston v. Commissioner*, 35 T.C.M. 916, 919 (1976); *Feeney v. Commissioner*, 25 T.C.M. 40 (1966).

[932] *Mehringer v. Commissioner*, 32 T.C.M. 186, 187 (1973).

[933] *Horne v. Commissioner*, 52 T.C. 572, 575 (1969).

[934] *McCauley v. Commissioner*, 56 T.C. 48, 49–50 (1971).

[935] *Long v. Commissioner*, 30 T.C.M. 588, 590 (1971).

[936] *Newman v. Commissioner*, 28 T.C. 550, 552 (1957).

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a political subdivision of the state,[937] hospitals,[938] mental institutions,[939] church organizations,[940] welfare schools,[941] or orphanages.[942]

In contrast, the value of medical and dental care provided to an individual under the Armed Forces Act is disregarded in determining support.[943]

(d) Multiple Support Agreements

Note: A list of items included in, and excluded from, support is provided in III.B.3.e.(4), below.

In situations involving multiple support agreements, more than one-half of an individual's support for a calendar year is deemed to have been received from a taxpayer if four conditions are satisfied.[944] First, no one person must contribute more than one-half of the individual's support for that calendar year.[945] Second, more than one-half of the individual's support must be received from two or more persons each of whom, but for the fact that he or she did not contribute more than one-half of the individual's support, would have been entitled to a dependency exemption with respect to the individual for a tax year beginning in that calendar year.[946] Third, the taxpayer must contribute more than 10% of the individual's support for that calendar year.[947] Fourth, each person who satisfies the third condition, other than the taxpayer, must file with his or her Form 1040 a statement identifying each of the other persons who satisfy the second condition and a statement that a written waiver was obtained from each of those other persons waiving their right to claim the individual as a dependent.[948] In addition, the taxpayer claiming the dependency exemption deduction must retain the waivers and be prepared to furnish these and other information necessary to substantiate the claim.[949] Before the written waivers were required,[950] a letter that failed to conform to the form that had been required presumably did not constitute a waiver unless was so drafted. A dependency exemption cannot be claimed on the basis of a multiple support agreement among a resident alien and nonresident aliens not engaged in business in the United States.[951]

(4) Support

(a) Items of Support in General

Support includes food, shelter, clothing, medical and dental care, education, and similar items.[952] Support also includes real property insurance,[953] furniture insurance,[954] medical insurance,[955] and Medicare premiums.[956] Support includes the cost of such items as maid or housekeeping services,[957] laundry and dry cleaning,[958] babysitters,[959] child care,[960] vitamins,[961] toys,[962] bicycle repairs,[963] telephones,[964] televisions,[965] book club costs,[966] hair styling[967] and haircuts,[968] pets,[969] entertainment,[970] wedding expenses,[971] vacations,[972] gifts,[973] and charitable contributions by or on behalf of the individual.[974]

Some cases hold that support is limited to necessities,[975] whereas others hold that support is not limited to expenditures that a court could require a person to make on behalf of another individual.[976] The cost of summer camp is a necessity,[977] as are

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[937] *Abbott v. Commissioner*, 13 T.C.M. 113, 115 (1954); *Haywood v. Commissioner*, 84 T.C.M. 442 (2002) (state prison system provides support).

[938] *LeBleu v. Commissioner*, 12 T.C.M. 13 (1953).

[939] *Pugisson v. Commissioner*, 17 T.C.M. 1038, 1039 (1958).

[940] *Riker v. Commissioner*, 244 F.2d 220, 229 (9th Cir. 1957), *aff'g* 14 T.C.M. 903, *cert. denied*, 355 U.S. 839 (1957); *Scott v. Commissioner*, 9 T.C.M. 932, 933 (1950).

[941] *Donner v. Commissioner*, 25 T.C.M. 1043, 1044–45 (1956).

[942] *Green v. Commissioner*, 25 T.C.M. 1443, 1445 (1966).

[943] Prop. Reg. §1.152-4(a)(4). Taxpayers may apply the 2017 proposed regulations to any open tax years pending the issuance of final regulations.

[944] §152(d)(3)(A); Reg. §1.152-3(a); Prop. Reg. §1.152-3(d)(4).

[945] §152(d)(3)(B); Reg. §1.152-3(a)(1); Prop. Reg. §1.152-3(d)(4)(i). *E.g.*, *Raiford v. Commissioner*, 25 T.C.M. 1036 (1966); Rev. Rul. 61-52.

[946] §152(d)(3)(B); Reg. §1.152-3(a)(2); Prop. Reg. §1.152-3(d)(4)(ii). *E.g.*, Rev. Rul. 61-52. *See Leitner v. Commissioner*, 21 T.C.M. 368, 370 (1962). *See also De La Garza v. Commissioner*, 46 T.C. 446, 448–49 (1966), *aff'd per curiam*, 378 F.2d 32 (5th Cir. 1967).

[947] §152(d)(3)(C); Reg. §1.152-3(a)(3); Prop. Reg. §1.152-3(d)(4)(iii). *E.g.*, *Raiford*, 25 T.C.M. 1036; Rev. Rul. 61-52.

[948] §152(d)(3)(D); Reg. §1.152-3(c)(2); Prop. Reg. §1.152-3(d)(4)(iv). *See Svalberg v. Commissioner*, 28 T.C.M. 529, 531 (1969).

[949] Reg. §1.152-3(c)(3).

[950] *See Moody v. Commissioner*, 62 T.C.M. 1357, 1362 (1991).

[951] Rev. Rul. 82-183.

[952] Reg. §1.152-1(a)(2)(i); Prop. Reg. §1.152-4(a)(1).

[953] *McLean v. Commissioner*, 14 T.C.M. 117, 119 (1955).

[954] *Maine v. Commissioner*, 11 T.C.M. 324, 325–26 (1952).

[955] *Parker v. Commissioner*, 18 T.C.M. 800 (1959); *Lopez v. Commissioner*, 18 T.C.M. 56, 58 (1959).

[956] Prop. Reg. §1.152-4(a)(4); Rev. Rul. 70-341, *revoked* on other issues, Rev. Rul. 79-173. When finalized, the proposed regulations issued in REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017), will obsolete Rev. Rul. 70-341 and Rev. Rul. 79-173.

[957] *Sauer v. Commissioner*, 12 T.C.M. 1377, 1379 (1953); *Lycan v. Commissioner*, 10 T.C.M. 278, 279 (1951).

[958] *Moore v. Commissioner*, 13 T.C.M. 65, 66 (1954).

[959] *Price v. Commissioner*, 20 T.C.M. 886, 887 (1961); *Tucker v. Commissioner*, 16 T.C.M. 488, 490 (1957).

[960] *Lustig v. Commissioner*, 274 F.2d 448 (9th Cir. 1960), *aff'g per curiam*, 30 T.C. 926 (1958), *cert. denied*, 364 U.S. 840 (1960); *Lovett v. Commissioner*, 18 T.C. 477, 478–79 (1952), *acq.*, 1952-2 C.B. 2. *See Limpert v. Commissioner*, 37 T.C. 447, 449 (1961).

[961] *Hastings v. Commissioner*, 16 T.C.M. 928, 929 (1957).

[962] *Hastings v. Commissioner*, 16 T.C.M. 928, 929 (1957); *Brumber v. Commissioner*, 11 T.C.M. 289, 290 (1952).

[963] *Price*, 20 T.C.M. at 886.

[964] *Price*, 20 T.C.M. at 886.

[965] *Jones v. Commissioner*, 28 T.C.M. 555, 556–57 (1969). *See* Rev. Rul. 77-282.

[966] *Price*, 20 T.C.M. 886.

[967] *Hastings*, 16 T.C.M. at 929.

[968] *Lycan v. Commissioner*, 10 T.C.M. 278, 279 (1951).

[969] *McKay v. Commissioner*, 34 T.C. 1080, 1082 (1960); *Sauer v. Commissioner*, 12 T.C.M. 1377, 1378 (1953).

[970] *Price*, 20 T.C.M. at 887.

[971] Rev. Rul. 76-184.

[972] *DeLeonardis v. Commissioner*, 14 T.C.M. 520, 521 (1955).

[973] *Sauer*, 12 T.C.M. at 1378.

[974] *Sumner v. Commissioner*, 13 T.C.M. 140, 141 (1954); *Brumber v. Commissioner*, 11 T.C.M. 289, 290 (1952); Rev. Rul. 58-67. When finalized, the proposed regulations issued in REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017), will obsolete Rev. Rul. 58-67.

[975] *E.g.*, *Dyer v. Commissioner*, 14 T.C.M. 642, 645 (1955); *Flowers v. United States*, 57-1 USTC ¶9655 (W.D. Pa. 1957).

[976] *E.g.*, *McKay*, 34 T.C. at 1084; *Rivers v. Commissioner*, 33 T.C. 935, 938 (1960).

[977] *Shapiro v. Commissioner*, 54 T.C. 347, 350 (1970); *Henderson v. Commissioner*, 12 T.C.M. 643, 644 (1953).

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swimming pool fees.[978] Allowances provided to the individual are support items.[979]

(b) Lodging

Lodging is an item of support,[980] and the amount of the lodging support item is its fair market value.[981] Repairs and other services furnished by the taxpayer with respect to lodging property owned by the individual are items of support.[982]

(c) Education

Education that constitutes support includes tuition,[983] parochial school tuition,[984] boarding school tuition,[985] music and drama lessons,[986] instrument fees,[987] school transportation,[988] school clothing,[989] school supplies,[990] and school lunches.[991]

(d) Medical and Dental Care and Insurance

Support includes medical and dental expenses of the dependent,[992] including health insurance premiums and Medicare premiums for the dependent,[993] but *not* including benefits (proceeds) received under a health or medical insurance policy.[994] Medical care items *not* included in support are discussed below in III.B.3.e.(4)(f)(iv).

(e) Automobiles and Boats

Whether the cost of operating an automobile is a support item depends on whether its use benefits the individual.[995] The expense of using the automobile for the individual is a support item.[996] Except in extraordinary situations, the cost of a boat and its operation is not a support item.[997]

(f) Items Not Included in Support

(i) In General

Support does not include life insurance premiums,[998] boat insurance,[999] funeral expenses,[1000] abortion inducement expenses,[1001] an individual's federal, state, and local income taxes paid from the individual's own income or assets,[1002] or social security taxes.[1003] Support also does not include the value of care rendered to the individual,[1004] but it does include the cost of traveling to the individual's residence to care for and take the individual shopping.[1005]

(ii) Visitations

Expenses incurred by a taxpayer in traveling to visit children are not items of support,[1006] whether they are for lodging,[1007] transportation,[1008] or driving,[1009] nor are the costs of transporting children to and from a visitation.[1010] However, food and entertainment expenses paid on behalf of the children during the visit are items of support, as are gifts given to the children.[1011]

Comment: The principles applicable to visitation expenses remain relevant for those infrequent instances where a child fails to satisfy the age or principal place of abode conditions, and thus must be a qualifying relative to be a dependent.

(iii) Capital Expenditures

The cost of home improvements is not a support item,[1012] nor are other capital expenditures such as a lawn mower[1013] or a rifle.[1014] In one case, the amortized cost of furniture was treated as an item of support.[1015]

(iv) Medical Expense Reimbursements

Support does not include medical insurance proceeds.[1016]

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[978] *Hastings v. Commissioner*, 16 T.C.M. 928, 929 (1957).

[979] *Hastings v. Commissioner*, 16 T.C.M. 928, 929 (1957); *Brooks v. Commissioner*, 16 T.C.M. 332, 333 (1957).

[980] Prop. Reg. §1.152-4(a)(1); *Haynes v. Commissioner*, 23 T.C. 1046 (1955); Rev. Rul. 58-302. When finalized, Prop. Reg. §1.152-4(a) will obsolete Rev. Rul. 58-302.

[981] Prop. Reg. §1.152-4(a)(1). Taxpayers may apply the 2017 proposed regulations to any open tax year pending the issuance of final regulations.

[982] *Bielawa v. Commissioner*, 20 T.C.M. 13, 14 (1961).

[983] *Frazier v. Commissioner*, 12 T.C.M. 1129, 1130 (1953).

[984] *McKay*, 34 T.C. at 1085.

[985] *Blyth v. Commissioner*, 21 T.C. 275, 278 (1953), *acq.*, 1954-1 C.B. 3.

[986] *McKay*, 34 T.C. at 1085; *Rivers*, 33 T.C. at 936.

[987] *McKay*, 34 T.C. at 1085; *Rivers*, 33 T.C. at 936.

[988] *Lycan*, 10 T.C.M. at 279.

[989] *Rivers*, 33 T.C. at 936.

[990] *Hastings*, 16 T.C.M. at 929.

[991] *Moore v. Commissioner*, 13 T.C.M. 65, 66 (1954).

[992] Reg. §1.152-1(a)(2)(i); Prop. Reg. §1.152-4(a)(1).

[993] Prop. Reg. §1.152-4(a)(4); *McGuire v. Commissioner*, 77 T.C. 765 (1981); Rev. Rul. 64-223. When finalized, Prop. Reg. §1.152-4(a) will obsolete Rev. Rul. 64-223.

[994] Prop. Reg. §1.152-4(a)(4); *Mawhinney v. Commissioner*, 355 F.2d 462 (3d Cir. 1966), *aff'g* 43 T.C. 443 (1965); *McGuire*, 77 T.C. at 773; Rev. Rul. 64-223.

[995] *See* Rev. Rul. 77-282, *revoking* Rev. Rul. 56-399.

[996] *See Sauer v. Commissioner*, 12 T.C.M. 1377, 1378 (1953).

[997] *See Flowers*, 57-1 USTC at ¶9655.

[998] Prop. Reg. §1.152-4(a)(1); *Rempert v. Commissioner*, 29 T.C.M. 979, 980 (1970); *Miller v. Commissioner*, 18 T.C.M. 673, 675 (1959); *Sauer*, 12 T.C.M. at 1379.

[999] *Flowers*, 57-1 USTC ¶9655.

[1000] Prop. Reg. §1.152-4(a)(1); Rev. Rul. 65-307. When finalized, Prop. Reg. §1.152-4(a) will obsolete Rev. Rul. 65-307.

[1001] Rev. Rul. 85-118, *clarifying* Rev. Rul. 73-156.

[1002] Prop. Reg. §1.152-4(a)(1); Rev. Rul. 58-67. When finalized, Prop. Reg. §1.152-4(a) will obsolete Rev. Rul. 58-67.

[1003] Prop. Reg. §1.152-4(a)(1).

[1004] *Markarian v. Commissioner*, 352 F.2d 870 (7th Cir. 1965), *aff'g* 42 T.C. 640 (1964); *Beck v. Commissioner*, 29 T.C.M. 659, 660 (1970). *See Mongiello v. Commissioner*, 35 T.C.M. 772, 773 (1976); *Mosher v. Commissioner*, 29 T.C.M. 251 (1970).

[1005] *Oates v. Commissioner*, 35 T.C.M. 1589, 1590–91 (1976).

[1006] *Woolley v. Commissioner*, 52 T.C.M. 398, 399 (1986), *aff'd by unpub. op.* (3d Cir. 1988).

[1007] *Vance*, 36 T.C. at 550; *Brandes*, 29 T.C.M. at 1440; *Turner v. Commissioner*, 26 T.C.M. 566, 571 (1967); *Pye v. Commissioner*, 25 T.C.M. 451, 454 (1966).

[1008] *Dyer v. Commissioner*, 14 T.C.M. 642, 645 (1955).

[1009] *Gilliam v. Commissioner*, 28 T.C.M. 956, 958 (1969), *aff'd per curiam*, 429 F.2d 570 (4th Cir. 1970).

[1010] *Vance*, 36 T.C. at 550; *Drake v. Commissioner*, 59 T.C.M. 312, 313 (1990).

[1011] *Houtz v. Commissioner*, 25 T.C.M. 1468, 1470 (1966).

[1012] *Artman v. Commissioner*, 28 T.C.M. 1335, 1336 (1969).

[1013] *Flowers*, 57-1 USTC at ¶9655. *See* Rev. Rul. 77-282, *revoking* Rev. Rul. 56-399.

[1014] *Flowers*, 57-1 USTC at ¶9655.

[1015] *Brandes*, 29 T.C.M. at 1440.

[1016] Prop. Reg. §1.152-4(a)(4); *McGuire*, 77 T.C. at 773 (premiums paid for health insurance, not proceeds received from insurance coverage, are the proper amounts to be included in the support computation); Rev. Rul. 64-223. When finalized, Prop. Reg. §1.152-4(a) will obsolete Rev. Rul. 64-223. *But cf. Samples*, 226 F. Supp. at 116 (medical benefits received under insurance poli-

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Support does not include Medicare benefits[1017] or Medicaid benefits.[1018]

Support does not include payments provided by a tortfeasor who has injured the individual or by the tortfeasor's insurance company.[1019]

Support does not include services provided in government medical facilities under the provisions of Dependents' Medical Care Act of 1956, as amended, or services provided to an individual under the medical and dental care provisions of the Armed Forces Act.[1020]

Payments for the medical care of an injured individual from a third party, including a third party's insurance company, in satisfaction of a legal claim for the personal injury of the individual are not treated as items of support and are disregarded in determining the amount of the individual's support.[1021]

(g) Amount of Support Items

In general, the amount of an item of support is the amount of the expense paid or incurred by the person providing it.[1022] The amount is not limited to the amount that would be reasonable.[1023] The use of estimates based on Department of Agriculture statistics is unacceptable.[1024] The use of an equal division of the taxpayer's gross income minus deductions is improper.[1025]

However, if an item of support is in the form of property or lodging, it must be measured in terms of its fair market value.[1026] The value of lodging furnished in kind is its fair rental value.[1027] No additional amount can be taken into account for real estate taxes, repairs, and utilities if they are reflected in fair rental value.[1028] Any amount paid by the individual is subtracted from fair rental value.[1029]

The amount of lodging and household expenses attributed to the support of an individual living in the household equals the proportion of the fair rental value and expenses reflecting the individuals' per capita proportionate share.[1030] This proportionality rule applies to lodging,[1031] utilities,[1032] food,[1033] and automobile expenses.[1034] The proportionality rule can be altered if some members of the household are present for significantly greater periods than others.[1035]

(h) Scholarships

(i) In General

A special support determination rule applies to any individual who is a child of the taxpayer[1036] and a student.[1037] Under the special rule, amounts received as scholarships for study at a qualified educational organization, as described in III.B.3.g.(4), below, are disregarded in determining whether the student received more than half of his or her support from the taxpayer.[1038]

Amounts received by the student as compensation for services rendered are not excluded from the support computations.[1039] Room and board furnished to a full-time nursing student as part of training is not compensation.[1040] Amounts paid by the state, as custodian, for the room, board, and education of a child committed to a state training school by juvenile courts is not a scholarship and is taken into account in making the support determinations.[1041]

Observation: The special support determination rule excludes scholarships,[1042] whereas the §117 exclusion is limited to qualified scholarships.[1043] The determination rule does not refer to the §117 exclusion.[1044] Though they are very similar, nevertheless, no matter the terminology, there can be scholarships that are within the special support determination rule that are not qualified scholarships. The qualified scholarship exclusion is discussed in detail in 517 T.M., *Scholarships and Educational Expenses.*

(ii) Military Payments

Appointments to the U.S. Military Academy, Naval Academy, Air Force Academy, or Coast Guard Academy are not scholarships,[1045] nor are amounts paid by the Navy under educational assistance programs.[1046] Amounts paid for tuition and books under a Naval Reserve Officer Training Corps program

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cy provided by claimed dependent's employer are part of claimed dependent's total support but are not part of support provided by taxpayer).

[1017] Prop. Reg. §1.152-4(a)(4); *Turecamo v. Commissioner*, 554 F.2d 564 (2d Cir. 1977), *aff'g* 64 T.C. 720 (1975); Rev. Rul. 70-341, *revoked* on other issues, Rev. Rul. 79-173. When finalized, Prop. Reg. §1.152-4(a) will obsolete Rev. Rul. 70-341 and Rev. Rul. 79-173.

[1018] *Archer v. Commissioner*, 73 T.C. 963 (1980) (Medicaid payments made to care for taxpayer's invalid and disabled mother are not support). *Cf. Williams v. Commissioner*, 71 T.C.M. 2423 (1996), *aff'd*, 119 F.3d 10 (11th Cir. 1997) (Medicaid payments treated as support, but court would have reached same result even if Medicaid not treated as support).

[1019] Rev. Rul. 64-223. When finalized, §1.152-4(a) will obsolete Rev. Rul. 64-223.

[1020] Prop. Reg. §1.152-4(a)(4); Rev. Rul. 64-223. When finalized, §1.152-4(a) will obsolete Rev. Rul. 64-223.

[1021] Prop. Reg. §1.152-4(a)(5).

[1022] Reg. §1.152-1(a)(2)(i); Prop. Reg. §1.152-4(a)(1).

[1023] *Shapiro v. Commissioner*, 54 T.C. 347, 350 (1970).

[1024] *Miller v. Commissioner*, 27 T.C.M. 42 (1968).

[1025] *Binley v. Commissioner*, 20 T.C.M. 695, 697 (1961).

[1026] Reg. §1.152-1(a)(2)(i); Prop. Reg. §1.152-4(a)(1).

[1027] *Carter v. Commissioner*, 62 T.C. 20, 24 (1974); *Blarek v. Commissioner*, 23 T.C. 1037, 1038 (1955); *Prickett v. Commissioner*, 18 T.C. 872, 874 (1952); *Barnes v. Commissioner*, 50 T.C.M. 653, 655 (1985); Rev. Rul. 58-302. When finalized, the proposed regulations issued in REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017), will obsolete Rev. Rul. 58-302. *See Gaines v. Commissioner*, 23 T.C.M. 1020, 1021 (1964).

[1028] *Abbott v. Commissioner*, 13 T.C.M. 113, 115 (1954). *See Harris v. Commissioner*, 23 T.C.M. 998, 1000 (1964).

[1029] *Melat v. Commissioner*, 12 T.C.M. 443, 444–45 (1953).

[1030] *Reed v. Commissioner*, 40 T.C.M. 1048, 1049 (1980); *Etienne v. Commissioner*, 18 T.C.M. 740, 742 (1959); *Tucker v. Commissioner*, 16 T.C.M. 488, 490 (1957). *See* Rev. Rul. 64-222, *clarified by* Rev. Rul. 72-591.

[1031] *Miller v. Commissioner*, 18 T.C.M. 673, 675 (1959); *Lopez v. Commissioner*, 18 T.C.M. 56, 58 (1959).

[1032] *Jordan v. Commissioner*, 17 T.C.M. 762, 764 (1958).

[1033] *Jordan v. Commissioner*, 17 T.C.M. 762, 764 (1958).

[1034] *Sauer v. Commissioner*, 12 T.C.M. 1377, 1379 (1953).

[1035] *Moore v. Commissioner*, 13 T.C.M. 65, 67 (1954).

[1036] §152(f)(5)(A).

[1037] §152(f)(5)(B).

[1038] §152(f)(5); Reg. §1.152-1(c); Prop. Reg. §1.152-4(a)(6). *E.g.*, *Houtz v. Commissioner*, 25 T.C.M. 1468, 1469 (1966).

[1039] *Long v. Commissioner*, 30 T.C.M. 588, 590 (1971); Rev. Rul. 57-484.

[1040] Rev. Rul. 58-338.

[1041] Rev. Rul. 71-491.

[1042] *See* §152(f)(5).

[1043] *See* §117(a), §117(b).

[1044] *See* §152(f)(5).

[1045] Rev. Rul. 55-347.

[1046] Rev. Rul. 58-403.

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are scholarships,[1047] as are amounts received by a student under the War Orphans' Educational Assistance Act of 1956[1048] and the National Defense Education Act of 1958.[1049] Amounts received for tuition payments and allowances by a veteran under the Servicemen's Readjustment Act of 1944[1050] or the Veterans' Readjustment Assistance Act of 1952[1051] were not treated as scholarships.[1052]

(iii) Disabled Individuals

Room, board, and tuition received by disabled individuals, regardless of age, attending specialized schools are scholarships.[1053] This rule does not apply to individuals residing at institutions for the learning disabled unless the institutions are qualified educational organizations, as described in III.B.3.g.(4), below, and the individuals are students, as described in III.B.3.g., below.[1054] Individuals can qualify as students even if they are unable to participate in formal classes, if the institution certifies that it is making an effort to educate or train them to use their faculties to the extent they are able.[1055] State aid toward room, board, and tuition in a school for the learning disabled is not considered in determining the individual's support.[1056] State assistance that is paid to the family of a disabled person to assist with support not for education or training, is treated as support provided by someone other than the taxpayer, and it does not matter that the disabled person receives training in the family's home because the family is not a qualified educational organization.[1057]

(5) Proof

(a) In General

The taxpayer has the burden of proving that the amount of support received by the individual from the taxpayer is more than one-half of the individual's support.[1058] If the taxpayer fails to satisfy that burden of proof, the dependency exemption is disallowed.[1059] It is possible to prove that more than half of the individual's support was provided by the taxpayer even if proof that the taxpayer provided all of the support is not entirely satisfactory.[1060]

(b) Specific Proofs

The taxpayer must prove both the total amount of support expended on behalf of the individual with respect to whom the taxpayer seeks a dependency exemption,[1061] and the percentage provided by the taxpayer.[1062] The taxpayer need not do so if the taxpayer can prove all of the individual's support was supplied by the taxpayer.[1063] However, the burden of proving the individual's total support cannot be avoided merely by proof that the taxpayer provided all of the individual's food and clothing for most of the year.[1064]

(c) Compliance with Burden of Proof

Whether the taxpayer satisfies the burden of proving that the amount of support received by the individual from the taxpayer is more than one-half of the individual's support is a question of fact.[1065] Merely demonstrating that the taxpayer has complied with court support orders is insufficient to establish that the taxpayer has provided more than one-half of the support.[1066]

(d) Evidence

All relevant evidence possessed by the taxpayer with respect to the support of the individual must be taken into account.[1067] In some cases, scanty evidence that the taxpayer provided more than one-half of the individual's support has been sufficient.[1068] The taxpayer's uncontroverted testimony is sufficient in some cases,[1069] but not if it is conclusory and unsupported by any other evidence.[1070]

1047 *Commissioner v. Ide*, 335 F.2d 852, 855 (3d Cir. 1964), *aff'g* 40 T.C. 721 (1963).

1048 *Keegstra v. Commissioner*, 48 T.C. 897, 900 (1967); Rev. Rul. 68-145.

1049 Rev. Rul. 61-53.

1050 Former 10 U.S.C. §1553–§1554.

1051 Former 38 U.S.C. §1601–§1643.

1052 Reg. §1.152-1(c); *Secone v. Commissioner*, 11 T.C.M. 504, 505–06 (1952). Regulations proposed in 2017, which taxpayers may apply to any open tax year pending the issuance of the final regulations, would not exclude any particular tuition payment programs from treatment as a scholarship. Prop. Reg. §1.152-4(a)(6).

1053 Rev. Rul. 64-221.

1054 Rev. Rul. 64-221.

1055 Rev. Rul. 64-221.

1056 Rev. Rul. 71-347.

1057 *Trail v. Commissioner*, 21 F.3d 1108 (5th Cir. 1994), *aff'g* 65 T.C.M. 2730 (1993).

1058 *Barnes v. United States*, 86-1 USTC ¶9130 (S.D.N.Y. 1985). *See Rinaldo v. Commissioner*, 36 T.C.M. 483, 484 (1977).

1059 *Rezazadeh v. Commissioner*, 356 F.2d 898, 900 (7th Cir. 1966), *aff'g* 24 T.C.M. 426 (1965); *Mendes v. Commissioner*, 121 T.C. 308 (2003); *Martino v. Commissioner*, 71 T.C. 456, 458 (1978); *Pillis v. Commissioner*, 47 T.C. 707, 708–09 (1967), *aff'd per curiam*, 390 F.2d 659 (4th Cir. 1968).

1060 *Florian v. Commissioner*, 31 T.C.M. 13 (1972).

1061 *Richardson v. Commissioner*, 72 T.C. 818, 825 (1979); *Jones v. Commissioner*, 76 T.C.M. 1014 (1998); *Fankhanel v. Commissioner*, 76 T.C.M. 809 (1998); *Cherry v. Commissioner*, 76 T.C.M. 626 (1998); *Basada v. Commissioner*, 75 T.C.M. 2159 (1998); *Tandon v. Commissioner*, 76 T.C.M. 1022 (1998); *Manukainiu v. Commissioner*, 75 T.C.M. 1919 (1998); *Smith v. Commissioner*, 74 T.C.M. 1344 (1997); *Terauds v. Commissioner*, 73 T.C.M. 1918 (1997); *Suckley v. Commissioner*, 72 T.C.M. 337 (1996); *Schmieder v. Commissioner*, 47 T.C.M. 1023, 1025–26 (1984); *Greene v. Commissioner*, 30 T.C.M. 661, 662 (1971); *Goodier v. Commissioner*, 29 T.C.M. 238, 239 (1970); *Pietrowski v. Commissioner*, 12 T.C.M. 442, 443 (1953). *See Greenfield v. Commissioner*, 28 T.C.M. 1264, 1265 (1969).

1062 *Sherman v. Commissioner*, 57 T.C.M. 599, 600 (1989). *See Beard v. Commissioner*, 75 T.C.M. 2002 (1998); *Olvera v. Commissioner*, 74 T.C.M. 1068 (1997); *Roberts v. Commissioner*, 72 T.C.M. 1034 (1996), *aff'd*, 127 F.3d 1106 (9th Cir. 1997).

1063 *Wayman v. Commissioner*, 14 T.C. 1267, 1270 (1950); *Halbin v. Commissioner*, 97 T.C.M. 1066 (2009); *Tranquilli v. Commissioner*, 39 T.C.M. 874, 877 (1980); *Presley v. Commissioner*, 38 T.C.M. 1301, 1326–27 (1979).

1064 *Blackshear v. Commissioner*, 36 T.C.M. 960, 961 (1977).

1065 *Hess v. Commissioner*, 57 T.C.M. 112, 113 (1989).

1066 *See Hilliard v. Commissioner*, 49 T.C.M. 504 (1985).

1067 *Marshall v. Commissioner*, 456 F.2d 1189, 1191 (2d Cir. 1972), *rev'g and rem'g* 29 T.C.M. 1509 (1970).

1068 *Woods v. Commissioner*, 45 T.C.M. 77, 79 (1982); *Conovitz v. Commissioner*, 39 T.C.M. 929, 937 (1980). *See Kellner v. Commissioner*, 30 T.C.M. 448, 449 (1971), *aff'd per curiam*, 468 F.2d 627 (2d Cir. 1972); *Peterson v. Commissioner*, 29 T.C.M. 33, 34 (1970).

1069 *E.g.*, *Pavia v. Commissioner*, 96 T.C.M. 398 (2008); *Guthrie v. Commissioner*, 57 T.C.M. 113, 115 (1989). *See Alisobhani v. Commissioner*, 68 T.C.M. 1493 (1994); *Sloan v. Commissioner*, 68 T.C.M. 1489 (1994); *Wilson v. Commissioner*, 20 T.C.M. 951, 952 (1961). *Cf. Rivers v. Commissioner*, 33 T.C. 935, 938 (1960).

1070 *Beatty v. Commissioner*, 26 T.C.M. 981, 984–85 (1967).

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Estimates based on evidence are permitted,[1071] but not if they are inconsistent with the taxpayer's income[1072] or with amounts provided by others,[1073] or insufficient to satisfy the more-than-one-half test.[1074] In many cases, the taxpayer has been allowed to claim the dependency exemption based on the totality of the evidence presented.[1075]

The fact that the taxpayer's child is a student does not prove that the taxpayer provided more than half of the child's support.[1076] Taxpayers need not prove the amount provided by them if they prove the total support they provide for the individual and the support provided by the individual and others besides the taxpayer.[1077]

(6) Constitutionality

The support condition does not violate the due process requirement of the Fifth Amendment,[1078] nor does it violate the Ninth Amendment.[1079]

f. Child

(1) In General

An individual is a child if the individual meets either one of two tests.[1080] The first test is met if the individual is a son, daughter, stepson, or stepdaughter of the taxpayer.[1081] The second test is met if the individual is an eligible foster child of the taxpayer.[1082]

(2) Legally Adopted Child

In determining whether a person is a child of the taxpayer, a legally adopted child of an individual, or a person who is lawfully placed with an individual for legal adoption by the individual, is treated as a child of the individual by blood.[1083] Under regulations proposed in 2017, which taxpayers may apply to any open tax years pending the issuance of final regulations, a child "lawfully placed with a person for legal adoption by that person" includes a child placed for legal adoption by a parent, an authorized placement agency, or any other person authorized by law to place a child for legal adoption.[1084]

Observation: It was unclear whether the removal by the 2004 legislation of the term "authorized placement agency" from the statutory provision addressing adoption, especially in light of its addition to the provision addressing foster children, permits adoption placement to be made by any person or organization.[1085] The 2017 proposed regulations would define an authorized placement agency as a state, the District of Columbia, a U.S. possession, a foreign country, an Indian Tribal Government (ITG), or any agency or organization that is authorized by any of the foregoing, or by a political subdivision of any of the foregoing, to place children for legal adoption or in foster care.[1086] Moreover, the 2017 proposed regulations would extend the definition of "a child lawfully placed with a person for legal adoption" to include a child placed by a biological parent or any other person authorized by law (even if not an authorized placement agency) to place a child for legal adoption.[1087] The holding that a child is placed if the natural mother consents to adoption, and physically delivers the child to the taxpayer's home under the approval of an authorized placement agency[1088] probably remains controlling in such situations, even in the absence of authorized placement agency approval.

The determination of when adoption occurs is made under state law, because in some states it occurs when the interlocutory decree is entered and in other states it occurs when the adoption decree is entered after the trial period.[1089]

An agreement with the state to care for a child is not equivalent to adoption.[1090] Nor is the taxpayer's brother a legally adopted child merely because the taxpayer cares for the child, if the taxpayer has not followed the procedures for adoption.[1091]

[1071] *Sewell v. Commissioner*, 32 T.C.M. 1184, 1185 (1973); *Lockhart v. Commissioner*, 19 T.C.M. 1012, 1015 (1960); *Lopez v. Commissioner*, 18 T.C.M. 56, 57 (1959); *Atchison v. Commissioner*, 17 T.C.M. 718 (1958). *See Lai v. Commissioner*, 21 T.C.M. 477, 478 (1962).

[1072] *Mattinson v. Commissioner*, 21 T.C.M. 932, 933–34 (1962); *Bernard v. Commissioner*, 21 T.C.M. 613, 614 (1962); *Scott v. Commissioner*, 20 T.C.M. 744, 745 (1961); *Propper v. Commissioner*, 11 T.C.M. 942, 943 (1952); *Mack v. Commissioner*, 10 T.C.M. 721, 722 (1951).

[1073] *Tyne v. Commissioner*, 20 T.C.M. 1713, 1714 (1961).

[1074] *Schwobel v. Commissioner*, 24 T.C.M. 802, 804 (1965).

[1075] *E.g., Fritschle v. Commissioner*, 79 T.C. 152, 160 (1982); *Fisher v. Commissioner*, 16 T.C. 1144, 1145 (1951); *Bennett v. Commissioner*, 75 T.C.M. 1945 (1998); *Columbus v. Commissioner*, 75 T.C.M. 1768 (1998), *aff'd*, 162 F.3d 1172 (10th Cir. 1998); *Mischel v. Commissioner*, 74 T.C.M. 253 (1997); *Dugan v. Commissioner*, 71 T.C.M. 2592 (1996); *Stanford v. Commissioner*, 69 T.C.M. 1930 (1995); *Byrd v. Commissioner*, 52 T.C.M. 220, 223 (1986); *Muracca v. Commissioner*, 47 T.C.M. 1762, 1769 (1984); *Biancone v. Commissioner*, 38 T.C.M. 446, 447 (1979), *aff'd by unpub. op.* (3d Cir. 1980); *Nordstrom v. Commissioner*, 30 T.C.M. 91, 94 (1971); *Biggs v. Commissioner*, 27 T.C.M. 1177 (1968), *aff'd on other issues*, 440 F.2d 1 (6th Cir. 1971); *Morris v. Commissioner*, 25 T.C.M. 1248, 1259 (1966); *Tyne v. Commissioner*, 25 T.C.M. 1112, 1115–16 (1966), *rev'd and rem'd on other issues*, 385 F.2d 40 (7th Cir. 1967); *Koocher v. United States*, 68-2 USTC ¶9603 (D.N.H. 1968); *Taylor v. United States*, 68-2 USTC ¶9488 (E.D. Ark. 1968); *Wilson v. United States*, 68-1 USTC ¶9310 (D. Kan. 1968); *Wolf v. United States*, 64-1 USTC ¶9211 (W.D. Mo. 1964); *Wayman v. United States*, 54-2 USTC ¶9570 (E.D. Ky. 1954).

[1076] *Feistman v. Commissioner*, 41 T.C.M. 1057, 1060 (1981), *aff'd by unpub. op.*, 705 F.2d 467 (9th Cir. 1983).

[1077] *Taylor v. Commissioner*, 19 T.C.M. 252, 253 (1960); *Sumner v. Commissioner*, 13 T.C.M. 140, 142 (1954); *Lund v. Commissioner*, 11 T.C.M. 189, 190 (1952).

[1078] *Levinson v. Commissioner*, 33 T.C.M. 1152, 1153 (1974).

[1079] *Campbell v. Commissioner*, 30 T.C.M. 226, 227 (1971).

[1080] §152(f)(1)(A); Prop. Reg. §1.152-1(b)(1).

[1081] §152(f)(1)(A)(i).

[1082] §152(f)(1)(A)(ii).

[1083] §152(f)(1)(B); Prop. Reg. §1.152-1(b)(1)(ii). Note that the holding in *McCann v. Commissioner*, 12 T.C. 239 (1949) (legal adoption usually has not occurred during the period of custody pending adoption) was obsoleted by §152(f)(1)(B).

[1084] Prop. Reg. §1.152-1(b)(1)(ii). An authorized placement agency would be defined as a state, the District of Columbia, a possession of the United States, a foreign country, an Indian Tribal Government (ITG), or an agency or organization that is authorized by a state, the District of Columbia, a possession of the United States, a foreign country, an ITG, or a political subdivision of any of the foregoing, to place children for legal adoption or in foster care. Prop. Reg. §1.152-1(b)(1)(iv).

[1085] *See* Reg. §1.152-2(c)(2) (interpreting pre-2005 statute).

[1086] Prop. Reg. §1.152-1(b)(1)(iv). Taxpayers may apply the 2017 proposed regulations to any open tax years pending the issuance of revised final regulations.

[1087] Prop. Reg. §1.152-1(b)(1)(ii).

[1088] *McLeod v. United States*, 276 F. Supp. 213, 216 (S.D. Ala. 1967).

[1089] Rev. Rul. 54-70.

[1090] *Grossman v. Commissioner*, 26 T.C. 234, 236 (1956).

[1091] *Young v. Commissioner*, 19 T.C.M. 1518, 1519 (1960).

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Comment: In some cases, the child may qualify as an eligible foster child, as discussed below. In other instances, the child may be a qualifying child because he or she satisfies the qualifying child relationship condition by being a sibling and satisfies the principal place of abode, age requirement, and support conditions.

(3) Eligible Foster Child

An eligible foster child is 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.[1092]

The federal statute does not expressly provide that a foster child ceases to be a child when he or she reaches the age of majority, but the Tax Court has so held.[1093] The Tax Court has relied on state law to define the relationship under the §152 deduction to determine whether a foster child remains eligible for the deduction, even after reaching the age of majority.[1094] However, the court has denied the application of the "relationship of affinity" exception under Reg. §1.152-2(d) and Prop. Reg. §1.152-4(b)(1) to support the claim that once an individual is a taxpayer's "eligible foster child," the individual remains as such despite the cessation of the legal circumstances that created them.[1095] In *Cowan v. Commissioner*, the court explained that the exception does not apply because, by definition, "affinity" is a relationship of marriage, or resulting therefrom, not foster care.[1096] The Tax Court acknowledged that a parent-child relationship that *will* last for life is the adoption relationship, which is recognized under the statute.[1097]

Comment: The definition provided by the IRS for "authorized placement agency" for purposes of adoption should apply to the definition for purposes of foster child placement, even though the 2004 legislation removed the term from the adoption provision and placed it for the first time in the foster child placement provision. Under that definition, an authorized placement agency is any agency authorized by a state, the District of Columbia, a U.S. possession, a foreign country, or a political subdivision of any of the foregoing to place children for adoption.[1098] The proposed regulations issued in 2017, which taxpayers may apply in any open tax years pending the issuance of final regulations, would expand the definition, such that an authorized placement agency would also include an Indian Tribal Government (as defined in §7701(a)(40)), or an agency or organization authorized by, or a political subdivision of, an Indian Tribal Government that places children in foster care or for adoption.[1099]

(4) Acknowledged Child

The taxpayer's child includes a child born out of wedlock who is acknowledged by the taxpayer.[1100]

(5) Deceased Children

A child who lives momentarily after birth is treated as a child for dependency exemption purposes if state or local law recognizes the birth and there is official documentation of the birth as a live birth.[1101] No dependency exemption is allowed for a stillborn child.[1102]

(6) Unborn Children

The Federal Claims Court has held that no dependency exemption is allowed for a child not yet born by the end of a tax year.[1103] The court determined that an unborn child did not fall within the definition of a "dependent"[1104] because an unborn child was neither a "citizen" as defined by the Immigration and Nationality Act[1105] nor a "resident" of the United States.[1106]

g. Student

(1) In General

A student is an individual who, during each of five calendar months during the calendar year in which the taxpayer's tax year begins, satisfied either the full-time attendance requirement or the full-time on-farm training requirement.[1107]

(2) Full-Time Attendance

The full-time attendance requirement is satisfied if the individual is a full-time student at a qualified educational organization.[1108] A full-time student is one who is enrolled for some part of five calendar months for the number of hours or courses considered to be full-time attendance.[1109] The five calendar months need not be consecutive.[1110] Enrollment is considered to begin in the month in which registration occurs, even if classes do not begin until the following month.[1111]

Under current regulations, school attendance at night does not constitute full-time attendance.[1112] However, full-time attendance at an educational institution may include some attendance at night in connection with a full-time course of study.[1113] The proposed regulations issued in 2017, which taxpayers may apply to any open tax years pending the issuance of final regu-

[1092] §152(f)(1)(C).
[1093] *See Cowan v. Commissioner*, T.C. Memo 2015-85.
[1094] *See Cowan v. Commissioner*, T.C. Memo 2015-85 (Ohio state law and court order itself terminated child's eligibility as a foster child when he reached age of majority; five years later taxpayer can no longer show child "is placed" with her by court order, thus denying him as taxpayer's eligible foster child).
[1095] *Cowan v. Commissioner*, T.C. Memo 2015-85.
[1096] Reg. §1.152-2(d); Prop. Reg. §1.152-4(b)(1).
[1097] §152(f)(1)(B); *Cowan v. Commissioner*, T.C. Memo 2015-85.
[1098] Reg. §1.152-2(c)(2).
[1099] Prop. Reg. §1.152-1(b)(iv).
[1100] Rev. Rul. 54-498.
[1101] Rev. Rul. 73-156, *clarified by* Rev. Rul. 85-118.
[1102] Special Ruling, 4 Fed. Tax Serv. (P-H) ¶76,100 (Jan. 24, 1945), *cited in Cassman v. United States*, 31 Fed. Cl. 121 (1994) (live birth required for dependency exemption).
[1103] *Cassman v. United States*, 31 Fed. Cl. 121 (1994).
[1104] Under former §152(b)(3).
[1105] *See* 8 U.S.C. §1401.
[1106] *See* 8 U.S.C. §1401.
[1107] §152(f)(2); Reg. §1.151-3(b); Prop. Reg. §1.152-1(b)(2).
[1108] §152(f)(2)(A); Reg. §1.151-3(b); Prop. Reg. §1.152-1(b)(2).
[1109] §152(f)(2)(A); Reg. §1.151-3(b); Prop. Reg. §1.152-1(b)(2).
[1110] §152(f)(2)(A); Reg. §1.151-3(b); Prop. Reg. §1.152-1(b)(2).
[1111] PLR 9838027.
[1112] Reg. §1.151-3(b); Prop. Reg. §1.152-1(b)(2).
[1113] Reg. §1.151-3(b); Prop. Reg. §1.152-1(b)(2).

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lations, does not include any restriction related to attendance at night.[1114]

A vocational high school student is a full-time student even though placed in cooperative jobs in private industry at certain specified intervals as part of that training.[1115] An individual who is an intern in the teaching hospital of a medical school is not a full-time student.[1116]

(3) Full-Time On-Farm Training

The full-time on-farm training requirement is satisfied if the individual is pursuing a full-time course of institutional on-farm training under the supervision of an accredited agent of a qualified educational organization or of a state or political subdivision of a state.[1117] The programs authorized under the former Veterans Readjustment Assistance Act of 1952, as amended,[1118] were examples of institutional on-farm training.[1119]

(4) Qualified Educational Organization

A qualified educational organization is an educational organization that normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on.[1120] Under current regulations, qualified educational institutions include primary and secondary schools, colleges, universities, normal schools, technical schools, mechanical schools, and similar institutions and do not include noneducational institutions, on-the-job training, correspondence schools, night schools, and similar institutions.[1121] However, Prop. Reg. §1.152-1(b)(2), which taxpayers may apply to any open tax years pending the issuance of final regulations, would define a qualified educational organization solely by reference to §170(b)(1)(A)(ii), without specifying any particular types of institutions that are included or excluded.

An institute that offers specialized training to employees who spend 24 weeks at the institute and 24 weeks with the employer is a qualified educational organization.[1122] An accredited school of nursing is a qualified educational organization;[1123] so, too, is a vocational technical institute that uses public school facilities and that schedules its classes during late afternoon and evening hours.[1124]

A general hospital that provides training programs for medical students, interns, and residents is not a qualified educational organization because its primary purpose is to provide medical care to sick and injured persons.[1125]

h. Children of Divorced or Separated Parents

(1) In General

Special rules apply for determining who is entitled to claim a dependency exemption with respect to a child of parents who are divorced or separated during a calendar year or who live apart at all times during the last six months of a calendar year.[1126] These rules are described below, and are discussed in detail in 515 T.M., *Divorce and Separation*. These special rules do not apply if more than one-half of the support of the child is treated as having been received from a taxpayer under a multiple support agreement.[1127]

(2) Applicable Child

The special rules apply to a child who receives more than one-half of his or her support from divorced or separated parents[1128] and who is in the custody of one or both of the parents for more than one-half of the specific calendar year.[1129] For this purpose, support received from the noncustodial parent's spouse is treated as having been received from the noncustodial parent.[1130] This presumption has withstood challenge on constitutional grounds.[1131] A child is in the custody of one or both parents for more than one-half of the calendar year if one or both parents have the right under state law to physical custody of the child for more than one-half of the calendar year.[1132]

Parents are divorced or separated if they meet one of three tests.[1133] The first test is met if the parents are divorced or legally separated under a decree of divorce or separate maintenance.[1134] The second test is met if the parents are separated under a written separation agreement.[1135] The third test is met if the parents live apart at all times during the last six months of the calendar year.[1136] The Tax Court has held that the third test can be met by parents who never were married to each other.[1137]

(3) Exemption Allowed to Custodial Parent

Generally, an applicable child is treated as being the qualifying child or qualifying relative of the custodial parent.[1138] The custodial parent is the parent who has custody for a greater portion of the specific calendar year,[1139] and in the absence of con-

[1114] *Compare* Reg. §1.151-3(b) *with* Prop. Reg. §1.152-1(b)(2) (2017).
[1115] Rev. Rul. 57-561.
[1116] *Bayley v. Commissioner*, 35 T.C. 288, 293 (1960).
[1117] §152(f)(2)(B); Reg. §1.151-3(b); Prop. Reg. §1.152-1(b)(2).
[1118] Former 38 U.S.C. §1652.
[1119] Reg. §1.151-3(b).
[1120] §170(b)(1)(A)(ii); Reg. §1.151-3(c); Prop. Reg. §1.152-1(b)(2).
[1121] Reg. §1.151-3(c).
[1122] Rev. Rul. 57-484.
[1123] Rev. Rul. 58-338.
[1124] Rev. Rul. 72-449.
[1125] Rev. Rul. 68-604.

[1126] §152(e); Reg. §1.152-4; Prop. Reg. §1.152-5.
[1127] §152(e)(5).
[1128] §152(e)(1)(A); Reg. §1.152-4(b)(2)(i). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate this rule as Reg. §1.152-5(b)(2)(i).
[1129] §152(e)(1)(B); Reg. §1.152-4(b)(2)(i). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate this rule as Reg. §1.152-5(b)(2)(i).
[1130] §152(e)(6).
[1131] *See Knight v. Commissioner*, 29 F.3d 632 (9th Cir. 1994), *aff'g* 64 T.C.M. 1519 (1992).
[1132] Reg. §1.152-4(c). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate the rule as Reg. §1.152-5(c).
[1133] §152(e)(1)(A).
[1134] §152(e)(1)(A)(i).
[1135] §152(e)(1)(A)(ii).
[1136] §152(e)(1)(A)(iii).
[1137] *King v. Commissioner*, 121 T.C. 245 (2003).
[1138] *See* §152(c)(1)(B), §152(e)(1); *Valarian v. Commissioner*, 72 T.C.M. 1267 (1996); *Allen v. Commissioner*, 64 T.C.M. 1134 (1992).
[1139] §152(e)(4)(A); Reg. §1.152-4(d) (rule for determining which parent has custody for a greater portion of the calendar year). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate the rule as Reg. §1.152-5(d). *See Maher v. Commissioner*, 85 T.C.M. 1053 (2003). *See also Harris v. Com-*

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vincing evidence on that question, the state's classification of one parent as the custodial parent has been treated as determinative.[1140] A parent who has custody for less than one-half of the year is not the custodial parent.[1141]

Custody is measured by counting the number of nights a child resides with a parent.[1142] A child resides with a parent for a night if the child sleeps at that parent's residence, whether or not the parent is present.[1143] A child resides with a parent for a night if the child sleeps in the company of the parent at a place that is not the parent's residence.[1144] If the child is emancipated, the child is treated as residing with neither parent.[1145] A night that straddles two tax years is assigned to the tax year in which the night begins.[1146] If the child resides with each parent for the same number of nights, the parent with the higher adjusted gross income is the custodial parent.[1147]

A child who does not reside with either parent for a night is treated as residing with the parent with whom the child would have resided for the night but for the absence.[1148] However, a child who does not reside with either parent for a night is treated as not residing with either parent for that night if it cannot be determined with which parent the child would have resided or if the child would not have resided with either parent for the night.[1149]

If a parent's nighttime work schedule causes a child to reside for a greater number of days but not nights with the parent who works at night, that parent is treated as the custodial parent.[1150] For this purpose, on a school day, the child is treated as residing at the primary residence registered with the school.[1151]

(4) Release of Exemption by Custodial Parent

If two conditions are satisfied, the applicable child is treated as the qualifying child of the noncustodial parent.[1152] The noncustodial parent is the parent who is not the custodial parent.[1153]

First, the custodial parent must sign a written declaration that the custodial parent will not claim a dependency exemption with respect to the applicable child for any tax year beginning in the specific calendar year, i.e., the custodial parent must sign a written release of his or her claim to the dependency exemption.[1154] Second, the noncustodial parent must attach the written declaration to his or her tax return for the tax year beginning during the specific calendar year.[1155] The written declaration can be made by its terms to apply to one year, a group of years, alternate years, or all future years.[1156] The written declaration must be unconditional, must name the noncustodial parent to whom the exemption is released, and must specify the year(s) to which it applies.[1157] If the custodial parent does not provide the requisite release of claim to the exemption on Form 8332, *Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent*, or a written declaration that conforms in substance to Form 8332, then the noncustodial parent cannot claim the child as a dependent.[1158]

An oral agreement between the parents is insufficient.[1159] So, too, is a state court order or judgment or a separation agreement purporting to allow the dependency exemption to a noncustodial parent even if it is attached to the taxpayer's return, because it is not a valid substitute for the requisite release.[1160] A subsequent letter from the custodial parent corroborating the existence of the Form 8332 does not suffice as a substitute.[1161]

The written declaration may be filed on Form 8332, but if the form does not specify the applicable tax year, it does not qualify as a valid release of the dependency exemption.[1162] A written declaration filed in lieu of a Form 8332 is not a valid release of the dependency exemption if it fails to include the years for which the custodial parent is releasing the claim for exemption, the social security number of either parent, and a

missioner, T.C. Memo 2014-69 (taxpayer is custodial parent because, although conciliation agreement stated child was to reside with mother more often, child actually resided with taxpayer for greater number of nights).

[1140] *See Baker v. Commissioner*, 91 T.C.M. 949 (2006).

[1141] *Smith v. Commissioner*, 92 T.C.M. 105 (2006).

[1142] Reg. §1.152-4(d)(1). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate the rule as Reg. §1.152-5(d)(1).

[1143] Reg. §1.152-4(d)(1)(i). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate the rule as Reg. §1.152-5(d)(1)(i).

[1144] Reg. §1.152-4(d)(1)(ii). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate the rule as Reg. §1.152-5(d)(1)(ii). *See Harris v. Commissioner*, T.C. Memo 2014-69 (child considered to reside with taxpayer because child slept at taxpayer's residence or in the company of taxpayer at his great aunt's house a greater number of nights).

[1145] Reg. §1.152-4(d)(1). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate the rule as Reg. §1.152-5(d)(1).

[1146] Reg. §1.152-4(d)(2). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate the rule as Reg. §1.152-5(d)(2).

[1147] Reg. §1.152-4(d)(4). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate the rule as Reg. §1.152-5(d)(4).

[1148] Reg. §1.152-4(d)(3)(i). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017), would redesignate the rule as Reg. §1.152-5(d)(3)(i).

[1149] Reg. §1.152-4(d)(3)(ii). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate the rule as Reg. §1.152-5(d)(3)(ii).

[1150] Reg. §1.152-4(d)(5). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate the rule as Reg. §1.152-5(d)(5).

[1151] Reg. §1.152-4(d)(5). REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017) would redesignate the rule as Reg. §1.152-5(d)(5).

[1152] §152(e)(2); Reg. §1.152-4(a) and §1.152-4(b)(1). *See also Hughes v. Commissioner*, 79 T.C.M. 1945 (2000); *Nieto v. Commissioner*, 63 T.C.M. 3050 (1992).

[1153] §152(e)(4)(B); Reg. §1.152-4(d)(1).

[1154] §152(e)(2)(A); Reg. §1.152-4(b)(3)(i). *See George v. Commissioner*, 139 T.C. 508 (2012) (custodial parent denied dependency exemption because taxpayer executed valid Form 8332; claimed error in the state court's custody order does not affect the form's validity).

[1155] §152(e)(2)(B); Reg. §1.152-4(b)(3)(i); *see also* Prop. Reg. §1.152-5(e)(2)(i) (noncustodial parent must attach copy of written declaration of release of dependency exemption to parent's original or amended return for each tax year for which noncustodial parent claims an exemption for the child). Taxpayers may apply the 2017 proposed regulations to any open tax years pending the issuance of final regulations.

[1156] Reg. §1.152-4(e)(1)(i).

[1157] Reg. §1.152-4(e)(1)(i).

[1158] Reg. §1.152-4(e)(1)(ii). *See also Walker v. Commissioner*, 96 T.C.M. 93 (2008); *Campos v. Commissioner*, 95 T.C.M. 1622 (2008); *Harris v. Commissioner*, 94 T.C.M. 205 (2007); *Caputi v. Commissioner*, 88 T.C.M. 619 (2004); *Norwood v. Commissioner*, 85 T.C.M. 982 (2003); *Duby v. Commissioner*, 85 T.C.M. 828 (2003); *Ramos v. Commissioner*, 84 T.C.M. 94 (2002). *See also Briscoe v. Commissioner*, T.C. Memo 2011-165 (dependency exemption denied where taxpayer attached support order instead of Form 8332); *Armstrong v. Commissioner*, 139 T.C. 468 (2012) (dependency exemption denied where taxpayer only provided a conditional support order).

[1159] *Thomas v. Commissioner*, 76 T.C.M. 738 (1998).

[1160] Reg. §1.152-4(e)(1)(ii), §1.152-4(e)(4), §1.152-4(g) *Ex.* 18. *See also Miller v. Commissioner*, 114 T.C. 184 (2000); *Shenk v. Commissioner*, 140 T.C. 200 (2013) (Internal Revenue Code, not state court orders, determines taxpayer's eligibility to claim deduction for federal income tax purposes).

[1161] *Chamberlain v. Commissioner*, 94 T.C.M. 35 (2007).

[1162] Reg. §1.152-4(e)(1)(i). *See also Cafarelli v. Commissioner*, 67 T.C.M. 3077 (1994).

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confirmation that the custodial parent will not claim the dependency exemption.[1163]

Proposed regulations issued in 2017, which taxpayers may apply to any open tax years pending the issuance of final regulations, would allow a noncustodial parent to submit a copy of the written declaration (release of claim to the dependency exemption) to the IRS during an examination to substantiate a claim to a dependency exemption for a child. However, a copy of a written declaration attached to an amended return, or provided during an examination, would not qualify as a valid release of the dependency exemption if the custodial parent signed the declaration after he or she filed a return claiming a dependency exemption for the child for the year at issue, and the custodial parent has not filed an amended return to remove that claim to a dependency exemption for the child.[1164]

> *Example 1:* Custodial Parent (CP) files her Year 20X1 return on March 1, 20X2 and claims a dependency exemption for Child. At Noncustodial Parent's (NCP's) request, CP signs a Form 8332 for the 20X1 tax year on April 15, 20X2. On April 15, 20X2, NCP files his return claiming a dependency exemption for Child and attaches the signed Form 8332 to his return. Under the proposed regulations, and assuming that the dependency exemption is available for 20X1, NCP is allowed a dependency exemption for Child for 20X1, and CP is not allowed a dependency exemption for Child for 20X0.[1165]

> *Example 2:* The facts are the same as in *Example 1*, except that on April 15, 20X2, NCP files a request for an extension to file his tax return because he does not have a signed Form 8332. CP signs the Form 8332 for the 20X1 tax year in August 20X2, and NCP files his return a week later. NCP claims a dependency exemption for Child and attaches the signed Form 8332 to his return. Under proposed regulations, and assuming that the dependency exemption is available for 20X1, NCP is allowed a dependency exemption for Child for 20X1, and CP is not allowed a dependency exemption for Child for 20X1.[1166]

> *Example 3:* CP files her 20X1 return on March 1, 20X2, and claims a dependency exemption for Child. NCP files his return on April 15, 20X2, and does not claim a dependency exemption for Child, even though his divorce decree allocates the dependency exemption for Child to him. CP signs a Form 8332 for the 20X1 tax year in August 20X2, and NCP files an amended return a week later and attaches the signed Form 8332 to his amended return claiming a dependency exemption for Child. Under the proposed regulations, and assuming that the dependency exemption is available for 20X1, even though CP has signed a Form 8332 for the 20X1 tax year, NCP is not allowed a dependency exemption for Child for 20X1 unless CP has amended her return to remove her claim to the dependency exemption for Child for 20X1.[1167]

If a custodial parent releases the claim to the exemption and the release is valid, then the child is treated as a dependent of both parents for purposes of §105(b), §132(h)(2)(B), and §213(d)(5); otherwise, only the taxpayer who is entitled to claim the child as a dependent may treat the child as a dependent for purposes of those Code sections.[1168] However, the IRS has determined that if four conditions are satisfied, both parents may treat the child as a dependent for purposes of §105(b), §132(h)(2)(B), and §213(d)(5), even if the custodial parent does not release the claim to the exception.[1169] First, the parents must be divorced, legally separated, or living apart for the last six months of the tax year.[1170] Second, the child must receive more than one-half of his or her support during the calendar year from the parents.[1171] Third, the child must be in the custody of one or both parents for more than one-half of the calendar year.[1172] Fourth, the child must be a qualifying child or a qualifying relative of one of the parents.[1173]

Comment: Release of the dependency exemption deduction by the custodial parent to the noncustodial parent does not permit any other person to treat the child as a qualifying child, even if that other person would be permitted to do so had the child not been a qualifying child of the custodial parent in the first instance.[1174]

If the parents are parties to a multiple support agreement which assigns the exemption for their child to one of them, or to another party to the agreement, then the agreement overrides the rules discussed above and determines which of them may claim the exemption.[1175]

A parent may revoke a written declaration releasing his or her dependency exemption to the other parent by providing written notice of the revocation to the other parent.[1176] The parent revoking the release must make reasonable efforts to provide actual notice to the other parent.[1177] The revocation may be effective no earlier than the tax year that begins in the first calendar year after the calendar year in which the parent revoking the release provides, or makes reasonable efforts to provide, the written notice.[1178] The revocation may be made on Form 8332, *Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent*, or successor form designated by the IRS, whether or not the written declaration releasing the claim to exemption was made on a form designated by the IRS.[1179] A revocation not on Form 8332 must conform to the

[1163] Reg. §1.152-4(e)(1)(i); *White v. Commissioner*, 72 T.C.M. 786 (1996).
[1164] Prop. Reg. §1.152-5(e)(2)(i).
[1165] Prop. Reg. §1.152-5(e)(2)(ii) *Ex. 1.*
[1166] Prop. Reg. §1.152-5(e)(2)(ii) *Ex. 2.*
[1167] Prop. Reg. §1.152-5(e)(2)(ii) *Ex. 3.*
[1168] Reg. §1.152-4(f).
[1169] Rev. Proc. 2008-48.
[1170] Rev. Proc. 2008-48.
[1171] Rev. Proc. 2008-48.
[1172] Rev. Proc. 2008-48.
[1173] Rev. Proc. 2008-48.
[1174] Notice 2006-86. When finalized, the proposed regulations under REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017), will obsolete Notice 2006-86.
[1175] §152(e)(5); Reg. §1.152-4(b)(2)(ii).
[1176] Reg. §1.152-4(e)(3)(i).
[1177] Reg. §1.152-4(e)(3)(i).
[1178] Reg. §1.152-4(e)(3)(i).
[1179] Reg. §1.152-4(e)(3)(ii).

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substance of Form 8332 and must be a document executed for the sole purpose of serving as a revocation of that parent's release of claim to the dependency exemption.[1180] The revocation must specify the year or years for which the revocation is effective.[1181] A revocation that specifies all future years is treated as specifying the first tax year after the tax year the revocation is executed and all subsequent tax years.[1182] The parent revoking the release of exemption must attach a copy of the revocation to the parent's return for each tax year for which the parent claims a child as a dependent as a result of the revocation.[1183] The parent revoking the written declaration must keep a copy of the revocation and evidence of delivery of the notice to the other parent, or of the reasonable efforts to provide actual notice.[1184] Under the 2017 proposed regulations, which taxpayers may apply to any open tax years pending the issuance of final regulations, a parent would be allowed to submit a copy of a revocation to the IRS during an examination to substantiate a claim to a previously released dependency exemption for the child.[1185] A written declaration or revocation that fails to satisfy the requirements above is ineffective.[1186]

Once the period of limitations for assessment for a particular tax year has expired, a declaration from a custodial parent that otherwise meets the requirements of §152(e)(2)(A) (e.g., a Form 8332 or an alternative form of documentation) is ineffective for that year; that is, a Form 8332 or equivalent release from a custodial parent is inconsequential once the statute of limitations has run.[1187] Further, it seems that a Form 8332 or an alternative form of documentation executed by a custodial parent in a tax year subsequent to the year for which the noncustodial parent's claim for the deduction is in dispute is also ineffective. This is because the language of §152(e)(2)(A) states a future promise: the custodial parent "will not claim" a dependency exemption for a certain child.[1188] It would be contradictory for a taxpayer to promise that he or she "will" do something in a tax year that has already passed.

4. *Exemption Amount*

Beginning in 2018, the §151 personal and dependency exemption amounts are zero.[1189] The zero amount does not apply to the temporary deduction for seniors discussed below.

Additionally, §151(d)(5)(B) provides that the zero amount does not apply to other Code provisions that reference §151 for other purposes. Instead, the exemption amount, as adjusted for inflation, is determined by the IRS each year.[1190] The exemption amounts for the most recent years are provided in Tables, Charts & Lists, *Personal Exemption by Year.*

Example: Taxpayers are permitted a partial child tax credit for qualifying relatives, whose gross income must be less than the §151 exemption amount. Under §151(d)(5)(B), the taxpayer can use the annually adjusted exemption amount for the gross income test to determine whether an individual is a qualifying relative for the child tax credit.[1191]

5. *Temporary Deduction for Seniors*

For tax years 2025–2028, taxpayers who are at least 65 years old by the end of the tax year are generally allowed a $6,000 deduction (the "enhanced deduction for seniors").[1192] For joint returns, both taxpayers can take the deduction if both are at least 65 years old by the end of the year. Married taxpayers must file a joint return to be eligible for the deduction.[1193] Taxpayers must provide a valid social security number (SSN) on their tax return to take the deduction.[1194] Failure to provide the correct SSN is treated as a mathematical or clerical error, allowing any additional tax due to be summarily assessed.[1195]

The $6,000 amount is reduced (not below zero) by 6% of the amount the taxpayer's modified adjusted gross income exceeds $75,000 ($150,000 for joint returns).[1196]

The enhanced deduction for seniors is available to itemizing and non-itemizing taxpayers and is reported on Schedule 1-A (Form 1040, Form 1040-SR, or Form 1040-NR).[1197]

C. Child Tax Credit

1. *In General*

Under §24, a taxpayer may claim a credit with respect to each qualifying child of the taxpayer.[1198] To discourage improper claims for the child tax credit, Congress enacted restrictions on taxpayers who made an improper claim in a prior year.[1199] The first restriction disallows the credit during a "disallowance period" for taxpayers who have made fraudulent or reckless claims. The disallowance period is the 10 tax years after the most recent tax year for which there was a final determination that the taxpayer's claim of credit was due to fraud. The disallowance period is two tax years after the most recent tax year for which there was a final determination that the claim was due to reckless or intentional disregard of the rules, but not due

[1180] Reg. §1.152-4(e)(3)(ii).
[1181] Reg. §1.152-4(e)(3)(ii).
[1182] Reg. §1.152-4(e)(3)(ii).
[1183] Reg. §1.152-4(e)(3)(iii); Prop. Reg. §1.152-5(e)(3)(iii).
[1184] Reg. §1.152-4(e)(3)(iii); Prop. Reg. §1.152-5(e)(3)(iii).
[1185] Prop. Reg. §1.152-5(e)(3)(iii).
[1186] Reg. §1.152-4(e)(4).
[1187] *See, e.g., Shenk v. Commissioner*, 140 T.C. 200 (2013).
[1188] *Shenk v. Commissioner*, 140 T.C. 200 (2013).
[1189] §151(d)(5), amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70103.
[1190] *See* Reg. §1.152-2(e)(1).
[1191] *See* §24(h)(4); Reg. §1.152-2(e)(1).
[1192] §151(d)(5)(C), added by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70103.
[1193] §151(d)(5)(C)(v).
[1194] §151(d)(5)(C)(iv). SSN is defined in §24(h)(7).
[1195] §6213(g)(2)(W), added by the OBBBA, §70103, effective after 2024.
[1196] §151(d)(5)(C)(iii). "Modified adjusted gross income" means adjusted gross income increased by any amount excluded from gross income under §911, §931, or §933.
[1197] IRS Fact Sheet FS-2025-03 (July 14, 2025).
[1198] §24(a). Beginning in 2025, §24(h) and §24(i) were amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70104. These rules are discussed throughout this section. For tax years 2018 through 2024, see the special rules in former §24(h) and former §24(i). For special procedures for individuals not otherwise required to file federal income tax returns for the 2021 tax year, see Rev. Proc. 2022-12, which provides several special procedures and simplified return options for taxpayers seeking to claim the child tax credit for the 2021 tax year.
[1199] §24(g).

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to fraud.[1200] The second restriction is for taxpayers who have been denied a credit as a result of the deficiency procedures. No credit is allowed in subsequent tax years unless the taxpayer provides whatever information the IRS may require to demonstrate eligibility for the credit.[1201] Congress added §6402(m), which provides that the IRS must hold the entire refund until February 15 for persons claiming the Child Tax Credit (CTC), even the portion not associated with the CTC. This provision was added to give the IRS more time to help detect and prevent fraud.[1202]

Disallowance of a child tax credit claimed during a disallowance period was added to the IRS's "math error" authority, so the IRS may disallow improper credits without a deficiency notice if the taxpayer claims the credit in a disallowance period or without providing the information required to demonstrate eligibility.[1203]

IRS forms and schedules used to claim and/or provide information about this credit are listed in Worksheet 2, below.

2. Computation

a. Basic Credit

Beginning in 2025, the child tax credit equals $2,200, adjusted for inflation beginning in 2026, for each qualifying child.[1204] For tax years 2018 through 2024, except 2021,[1205] the child tax credit is $2,000.[1206]

Practice Point: Beginning in 2018, the dependency exemption amount is zero. Even though the dependency exemption amount is zero, the exemption is still "allowed" and, therefore, the taxpayer can claim the child tax credit if all other requirements are met.[1207]

> *Example:* H and W have two children, ages 4 and 8. They file a joint return. If their 2021 AGI is $150,000 or less, their child tax credit for 2021 is $6,600 ($2,000 per child basic credit + $2,000 per child basic credit + $1,600 additional credit for the four-year-old + $1,000 additional credit for the eight-year-old). If their AGI is more than $150,000, then they may claim the $4,000 basic child tax credit, but the $2,600 amount of the additional credit for 2021 is reduced (possibly to $0), as discussed in III.C.2.b., below.

Beginning in 2018, a partial credit may be available for a dependent of the taxpayer[1208] other than a qualifying child (defined in §24(c));[1209] the IRS refers to this credit as the credit for other dependents or ODC.[1210] For each of the dependents that is not a qualifying child, the credit is increased by $500.[1211] Additionally, the credit for other dependents is available when the child tax credit is unavailable for qualifying children due to the social security number requirements of §24(h)(7).[1212]

For tax years before 2018, the child tax credit equals $1,000 for each qualifying child with respect to whom the taxpayer is allowed a dependency exemption deduction.[1213]

For tax years beginning in 2021 and later, the child tax credit applies to residents of U.S. possessions.[1214] No child tax credit against U.S. income taxes is allowed, if the child tax credit is allowable against taxes imposed by a U.S. possession with a mirror code tax system.[1215]

b. Income Limitation

Beginning in 2018, the otherwise allowable basic child tax credit amount is reduced, but not below zero, by $50 for each $1,000 or fraction thereof by which the taxpayer's modified adjusted gross income (MAGI) exceeds $400,000 for married couples filing jointly or $200,000 for all other taxpayers.[1216] MAGI equals the taxpayer's adjusted gross income (AGI) increased by any amount excluded from gross income under §911, §931, or §933.[1217]

For 2021 only, the additional $1,000 per qualifying child age 6–17 and additional $1,600 per qualifying child under age 6 is phased out by $50 for each $1,000 by which a taxpayer's MAGI exceeds $75,000 for unmarried taxpayers, $112,500 for

[1200] §24(g)(1).

[1201] §24(g)(2); *see* Form 8862, *Information to Claim Certain Credits After Disallowance.*

[1202] The bankruptcy court clarified that §6402(m) only dictates when a refund resulting from §24 or §32 will be issued, and has no bearing on when the claim to refund (or right to payment) arises. *Myers v. Army & Air Force Exch. Serv. (In re Myers)*, 608 B.R. 464 (Bankr. E.D.N.C. Sept. 26, 2019).

[1203] §6213(g)(2)(P). For §6213(g)(2) treatment of incorrect social security or taxpayer identification numbers on returns for the child tax credit, see III.C.3.a., below.

[1204] §24(h), §24(i), amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70104.

[1205] *See* former §24(i)(3) (child tax credit for tax year beginning in 2021 is $3,000 per qualifying child age six and older, and $3,600 per qualifying child under age six, with additional $1,000 credit for each qualifying child age six and older and $1,600 for each qualifying child under age 6). As discussed further below, the definition of "qualifying child" expanded for 2021 only. For commonly asked 2021 child tax credit filing season questions, see *Tax Year 2021/Filing Season 2022 Child Tax Credit Frequently Asked Questions — Topic F: Commonly Asked Filing Season Questions.* on the IRS website.

[1206] *See* former §24(h)(2).

[1207] §151(d)(5), amended by the OBBBA, Pub. L. No. 119-21, §70103. See III.B., above, for a detailed discussion of the dependency exemption deduction.

[1208] §24(h)(4)(A); Reg. §1.24-1(a). The partial credit is available to qualifying relatives whose gross income for the calendar year in which such tax year begins must be less than the exemption amount. §24(h)(4)(A) (referencing dependent definition in §152(d)(1)(B), which is subject to exemption amount in §151(d)), amended by the OBBBA, §70103. *Note:* Despite the personal exemption deduction being terminated for tax years 2018 and later, that amount does not apply to the gross income limitation in the qualifying relative definition. *See* §151(d)(5), amended by the OBBBA, §70103. The taxpayers should use the §151(d)(1) exemption amount to determine whether an individual is a qualifying relative. Reg. §1.152-2(e)(1). For referenced exemption amounts adjusted for inflation, see Tables, Charts & Lists, *Personal Exemption by Year.*

[1209] §24(h)(4). The partial credit is not available unless the dependent is a citizen or national of the United States. §24(h)(4)(B).

[1210] See Schedule 8812 (Form 1040), *Credit for Qualifying Children and Other Dependents.*

[1211] §24(h)(4)(A); Reg. §1.24-1(a).

[1212] §24(h)(4)(C).

[1213] §24(a).

[1214] *See* §24(k). For links to FAQs and further information, see the *Child Tax Credit* page on the IRS website.

[1215] §24(k)(1)(B). "Mirror code tax system" means, for any possession of the United States, the income tax system of such possession if the income tax liability of the residents of such possession under such system is determined by reference to the income tax laws of the United States as if such possession were the United States. §24(k)(1)(C).

[1216] §24(b)(1), §24(h)(3).

[1217] §24(b)(1).

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heads of household, or $150,000 for married couples filing jointly.[1218]

Practice Point: Taxpayers whose 2021 adjusted gross income is too high to qualify for the additional child tax credit amount for 2021 are still eligible for the child tax credit under the same rules applicable to 2020, meaning they can receive up to $2,000 per child with the higher phaseout amounts ($400,000 for joint returns, $200,000 for all other returns).

> *Example:* H and W have two children, ages 4 and 8. Their child tax credit for 2021 before the phaseout would be $6,600 ([$2,000 per child basic credit × 2 qualifying children] + $1,600 additional credit for the four-year-old + $1,000 additional credit for the eight-year-old). They file a joint return. Their AGI is $220,000. The additional 2021 credit amount of $2,600 (i.e., $1,600 + $1,000) is completely phased out because the reduction amount is $3,500 ($50 × ($220,000 − $150,000) ÷ $1,000). However, H and W still qualify for the basic $2,000 per child credit. As their AGI is below the $400,000 phaseout threshold, their credit for 2021 is $4,000 (2 × $2,000).

For tax years before 2018, the otherwise allowable basic credit is reduced, but not below zero, by $50 for each $1,000 or fraction thereof by which the taxpayer's modified adjusted gross income (MAGI) exceeds $110,000 for married couples filing joint returns,[1219] $75,000 for unmarried taxpayers,[1220] and $55,000 for married individuals filing separate returns.[1221]

The determination of whether a taxpayer is married is made as of the close of the tax year, except that if either spouse dies during the tax year the determination is made as of the date of death.[1222] An individual who is legally separated under a decree of divorce or separate maintenance is not considered to be married.[1223]

Married taxpayers living apart are not considered married if:

- they file a separate return, maintain a household for more than half the tax year as the principal place of abode of a child with respect to whom they are allowed to claim a dependency exemption deduction;
- they furnish more than half the cost of maintaining that household during the tax year;
- the taxpayer's spouse was not be a member of the household during the last six months of the tax year.[1224]

Spouses who live in the same house are members of the same household even if they are emotionally estranged and do not share a bedroom.[1225]

c. Limitation Based on Amount of Tax

Section 26(a) limits the amount of the child tax credit that a taxpayer may claim. The child tax credit is allowed to the extent it does not exceed the sum of the taxpayer's regular tax liability for the tax year reduced by the foreign tax credit allowable under §27, plus the taxpayer's alternative minimum tax liability for the tax year.[1226] Note that a portion of the child tax credit is refundable, as discussed at III.C.2.d., below.

The child tax credit can be used to reduce a taxpayer's alternative minimum tax (AMT) liability.[1227] The excess advance payment amount is not taken into account for purposes of the §26 limit on nonrefundable personal credits.[1228]

The §26(a) tax liability limitation is discussed in detail in 506 T.M., *Principles of Income Tax Credits.*

d. Refundable Portion of Child Tax Credit

Note: The IRS refers to the refundable portion of the child tax credit as the "additional child tax credit." To determine the additional child tax credit amount, taxpayers should complete Form 15110, *Additional Child Tax Credit Worksheet*, and attach it to Schedule 8812 (Form 1040), *Credit for Qualifying Children and Other Dependents.*

A taxpayer's aggregate refundable credits are increased by the refundable portion of the taxpayer's §24 child credit.[1229] No portion of the child tax credit is refundable to a taxpayer that elects to exclude any portion of foreign earned income from gross income pursuant to §911.[1230]

For 2021 only, the child tax credit is fully refundable (except for the $500 credit for a dependent who is not a qualifying child)[1231] if the taxpayer (or either spouse on a joint return) has a principal place of abode in the United States (determined as provided in §32) for more than one-half of the tax year or is a bona fide resident of Puerto Rico for that tax year.[1232]

For other tax years, the refundable portion of the child tax credit is the lesser of two amounts.[1233]

Beginning in 2018, the first amount cannot exceed $1,400 (adjusted for inflation).[1234] For tax years before 2018, the first amount is the child tax credit that would be allowed without regard to the refundable portion and without regard to the tax liability limitation described in III.C.2.c., above.[1235] The second amount is the corresponding increase in aggregate nonrefundable personal credits, other than the child tax credit, if the ap-

[1218] Former §24(i)(4).
[1219] §24(b)(2)(A).
[1220] §24(b)(2)(B).
[1221] §24(b)(2)(C).
[1222] §24(b)(2) (flush language) (reference to §7703(a)(1)).
[1223] §24(b)(2) (flush language) (reference to §7703(a)(2)).
[1224] §24(b)(2) (flush language) (reference to §7703(b)). See further discussion of the results of a waiver of the dependency exemption deduction attendant to a divorce under "Qualifying Child," below. There is a third alternative test that applied if the individual would have been allowed to claim a dependency exemption deduction but for the exceptions applicable to pre-1985 instruments.
[1225] *Chiosie v. Commissioner*, 79 T.C.M. 1812 (2000).

[1226] §26(a).
[1227] *See* §26(a).
[1228] §26(b)(2)(Z).
[1229] §24(d), §24(h), amended by OBBBA, §70104.
[1230] §24(d)(3).
[1231] *See* former §24(i)(1)(B) (reference to §24(h)(4)). For special procedures for individuals not otherwise required to file federal income tax returns for 2021, see Rev. Proc. 2022-12, which provides several special procedures and simplified return options for taxpayers seeking to claim the child tax credit for 2021.
[1232] Former §24(i)(1). For special, simplified procedures for certain bona fide residents of Puerto Rico to claim the child tax credit for the 2021 tax year, see Rev. Proc. 2022-22.
[1233] §24(d)(1), §24(h)(2).
[1234] §24(h)(5). Inflation adjusted amounts for recent years are listed in Tables, Charts & Lists, *Portion of Credit Refundable by Year under §24(h)(5).*
[1235] §24(d)(1)(A). Note: When calculating the amount, any partial credit from §24(h) is not included. §24(h)(5)(A).

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plicable tax liability limitation were increased by the greater of the earned income segment or, in the case of a Puerto Rico resident or a taxpayer with three or more qualifying children, the excess of the taxpayer's social security taxes for the tax year[1236] over the taxpayer's earned income tax credit for the tax year.[1237]

The earned income segment is 15% of earned income taken into account in computing taxable income that exceeds the $3,000 income segment threshold amount.[1238] Beginning in 2018, the income segment threshold amount is $2,500.[1239]

For this purpose, earned income is earned income for earned income tax credit purposes,[1240] increased by any combat zone compensation excluded under §112. Earned income for earned income tax credit purposes is discussed in III.K.3.f.

The taxpayer's social security taxes equal the sum of the employee portion of social security taxes withheld from the taxpayer's wages,[1241] the employee portion of railroad retirement taxes withheld from the taxpayer's wages,[1242] 50% of the self-employment taxes imposed on the taxpayer's self-employment income,[1243] 50% of the railroad employee representative taxes imposed on the taxpayer's railroad employee representative income,[1244] and amounts equivalent to these taxes that are paid under agreements entered into by American employers with respect to foreign affiliates.[1245] Social security taxes do not include any tax to the extent the taxpayer is entitled to a special refund of the tax on account of having withholding from multiple employers.[1246]

The refundable portion of the child tax credit is not to be treated as a nonrefundable personal credit and reduces the amount of the otherwise allowable child tax credit without regard to the appropriate tax liability limitation.[1247]

3. *Qualifying Child*

a. *In General*

For purposes of the child tax credit, a qualifying child is an individual who:

(1) is the child of the taxpayer, a descendant of the taxpayer's child, a brother, sister, stepbrother, or stepsister of the taxpayer, or a descendant of any such relative;[1248]

(2) has the same principal place of abode as the taxpayer for more than half the tax year;[1249]

(3) has not provided over half of such individual's own support for the calendar year the taxpayer's tax year began;[1250]

(4) who is not age 17 or older[1251] (or, for 2021 only, age 18 or older);[1252]

(5) has not filed a joint return (except for a claim of refund) with their spouse for the tax year beginning in the calendar year the taxpayer's tax year began;[1253]

(6) is claimed as a dependent by the taxpayer on his or her tax return for the tax year in which the taxpayer seeks to claim the credit;[1254] and

(7) was a U.S. citizen, a U.S. national, or a U.S. resident alien for the tax year in which the taxpayer seeks to claim the credit.[1255]

Observation: Application of these requirements to a divorce situation, involving a written waiver of the right to claim a dependency exemption deduction for a child by the custodial parent may result in neither parent being allowed to claim the child tax credit. The custodial parent cannot claim the credit if they waived the right to claim the child on his or her tax return. Yet the noncustodial parent, while holding the right to claim the deduction, may not claim the credit because the child did not live with them for at least half the tax year.

The definition of a qualifying child for purposes of the dependency exemption deduction is discussed in III.B.3.c., above.

b. *Social Security Number Requirement*

Beginning in 2025, no child tax credit is allowed for a qualifying child unless the social security number (SSN) for the child and taxpayer are provided on the return. For joint returns, at least one spouse must provide a SSN.[1256] The SSN must be issued to a citizen of the United States and before the due date for the return. For tax years 2018 through 2024, the child's SSN must be provided on the return for the child tax credit or additional child tax credit.[1257] The SSN must be issued to a U.S. citizen before the return's due date. If the taxpayer's qualifying child was not issued a SSN before the due date of the taxpayer's return (including extensions), the taxpayer cannot claim the child tax credit or additional child tax credit on either the tax-

[1236] §24(d)(1)(B)(ii)(I), §24(k)(2)(B)(ii) (application of child tax credit in Puerto Rico).
[1237] §24(d)(1)(B).
[1238] §24(d)(1)(B)(i).
[1239] §24(h)(6).
[1240] §24(h)(6). For special calculations related to earned income for certain disasters, see 597 T.M., *Tax Incentives for Economically Distressed Areas.*
[1241] §24(d)(2)(A)(i) (reference to §3101).
[1242] §24(d)(2)(A)(i) (reference to §3201(a)).
[1243] §24(d)(2)(A)(ii) (reference to §1401).
[1244] §24(d)(2)(A)(iii) (reference to §3211(a)(1)).
[1245] §24(d)(2)(C) (reference to §3121(l)).
[1246] §24(d)(2)(B) (reference to §6413(c)).
[1247] §24(d)(1) (flush language).
[1248] Section 24(c)(1) (reference to §152(c), §152(c)(1)(A)). A brother or sister for purposes of both the child tax credit and the personal exemption rules includes a brother or sister related by half-blood. §152(f)(4). A taxpayer may not claim the child tax credit for a qualifying relative who is not a qualifying child of the taxpayer. CCA 200812024. However, the taxpayer may be able to claim the credit for other dependents, which is a nonrefundable credit of up to $500 for each eligible dependent who cannot be claimed for the child tax credit. *See* §24(h)(4); IRS Pub. 972, *Child Tax Credit and Credit for Other Dependents.*
[1249] §152(c)(1)(B).
[1250] §152(c)(1)(D).
[1251] §24(c)(1). *See Polsky v. United States*, 844 F.3d 170 (3d Cir. 2016) (because taxpayer's disabled child was over 17, taxpayer was not entitled to child tax credit; §24(c)(1) age limitation rather than §152(c)(3) age limitation controls); *Rodriguez v. United States*, 4:12-cv-00049 (S.D. Tex. 2013) (a disabled child must be under 17 for taxpayer to claim the child tax credit).
[1252] Former §24(i)(2) (17-year-olds can qualify for 2021 only).
[1253] §152(c)(1)(E).
[1254] IRS Pub. 972, *Child Tax Credit and Credit for Other Dependents.*
[1255] §24(c)(2).
[1256] §24(h)(7), amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70104.
[1257] Former §24(h)(7). *See* PMTA 2019-02 (administrative relief denied for religious or conscience-based objections to obtaining SSNs because requirement is facially neutral and promotes legitimate and important public interest).

ISBN 978-1-55871-737-4

payer's original or amended return.[1258] However, if the taxpayer's qualifying child does not have the required SSN, but has another type of taxpayer identification number issued on or before the return's due date (including extensions), the taxpayer may be able to claim the credit for other dependents under §24(h)(4), discussed above in III.C.2.a.[1259]

Other supporting documents required to claim the child tax credit include:

- proof of U.S. citizenship, national, or resident status;
- proof of relationship between the dependent and the taxpayer;
- proof of residency;
- proof of financial support;
- whether the dependent was disabled;
- whether the dependent was a student; and
- whether the dependent is a qualifying child of more than one taxpayer.[1260]

No child tax credit is allowed for a qualifying child for any tax year unless the name and TIN of the qualifying child is included on the tax return for that tax year. The TIN must be issued by the due date for filing the return. The second requirement prevents retroactive claims for the credit.[1261]

Note: Unlike the earned income tax credit provision, there is no statutory child credit provision defining a TIN generally as an SSN issued by the Social Security Administration (SSA).[1262] Presumably, for purposes of the identification requirement, a TIN will generally be considered a SSN issued by the SSA.

Prospective adoptive parents may apply for an Adoption Taxpayer Identification Number (ATIN) for a prospective adoptive child as a temporary measure to satisfy the identification requirement.[1263] An application for an ATIN must include documentary evidence establishing that a child has been placed lawfully with the prospective adoptive parent for legal adoption by that person.[1264] When the adoption becomes final, the adoptive parent must apply for a SSN for the child.[1265]

Note: The omission of a correct TIN or SSN is considered to be a mathematical or clerical error allowing any additional tax due to be summarily assessed.[1266] The IRS is also authorized to use the mathematical and clerical error procedure to deny eligibility for the child tax credit even though a correct TIN is supplied if the IRS determines that the applicable statutory age restrictions for eligibility is not satisfied. A taxpayer is considered to have omitted a correct TIN for purposes of the mathematical error procedures if the information provided by the taxpayer on the return with respect to the individual whose TIN is required differs from the information the Treasury Secretary obtains from the person issuing the TIN, that is, the SSA.[1267] This information includes the name, age, date of birth, and SSN of the qualifying child.

4. *Short Taxable Years*

The §24 child tax credit is not allowable for a tax year shorter than 12 months. This limitation does not apply if the reason for the short tax year is the taxpayer's death.[1268]

5. *Refunds of Child Tax Credit Disregarded for Purposes of Federal Programs and Federally Assisted Programs*

In determining eligibility and benefits under any federal program, or state or local program financed in whole or in part with federal funds, any refund arising from the child tax credit is not treated as income and is not taken into account in determining resources for the month in which it is received or the following month.[1269]

Note: The earned income and child tax credits can be treated differently for bankruptcy estate purposes in Missouri. For example, in *In re Goertz*, a refund arising from the earned income tax credit was not considered local public assistance under state law and was therefore included in the taxpayer's bankruptcy estate.[1270] Absent a statutory definition, the bankruptcy court focused on the state law term "*local* public assistance benefits," interpreting "local" to denote an application more limited in scope than "federal." Thus, the *federal* earned income tax credit refund is not exempt under state law. Alternatively, in *Hardy v. Fink*,[1271] the refundable portion of the child tax credit fell within public assistance under state law and accordingly was exempt from the taxpayer's bankruptcy estate. In both cases, Missouri law was analyzed, and in each instance, state law failed to define "public assistance benefits." However, in *Hardy*, the state law had been revised by the legislature since *In re Goertz*, removing "local" from the term "public assistance benefits," thus expanding the reach of exemptions. The court then directed its attention to Congress's intent for the child tax credit amendments, which ultimately led to the conclusion that the applicable refund qualifies as public assistance under Missouri law.[1272]

[1258] IRS Pub. 972, *Child Tax Credit and Credit for Other Dependents.* See §6213(g)(2)(L) treatment of incorrect SSN on return discussed below.

[1259] IRS Pub. 972, *Child Tax Credit and Credit for Other Dependents.*

[1260] *See* Form 14815, *Supporting Documents to Prove the Child Tax Credit (CTC) and Credit for Other Dependents (ODC) for 2018–2025*, and Form 14815-A, *Supporting Documents to Prove the Child Tax Credit (CTC) and Credit for Other Dependents (ODC) for 2021.*

[1261] §24(e).

[1262] *Cf.* §32(m).

[1263] *See* Reg. §301.6109-3. Proposed regulations, which taxpayers may apply to any open tax years pending the issuance of final regulations, would define "prospective adoptive parent" as a person in whose household a child has been placed lawfully for legal adoption. Prop. Reg. §301.6109-3.

[1264] Prop. Reg. §301.6109-3(c)(2).

[1265] Reg. §301.6109-3(a)(1); Prop. Reg. §301.6109-3(a)(1).

[1266] §6213(g)(2)(I), amended by OBBBA, §70104, effective for tax years beginning after Dec. 31, 2024.

[1267] §6213(g)(2) (flush language). *See* PMTA 2018-17 (IRS's "math error" authority extends to child tax credits that should have been disallowed where refunds were paid before taxpayers were issued their TINs).

[1268] §24(f).

[1269] §6409.

[1270] 202 B.R. 614 (Bankr. W.D. Mo. 1996).

[1271] 787 F.3d 1189 (8th Cir. 2015).

[1272] *Hardy v. Fink*, 787 F.3d 1189 (8th Cir. 2015) (Congress intended that refund is "key to helping children in low-income families," and that millions of families "will be lifted out of poverty").

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D. Household and Dependent Care Credit

1. In General

Under §21, taxpayers for whom there are one or more qualifying individuals are allowed a credit for a portion of certain household and dependent care employment-related expenses.[1273] The credit is nonrefundable, i.e., the amount of the credit is limited to the amount of the taxpayer's tax liability, except for tax years beginning in 2021, when the credit is fully refundable for eligible taxpayers with a principal place of abode in the United States for more than one-half of 2021.[1274] To claim the household and dependent care credit, a taxpayer must complete Form 2441, *Child and Dependent Care Expenses*, and attach it to a Form 1040. The individual claiming the credit must identify all persons or organizations that provided care for the child, dependent, or spouse.

For FAQs regarding claiming the credit, see Child and Dependent Care Credit FAQs.

Editor's Note: Making the credit refundable for 2021 effectively expanded eligibility to lower-income taxpayers by making the credit available to taxpayers with little or no 2021 income tax liability.

The U.S. Treasury will make payments to U.S. possessions with mirror code tax systems for the cost of providing the refundable household and dependent care credit to their territorial residents for the 2021 tax year.[1275] Puerto Rico and American Samoa (neither of which have a mirror code tax system) must develop a plan, to be approved by the Treasury Secretary, to distribute the amounts of the refundable credit to their residents.[1276]

A "mirror code tax system" is, with respect to any U.S. possession, the income tax system of the U.S. possession if the income tax liability of the residents of the U.S. possession is determined by reference to the U.S. income tax laws as if the possession were the United States.[1277]

For any tax year beginning in or with 2021, the household and dependent care credit is not allowable against an individual's U.S. income taxes, if the credit is allowable against taxes imposed on that individual by a U.S. possession with a mirror code tax system. If the U.S. possession does not have a mirror code tax system, then the credit is not allowable against an individual's U.S. income taxes if the individual is eligible for a payment under a plan pursuant to which payments of the credit by the Treasury to the U.S. possession are promptly distributed to its residents.[1278]

2. Qualifying Individuals

a. In General

A person is a qualifying individual if they satisfy any one of three conditions.[1279] First, the person is a dependent of the taxpayer by reason of being a qualifying child of the taxpayer and has not attained age 13.[1280] Second, the person is a dependent of the taxpayer, is physically or mentally incapable of caring for himself or herself, and has the same principal place of abode as the taxpayer for more than one-half of the tax year.[1281] Third, the person is the spouse of the taxpayer, is physically or mentally incapable of caring for himself or herself, and has the same place of abode as the taxpayer for more than one-half of the tax year.[1282] For purposes of the second condition, whether a person is a dependent is determined without regard to (1) the limitation that treats a person as having no dependents if the person is a dependent of someone else, (2) the limitation that precludes a person from being treated as a dependent if the individual has filed a joint return, and (3) the requirement that to be a qualifying relative the person's gross income must be less than the exemption amount.[1283] The definitions of dependent and qualifying child and those limitations are discussed in III.B., above.

Thus, the IRS Chief Counsel's Office has advised that a person who is the taxpayer's dependent by reason of being a qualifying relative is not a qualifying individual for purposes of the household and dependent care credit unless the person is physically or mentally disabled and has the same principal place of abode as the taxpayer for more than one-half of the tax year.[1284]

For purposes of the household and dependent care credit, if at any time during the tax year the relationship between the taxpayer and a person violates local law, that person is not treated as having the same principal place of abode as the taxpayer.[1285]

The status of an individual as a qualifying individual is determined on a daily basis.[1286]

> *Example:* T's 17-year-old dependent child, C, was capable of self-care until October 3, when C was injured in a diving accident. For this year, C was a qualifying individual only for the period October 3 through December 31.

No credit is allowable with respect to a qualifying individual unless the taxpayer includes the individual's taxpayer identification number (TIN) on the return claiming the credit.[1287] A prospective adoptive parent may satisfy the TIN requirement by procuring an adoption taxpayer identification number for a prospective adoptive child, but the ATIN expires two years af-

[1273] §21; Reg. §1.21-1(a)(1); Prop. Reg. §1.21-1.

[1274] *See* §26(a), §21(g)(1) (2021 refundability), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9631(a). Section 21(g) provides "Special Rules for 2021," which apply only to tax years beginning after 2020 and before 2022.

[1275] *See* §21(h)(1), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9631(b).

[1276] *See* §21(h)(2), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9631(b).

[1277] §21(h)(4), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9631(b).

[1278] §21(h)(3), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9631(b).

[1279] §21(b)(1); Reg. §1.21-1(b)(1).

[1280] §21(b)(1)(A) (reference to §152(a)(1)); Reg. §1.21-1(b)(1)(i). *See Collins v. Commissioner*, 73 T.C.M. 2305 (1997) (child not under age 13). *See also* Rev. Rul. 2003-72 (method for determining age of child).

[1281] §21(b)(1)(B) (reference to §152); Reg. §1.21-1(b)(1)(ii).

[1282] §21(b)(1)(C); Reg. §1.21-1(b)(1)(iii).

[1283] §21(b)(1)(B).

[1284] CCA 200812024.

[1285] §21(e)(1).

[1286] Reg. §1.21-1(b)(3).

[1287] §21(e)(10).

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ter it is issued, and when the adoption becomes final, the parent must apply for a social security number for the child which, when obtained, is the child's TIN for future returns.[1288]

Note: The omission of a correct TIN is considered to be a mathematical or clerical error allowing any additional tax due to be summarily assessed.[1289] The IRS is also authorized to use the mathematical and clerical error procedure to deny eligibility for the household and dependent care credit even though a correct TIN is supplied if the IRS determines that the applicable statutory age restrictions for eligibility is not satisfied.[1290] A taxpayer is considered to have omitted a correct TIN for purposes of the mathematical error procedures if the information provided by the taxpayer on the return with respect to the individual whose TIN is required differs from the information the Treasury Secretary obtains from the person issuing the TIN, that is, the SSA.[1291] This information includes the name, age, date of birth, and social security number.

For FAQs regarding who are qualifying individuals, see Child and Dependent Care Credit FAQs.

b. Physical or Mental Incapacity

An individual is physically or mentally incapable of self-care if, as a result of a physical or mental defect, the individual is incapable of caring for his or her hygiene or nutritional needs, or requires the full-time attention of another person for his or her own safety or for the safety of others.[1292] Incapability of self-care is not established merely because a physical or mental defect makes the individual unable to engage in any substantial gainful activity, to perform the normal household functions of a homemaker, or to care for children.[1293]

c. Divorced or Separated Parents

A special rule applies in the case of a child of divorced or separated parents.[1294] The special rule applies if the child satisfies two conditions.[1295] First, the custodial parent determination rules of §152(e) (discussed in III.B.3.h., above) must apply to the child.[1296] Second, the child must either be under the age of 13 or be physically or mentally incapable of self-care.[1297] Under the special rule, the child is treated as a qualifying individual with respect to the custodial parent and is not treated as a qualifying child with respect to the noncustodial parent.[1298]

3. Computation of Credit

a. In General

The household and dependent care credit equals the taxpayer's employment-related expenses paid during the tax year multiplied by the applicable percentage.[1299] The credit is allowable only in the tax year in which the services are provided or the expenses are paid, whichever is later, regardless of the taxpayer's method of accounting.[1300] However, the determination of whether the conditions for claiming the credit have been met is made as of the time the services are provided, regardless of when the expenses are paid.[1301] Prepaid expenses can be taken into account only in the tax year in which the services are performed.[1302]

b. Applicable Percentage

(1) Tax Years Beginning After 2025

For tax years beginning after 2025, the "applicable percentage" equals 50%, reduced (not below 35%) by 1% for each $2,000 or fraction thereof the taxpayer's adjusted gross income (AGI) for the tax year exceeds $15,000, and further reduced (not below 20%) by 1% for each $2,000 ($4,000 for joint returns) or fraction thereof the taxpayer's AGI for the tax year exceeds $75,000 ($150,000 for joint returns).[1303]

(2) Tax Years Beginning Before 2026 Other than Tax Years Beginning in 2021

For all tax years beginning before 2026, except tax years beginning in 2021, the "applicable percentage" equals 35%, reduced (not below 20%), by 1% for each $2,000 or fraction thereof by which the taxpayer's AGI exceeds $15,000.[1304]

> *Example (1):* T qualifies for the household and dependent care credit. T's AGI is $9,000. T's applicable percentage is 35%.

> *Example (2):* Refer to Example (1). T's AGI is $27,300. The excess of $27,300 over $15,000 is $12,300. There are seven full or fractional $2,000 amounts in $12,300. T's applicable percentage is 28% (35% minus 7%).

> *Example (3):* Refer to Example (1) and ignore Example (2). T's AGI is $48,000. The excess of $48,000 over $15,000 is $33,000. There are 17 full or fractional $2,000 amounts in $33,000. T's applicable percentage would be 18% (35% minus 17%), but the applicable percentage cannot be reduced below 20%, so T's applicable percentage is 20%.

(3) Tax Years Beginning in 2021

For tax years beginning in 2021 only, the "applicable percentage" equaled 50%, reduced by 1% for each $2,000 or fraction thereof the taxpayer's AGI exceeded $125,000.[1305] The applicable percentage was not reduced below the "phaseout per-

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[1288] Reg. §301.6109-3(a)(1), §301.6109-3(a)(2); Prop. Reg. §301.6109-3(a)(1), REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017).
[1289] §6213(g)(2)(H).
[1290] §6213(g)(2)(L).
[1291] §6213(g)(2) (flush language).
[1292] Reg. §1.21-1(b)(4).
[1293] Reg. §1.21-1(b)(4).
[1294] §21(e)(5).
[1295] §21(e)(5); Reg. §1.21-1(b)(5)(i).
[1296] §21(e)(5)(A).
[1297] §21(e)(5)(B).
[1298] §21(e)(5) (flush language) (reference to §152(e)(4)(A)); Reg. §1.21-1(b)(5)(ii) (reference to §152(e)(4)(A)).
[1299] §21(a)(1); Reg. §1.21-1(a)(2).
[1300] Reg. §1.21-1(a)(3).
[1301] Reg. §1.21-1(a)(4).
[1302] Reg. §1.21-1(a)(3), Reg. §1.21-1(a)(5) *Ex. 1.*
[1303] §21(a)(2), amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70405.
[1304] §21(a)(2); Reg. §1.21-1(a)(2).
[1305] §21(g)(3).

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centage."[1306] The "phaseout percentage" equaled 20%, reduced (not below zero) by 1% for each $2,000 or fraction thereof the taxpayer's AGI exceeded $400,000.[1307] Thus, the 2021 credit rate was higher than the 2020 credit rate for taxpayers with $183,000 or less of AGI, but the 2021 credit rate was lower (compared to 2020) for taxpayers with more than $400,000 of AGI. Specifically, for taxpayers with AGI of $125,000 or less, the 2021 credit rate was 50% (compared to 35% in 2020). The 50% credit rate was gradually phased down to 20% for taxpayers with more than $125,000 but not more than $183,000 of AGI. For taxpayers with more than $183,000 but not more than $400,000 of AGI, the 2021 credit rate was gradually phased down from 20%, and the 2021 credit rate reached 0% when AGI exceeded $438,000. Thus, taxpayers with AGI above $438,000 were not eligible for the household and dependent care credit in 2021.

Editor's Note: In effect, the maximum allowable household and dependent credit was increased for 2021 from $2,100 to $8,000 for two or more qualifying individuals ($4,000 for one qualifying individual), with the precise credit amount depending on the taxpayer's income and qualifying expenses.

c. Employment-Related Expenses

(1) In General

Employment-related expenses are expenses that satisfy two conditions.[1308] First, the expenses must be incurred to enable the taxpayer to be gainfully employed for any period for which there are one or more qualifying individuals with respect to the taxpayer.[1309] Second, the expenses must be for household services[1310] or for the care of a qualifying individual.[1311] Employment-related expenses do not include amounts for which a nontaxable reimbursement is obtained from a state social services agency.[1312]

Expenses that are for both household services or the care of a qualifying individual and for other purposes must be allocated between household services or care and the other purposes.[1313] Only the expenses reasonably allocated to household services and care of a qualifying individual can qualify as employment-related expenses.[1314] No allocation is required if the portion of the expense for the other purpose is minimal or insignificant.[1315]

> *Example:* T pays $2,300 to R to clean and cook for a qualifying individual, to serve food at dinner parties, and to do clerical work. Only the portion of the $2,300 allocated to the cleaning and cooking can qualify as employment-related expenses.[1316]

For FAQs regarding the types of employment-related expenses that qualify, see Child and Dependent Care Credit FAQs.

(2) Employment Related

To be employment-related expenses, the expenses must be incurred while the taxpayer is gainfully employed or is in active search of gainful employment.[1317] Consistent with the regulation which make clear that the term "taxpayer" includes a spouse (in the case of a joint return), the IRS has indicated than an unemployed spouse who is actively seeking employment can claim the credit.[1318] The employment may consist of services rendered either within or outside of the taxpayer's home and may include self-employment.[1319] Gainful employment does not include the rendering of volunteer services for a nominal salary.[1320]

An expense is not employment-related merely because it is incurred while the taxpayer is gainfully employed.[1321] The expense must be one the purpose of which is to enable the taxpayer to be gainfully employed,[1322] the determination of which depends upon the facts and circumstances of the particular case.[1323]

If expenses cover a period during which the taxpayer is at times gainfully employed or in active search of gainful employment and at other times unemployed and not seeking employment, the expenses must be allocated on a daily basis.[1324]

The regulations allow an exception to the allocation rule for short, temporary absences. Absences of up two consecutive calendar weeks are considered short, temporary absences.[1325]

> *Example (1):* During the tax year, T was employed as a carpenter for 212 days. During the other times T was unemployed and not in active search of gainful employment. T incurred $3,650 of expenses that would be employment-related expenses had T been gainfully employed for the entire year. $2,840 of those expenses were for the period that T was employed and $810 was for the period that T was not employed. T's employment-related expenses are $2,840.[1326]

> *Example (2):* Refer to *Example (1).* Assume that T was employed sporadically during at least one day in each month of the calendar year but was required to pay for dependent care services on a monthly basis. The entire $3,650 are employment-related expenses.[1327]

Taxpayers who work part-time must allocate expenses between days worked and days not worked.[1328] However, taxpay-

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[1306] §21(g)(4)(A).
[1307] §21(g)(4)(B).
[1308] §21(b)(2)(A); Reg. §1.21-1(c)(1).
[1309] §21(b)(2)(A); Reg. §1.21-1(c)(1).
[1310] §21(b)(2)(A)(i); Reg. §1.21-1(c)(1).
[1311] §21(b)(2)(A)(ii); Reg. §1.21-1(c)(1).
[1312] Reg. §1.21-1(f); Rev. Rul. 83-1.
[1313] Reg. §1.21-1(d)(2).
[1314] Reg. §1.21-1(d)(2).
[1315] Reg. §1.21-1(d)(2).
[1316] *See* Reg. §1.21-1(d)(2).
[1317] Reg. §1.21-1(c)(1).
[1318] Reg. §1.21-1(c). *See* IRS Pub. 503, *Child and Dependent Care Expenses.*
[1319] Reg. §1.21-1(c)(1).
[1320] Reg. §1.21-1(c)(1).
[1321] Reg. §1.21-1(c)(1).
[1322] Reg. §1.21-1(c)(1).
[1323] Reg. §1.21-1(c)(1).
[1324] Reg. §1.21-1(c)(2)(i).
[1325] Reg. §1.21-1(c)(2)(ii).
[1326] *See* Reg. §1.21-1(c)(2)(i), §1.21-1(c)(3) *Ex.* 3.
[1327] *See* Reg. §1.21-1(c)(3) *Ex.* 6.
[1328] Reg. §1.21-1(c)(2)(iii).

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ers who work part-time but are required to pay for dependent care expenses on a weekly or longer basis need not allocate the expenses.[1329]

> *Example (3):* Assume that N works three days a week and her child attends a dependent care center to enable her to be gainfully employed. The center allows payment for any three days per week for $150 or five days for $250. N enrolls her child for five days. Three-fifths of $250, or $150, may be an employment-related expense.[1330]

> *Example (4):* Refer to *Example (3)*, except that the center does not offer a three-day option. The entire $250 weekly fee may be an employment-related expense.[1331]

(3) Household Services

Expenses are paid for household services if they are paid for the performance, in and about the taxpayer's home, of ordinary and usual services necessary to the maintenance of the household.[1332] Expenses are not paid for household services unless they are attributable in part to the care of a qualifying individual.[1333]

> *Example:* T maintains a household for C, T's child, whom T supports. T was gainfully employed during all of a certain tax year. T paid $1,800 during that tax year to X, for cooking and cleaning services in T's household. T also paid $950 to G, the gardener, and $550 to D, T's chauffeur. Only $1,800 of the expenses are considered paid for household services.[1334]

(4) Care of Qualifying Individual

Expenses are for the care of a qualifying individual if their primary purpose is to assure that individual's well-being and protection.[1335] Not all benefits bestowed on a qualifying individual are considered as provided for that individual's care.[1336] Amounts paid to provide food, clothing, and education are not expenses for the care of a qualifying individual.[1337] Nor, according to an IRS interpretation of a predecessor to §21, is the cost of a home security system considered to be an expense for the care of a qualifying individual.[1338] However, the additional cost of providing room and board for a caregiver may be an employment-related expense.[1339] If the manner of providing care is such that the expense that is incurred includes payment for other benefits that are incident to, and inseparably a part of, the care, the full amount of the expense is for care.[1340]

> *Example:* T maintains a household for C, T's child, whom T supports. T was gainfully employed during all of a certain tax year. T paid $1,800 to Y, a babysitter, to spend three hours each weekday with C. Y prepared snacks for C, and also provided rudimentary educational exercises. The entire $1,800 is considered for the care of a qualifying individual.[1341]

Expenses incurred for the education of a child in kindergarten or a higher grade level are not expenses for the care of a qualifying individual.[1342] However, expenses for before- and after-school care of a child in kindergarten or a higher grade may be for the care of a qualifying individual.[1343]

Social security and unemployment compensation taxes paid by the taxpayer with respect to wages that otherwise constitute employment-related expenses are themselves considered employment-related expenses.[1344] Additionally, indirect expenses, such as application fees, agency fees, and deposits, may be employment-related expenses.[1345] However, forfeited deposits and other payments are not.[1346]

The additional costs of commuting individually rather than in a carpool, even if necessary to transport a qualifying individual to a place of care, do not qualify as employment-related expenses.[1347] The cost of transportation incurred to permit qualifying individuals to spend a vacation with relatives is not an expense for the care of a qualifying individual.[1348] Amounts paid to cleaning companies that provide no child care are not employment-related because the expense permits the taxpayer to use leisure time for other endeavors rather than for cleaning and is not necessary to permit full-time employment.[1349]

The cost of transportation by a dependent care provider of a qualifying individual to or from a place where care of that qualifying individual is provided may be for the care of the qualifying individual. However, the cost of transportation not provided by a dependent care provider is not for the care of the qualifying individual.[1350]

The cost of a day camp or similar program may be for the care of a qualifying individual and may be an employment-related expense, without allocation, even if the day camp specializes in a particular activity.[1351] However, summer school and tutoring programs are not for the care of a qualifying individual and are not employment-related expenses.[1352]

The manner of providing the care need not be the least expensive alternative available to the taxpayer.[1353]

[1329] §1.21-1(c)(2)(iii).
[1330] *See* Reg. §1.21-1(c)(2)(iii), §1.21-1(c)(3) *Ex.* 5.
[1331] §1.21-1(c)(3) *Ex.* 6.
[1332] Reg. §1.21-1(d)(3).
[1333] Reg. §1.21-1(d)(3).
[1334] Reg. §1.21-1(d)(3).
[1335] Reg. §1.21-1(d)(1).
[1336] Reg. §1.21-1(d)(1).
[1337] Reg. §1.21-1(d)(1); *Houston v. Commissioner*, 47 T.C.M. 83, 85 (1983).
[1338] PLR 8437055.
[1339] Reg. §1.21-1(d)(10), §1.21-1(d)(12) *Ex.* 6.
[1340] Reg. §1.21-1(d)(1).
[1341] Reg. §1.21-1(d)(1), §1.21-1(d)(12) *Exs.* 1, 3.
[1342] Reg. §1.21-1(d)(5).
[1343] Reg. §1.21-1(d)(5).
[1344] Reg. §1.21-1(d)(9); *Perry v. Commissioner*, 92 T.C. 470, 485–86 (1989), *aff'd*, 912 F.2d 1466 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1392 (1991).
[1345] Reg. §1.21-1(d)(11).
[1346] Reg. §1.21-1(d)(11).
[1347] *Kourouklis v. Commissioner*, 51 T.C.M. 471, 472 (1986).
[1348] *Perry v. Commissioner*, 92 T.C. 470, 484–85 (1989), *aff'd*, 912 F.2d 1466 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1392 (1991).
[1349] *Knutson v. Commissioner*, 60 T.C.M. 540, 541–42 (1990).
[1350] Reg. §1.21-1(d)(8).
[1351] Reg. §1.21-1(d)(7).
[1352] Reg. §1.21-1(d)(7).
[1353] Reg. §1.21-1(d)(4).

ISBN 978-1-55871-737-4

Example: T maintains a household in which T's spouse, S, resides. S is supported by T and is incapable of self-care. T's mother, M, also resides in T's household, and is capable of caring for S. For various reasons, T decides to pay a visiting nurse to tend to S's care rather than asking M to do so. The amounts paid to the visiting nurse are for the care of a qualifying individual, even though it would have been less expensive for T if M had been paid to care for S.

(5) Services Outside Household

Expenses that would otherwise be employment-related expenses but are incurred for services provided outside the taxpayer's household are not treated as employment-related expenses unless they are incurred for the care of a qualifying child[1354] or for the care of a qualifying dependent or qualifying spouse who regularly spends at least eight hours each day in the taxpayer's household.[1355] If the services provided outside the taxpayer's household are provided by a dependent care center, the expenses for those services are not treated as employment-related expenses unless that center complies with all applicable state or local laws and regulations.[1356] This rule also applies to day camps.[1357]

Note: The fact that the center complies with all applicable laws and regulations does not eliminate the requirement that the expenses be incurred for the care of a qualifying child or for the care of a qualifying dependent or qualifying spouse who regularly spends at least eight hours each day in the taxpayer's household.[1358] The compliance requirement is an additional requirement that applies to expenses for services provided by dependent care centers.

A dependent care center is a facility that satisfies two conditions.[1359] First, it must provide full-time or part-time care on a regular basis for more than six individuals other than individuals who reside at the facility.[1360] Second, it must receive a fee, payment, or grant for providing services for any of those individuals, regardless of whether the facility is operated for profit.[1361] A facility is presumed not to satisfy the first condition if it has fewer than seven individuals, including the taxpayer's qualifying individual, enrolled for full-time or part-time care on the testing day.[1362] If the qualifying individual is enrolled in the facility during the tax year, the testing day is the day the individual is enrolled.[1363] If the qualifying individual was enrolled in the facility during a previous tax year, the testing day is the first day of the tax year.[1364] The presumption does not apply if the IRS determines that the facility satisfies the first condition.[1365]

A day camp that meets the definition of dependent care center must comply with these requirements.[1366]

(6) Exceptions

(a) Overnight Camp Exception

Employment-related expenses do not include any amount paid for services outside the taxpayer's household at a camp where the qualifying individual stays overnight.[1367]

Observation: A boarding school is not an overnight camp. Thus, expenses of a boarding school can be employment-related expenses. However, a taxpayer must allocate the cost of the boarding school between "expenses for care" and "expenses for education and other services not constituting care." There is an example in the regulations related to boarding school expenses and, interestingly, in that example, the IRS lists education, meals and housing as expenses for education and services not constituting care. The IRS did not provide an example of an expense incurred in a boarding school context that would specifically be considered an expense for "care," but it would clearly have to be something other than education, meals or housing.[1368]

(b) Payments to Related Individuals

Employment-related expenses do not include payments to related individuals.[1369] A related individual includes a person with respect to whom a dependency exemption deduction is allowable to the taxpayer or the taxpayer's spouse for the tax year in which the services are provided.[1370] A related individual also includes a person who is a son, daughter, eligible foster child, stepson, or stepdaughter of the taxpayer who has not attained age 19 by the close of the tax year in which the services are provided.[1371] Further, a related individual includes the taxpayer's spouse or parent of the taxpayer's child who is not the taxpayer's spouse.[1372] In *Lingoes v. Commissioner*,[1373] the Sixth Circuit allowed a §21 credit for payments to a married couple's 20-year-old daughter who was not claimed as a dependent and who provided babysitting services while both taxpayers were gainfully employed.[1374]

Note: Technically, "no credit is allowed" for payments to related individuals. In effect, though, this is equivalent to excluding these payments from the definition of employment-related expenses.

If the service is performed by an entity or partnership that is established or maintained primarily to avoid the exception for payments to related individuals, the payment of amounts that are otherwise employment-related expenses is treated as being made directly to the owners of the entity or to the partners in proportion to their shares of the entity or partnership.[1375] A factor to consider in determining whether the entity or partnership is so established or maintained is whether it is established

[1354] §21(b)(2)(B)(i); Reg. §1.21-1(e)(1)(i).
[1355] §21(b)(2)(B)(ii); Reg. §1.21-1(e)(1)(ii).
[1356] §21(b)(2)(C)(i); Reg. §1.21-1(e)(2).
[1357] Reg. §1.21-1(d)(7)(ii).
[1358] §21(b)(2)(C)(ii); Reg. §1.21-1(e)(2)(i)(B).
[1359] §21(b)(2)(D); Reg. §1.21-1(e)(2)(ii).
[1360] §21(b)(2)(D)(i); Reg. §1.21-1(e)(2)(ii).
[1361] §21(b)(2)(D)(ii); Reg. §1.21-1(e)(2)(ii).
[1362] Reg. §1.21-1(e)(2)(ii).
[1363] Reg. §1.21-1(e)(2)(ii).
[1364] Reg. §1.21-1(e)(2)(ii).
[1365] Reg. §1.21-1(e)(2)(ii).
[1366] Reg. §1.21-1(e)(2)(ii).
[1367] §21(b)(2)(A) (flush language); Reg. §1.21-1(d)(6).
[1368] *See* Reg. §1.21-1(d)(12) *Ex.* 2.
[1369] §21(e)(6); Reg. §1.21-4(a)(1).
[1370] §21(e)(6)(A); Reg. §1.21-4(a)(1).
[1371] §21(e)(6)(B) (reference to §152(f)(1)); Reg. §1.21-4(a)(2).
[1372] Reg. §1.21-4(a)(3)–§1.21-4(a)(4).
[1373] 56 T.C.M. 36, 39 (1988), *aff'd*, 886 F.2d 1316 (6th Cir. 1989).
[1374] 56 T.C.M. 36, 39 (1988), *aff'd*, 886 F.2d 1316 (6th Cir. 1989).
[1375] Reg. §1.21-4(b).

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solely to care for the taxpayer's qualifying individual and to provide household services to the taxpayer.[1376]

d. Limitations

(1) Dollar Limitation

The amount of employment-related expenses incurred during the tax year that may be taken into account in computing the §21 credit is limited to the modified limitation amount.[1377] The modified limitation amount is the limitation amount reduced by the aggregate amount excluded from the taxpayer's gross income under the §129 dependent care assistance program exclusion.[1378] The §129 dependent care assistance program exclusion is discussed in detail in 394 T.M., *Employee Fringe Benefits*.

The limitation amount is $3,000 ($8,000 for 2021 only) if there is one qualifying individual with respect to the taxpayer for the tax year,[1379] and $6,000 ($16,000 for 2021 only) if there are two or more qualifying individuals with respect to the taxpayer for the tax year.[1380]

> *Example (1):* In a tax year other than 2021, T, an eligible individual, paid $7,000 in employment-related expenses for the care of B and C, T's three-year-old twin children who reside in T's household and are supported by T. T did not participate in any programs to which the §129 exclusion applies. Only $6,000 of the expenses can be taken into account in computing T's §21 credit.

> *Example (2):* Refer to *Example (1)*. Assume that T's employer provided dependent care assistance in the amount of $5,000, which was excluded from T's gross income under §129. Only $1,000 of T's expenses can be taken into account in computing T's §21 credit.

Taxpayers with two or more qualifying persons are subject to the higher employment-related expense limitation, regardless of how the expenses are allocated among the qualifying persons (even if one incurs zero expenses). Reg. §1.21-2(a)(3) provides that a taxpayer may take into account the total amount of employment-related expenses that do not exceed the annual dollar limitation although the amount of employment-related expenses attributable to one qualifying individual is disproportionate to the total employment-related expenses.

> *Example (3):* In a tax year other than 2021, T, an eligible individual, paid $4,000 in employment-related expenses for one qualifying individual and $1,500 for a second qualifying individual. All $5,500 of the care expenses may be taken into account in computing T's §21 credit.

The limitation amount is not prorated if an individual is a qualifying individual or a member of the taxpayer's household for only a portion of the tax year. However, only those employment-related expenses incurred during the period the individual is a qualifying individual may be taken into account in computing the §21 credit.[1381]

Note: A taxpayer may take into account the total amount of employment-related expenses that do not exceed the annual dollar limitation even if the amount of the employment-related expenses attributable to one qualifying individual exceeds 50% of the limitation.[1382] In other words, the annual dollar limitation can be applied to two or more qualifying individuals in unequal proportions.

(2) Earned Income Limitation

(a) In General

The amount of employment-related expenses incurred during the tax year that may be taken into account in computing the §21 credit is limited to the taxpayer's earned income for that tax year.[1383] If the taxpayer is married at the end of the tax year, the applicable earned income is the lesser of the taxpayer's earned income or the earned income of the taxpayer's spouse for that tax year.[1384] The taxpayer's spouse is the person to whom the taxpayer is married at the end of the tax year, and is not the person to whom the taxpayer was married earlier in the year but who has died or was divorced from the taxpayer during the year.[1385] The earned income of the taxpayer's spouse for the entire tax year is taken into account even if the taxpayer has been married to that spouse for less than the entire year.[1386] If the spouse is self-employed but has no earned income for the tax year, no employment-related expenses can be taken into account and no §21 credit is allowable for that tax year.[1387]

(b) Marital Status

For purposes of the earned income limitation, a married individual is not considered to be married if he or she is legally separated from his or her spouse under a decree of divorce or separate maintenance,[1388] or if the individual satisfies the following four conditions.[1389] First, the individual must file a separate return.[1390] Second, the individual must maintain as his or her home a household that for more than one-half of the tax year is the principal place of abode of a qualifying individual.[1391] Third, the individual must furnish more than one-half of the cost of maintaining that household during the tax year.[1392]

[1376] Reg. §1.21-4(b).

[1377] §21(c); Reg. §1.21-2(a)(2).

[1378] §21(c) (flush language); Reg. §1.21-2(a)(2).

[1379] §21(g)(2) (2021 only); §21(c)(1) (all other years); Reg. §1.21-2(a)(1)(i).

[1380] §21(g)(2) (2021 only); §21(c)(2) (all other years); Reg. §1.21-2(a)(1)(ii).

[1381] Reg. §1.21-2(a)(4).

[1382] Reg. §1.21-2(a)(3).

[1383] §21(d)(1)(A); Reg. §1.21-2(b)(1)(i).

[1384] §21(d)(1)(B); Reg. §1.21-2(b)(1)(ii).

[1385] Reg. §1.21-2(b)(2).

[1386] Reg. §1.21-2(b)(2).

[1387] *Fling v. Commissioner*, 41 T.C.M. 711, 713 (1981).

[1388] §21(e)(3); Reg. §1.21-2(b)(2) (reference to Reg. §1.21-3(b)).

[1389] §21(e)(4); Reg. §1.21-3(b) (reference to §7703(b) and the regulations thereunder).

[1390] §21(e)(4)(A); Reg. §1.21-3(b) (reference to §7703(b) and the regulations thereunder).

[1391] §21(e)(4)(A)(i); Reg. §1.21-3(b) (reference to §7703(b) and the regulations thereunder).

[1392] §21(e)(4)(A)(ii); Reg. §1.21-3(b) (reference to §7703(b) and the regulations thereunder).

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Fourth, the individual's spouse must not be a member of that household during the last six months of the tax year.[1393]

Comment: The preceding conditions are almost identical to those prescribed in §7703(b) for a married individual to qualify as unmarried and be eligible to use head of household filing status. The difference is that for §21 purposes the household must be maintained for a qualifying individual, whereas for §7703(b) purposes it must be maintained for a child.[1394]

(c) Earned Income

Earned income has the same meaning it has for purposes of the earned income tax credit.[1395] Thus, earned income is defined as wages, salaries, tips, and other employee compensation,[1396] as well as net earnings from self-employment for purposes of self-employment social security taxes.[1397] Earned income is computed without regard to any community property laws that may otherwise apply.[1398] Earned income does not include amounts received as a pension or an annuity,[1399] or income of a nonresident alien individual that is not effectively connected with the conduct of a trade or business within the United States.[1400] Earned income does not include amounts received for services provided by an individual while the individual is an inmate at a penal institution[1401] or under certain subsidized state programs,[1402] but does include amounts that a taxpayer elects to exclude from gross income for combat zone compensation.[1403] The earned income tax credit is discussed in III.K.

(d) Student Spouses and Spouses Incapable of Self-Care

In determining the earned income of the taxpayer's spouse, a special rule applies if that spouse is, at any time during the tax year, either a full-time student or a qualifying spouse.[1404] A full-time student is an individual who, during each of five calendar months during the tax year, is enrolled at and attends, for the number of course hours considered to be a full-time course of study, an educational organization,[1405] contributions to which qualify for the charitable contribution deduction subject to the 50%-of-adjusted-gross-income limitation.[1406] The enrollment for five calendar months need not be consecutive.[1407] Attendance exclusively at night can constitute full-time attendance.[1408]

Under the special rule, for each month during which the spouse is a student or a qualifying spouse, the spouse is considered to be gainfully employed and to have earned income of at least $250 if there is one qualifying individual with respect to the taxpayer during that tax year[1409] or $500 if there are two or more qualifying individuals with respect to the taxpayer during that tax year.[1410] If both the taxpayer and the spouse are students, or if the taxpayer is a student and the spouse is a qualifying spouse, the special rule applies with respect to only one spouse.[1411]

> *Example 1:* T is an eligible individual who earned $50,000 in during the calendar tax year. T's spouse, S, is not a student or qualifying spouse, and earned $2,500 during the year. During the year, T paid $6,000 in employment-related expenses for the care of B and C, T's three-year-old twin children who reside in T's household and are supported by T. T does not participate in any programs to which the §129 exclusion applies. Only $2,500 of T's expenses can be taken into account in computing T's §21 credit.

> *Example 2:* Refer to *Example 1.* Assume that S has no earned income and is a full-time student for every month of the year. Under the special rule, S is deemed to have earned income of $6,000 ($500 × 12 months) for the year. All $6,000 of T's expenses can be taken into account in computing T's §21 credit.

> *Example 3:* Refer to *Example 2.* Assume that S has no income because S is physically disabled and incapable of self-care during the entire year. The result does not change.

> *Example 4:* Refer to *Example 2.* Assume that T does not work, but is a full-time student for every month of the year. Assume that T is supporting S, B, and C from savings. Under the special rule, S is deemed to have earned income of $6,000 for the year. The special rule cannot be applied to T. Alternatively, if it is applied to T, T is deemed to have earned income of $6,000 for the year, but the special rule cannot be applied to S. Because T has no earned income, none of the $6,000 of T's expenses can be taken into account in computing T's §21 credit.

Note: The earned income deemed to exist for a spouse under this special rule is not treated as the spouse's earned income for purposes of the earned income tax credit.[1412]

4. Coordination with Medical Expense Deduction

If employment-related expenses also qualify as a deductible medical expense under §213, the portion of the expense for which a §21 credit is allowable is not deductible as a medical expense.[1413] If the taxpayer chooses to treat the expense as a medical expense for purposes of computing the medical expense deduction, the expense may not be taken into account

[1393] §21(e)(4)(B); Reg. §1.21-3(b) (reference to §7703(b) and the regulations thereunder).
[1394] *See* §7703(b)(1).
[1395] Reg. §1.21-2(b)(3).
[1396] §32(c)(2)(A)(i).
[1397] §32(c)(2)(A)(ii) (reference to §1402).
[1398] §32(c)(2)(B)(i).
[1399] §32(c)(2)(B)(ii).
[1400] §32(c)(2)(B)(iii) (reference to §871(a)).
[1401] §32(c)(2)(B)(iv).
[1402] §32(c)(2)(B)(v).
[1403] §32(c)(2)(B)(vi) (reference to §112).
[1404] §21(d)(2); Reg. §1.21-2(b)(4).
[1405] §21(e)(7); Reg. §1.21-2(b)(4)(ii).
[1406] §21(e)(8) (reference to §170(b)(1)(A)(ii)).
[1407] Reg. §1.21-2(b)(4)(ii).
[1408] Reg. §1.21-2(b)(4)(ii).
[1409] §21(d)(2)(A); Reg. §1.21-2(b)(4)(i)(A).
[1410] §21(d)(2)(B); Reg. §1.21-2(b)(4)(i)(B).
[1411] §21(d)(2) (flush language); Reg. §1.21-2(b)(4)(ii).
[1412] *Powers v. Commissioner*, 79 T.C.M. 1287 (2000), *aff'd*, 234 F.3d 1269 (6th Cir. 2000), *cert denied*, 121 S. Ct. 1657 (2001).
[1413] Reg. §1.21-1(j)(1).

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in computing the §21 credit.[1414] The §213 medical expense deduction is discussed in III.A., above.

Example (1): During the calendar tax year, T incurred and paid $6,500 of employment-related expenses. There is one qualifying individual with respect to T. These expenses also qualify as medical expense deductions. T's adjusted gross income for the year was $50,000, and it arises from earned income. The computation of T's §21 credit is based on $3,000 of employment-related expenses. The other $3,500 is taken into account as a medical expense deduction. Because 7.5% of T's adjusted gross income is $3,750, none of the $3,500 is allowable as a medical expense deduction.[1415] If the taxpayer chooses instead to treat all $6,500 as a medical expense, only the $2,750 excess of $6,500 over $3,750 is deductible. The $3,750 portion that is not deductible may not be treated as employment-related expenses for purposes of computing the §21 credit because it has been taken into account in computing T's medical expense deduction.[1416]

Example (2): Refer to *Example (1).* Assume T's adjusted gross income is $40,000. The computation of T's §21 credit is based on $3,000 of employment-related expenses. The other $3,500 is taken into account as a medical expense deduction. Because 7.5% of T's adjusted gross income is $3,000, $500 of the $3,500 is allowable as a medical expense deduction.[1417]

5. Filing Requirement

An individual who is married at the close of a tax year is not allowed to claim the §21 credit for that year unless the individual and the individual's spouse file a joint return, unless the individual meets certain criteria to be treated as unmarried.[1418] An individual who is legally separated under a decree of divorce or separate maintenance is not considered to be married.[1419] Additionally, certain married individuals living apart are not considered to be married if they satisfy four conditions.[1420] First, the individual must file a separate return.[1421] Second, the individual must maintain as his or her home a household that constitutes for more than one-half of the tax year the principal place of abode of a qualifying individual.[1422] Third, the individual must furnish more than one-half of the cost of maintaining that household during the tax year.[1423] Fourth, the individual's spouse must not be a member of that household during the last six months of the tax year.[1424] Thus, if the individual is estranged from his or her spouse but permits the spouse to remain living in the household, the individual is considered married and must file a joint return to claim the §21 credit.[1425] A married individual whose spouse is absent on account of military duty does not satisfy the fourth condition because that absence is considered temporary, during which the absent spouse is a member of the household.[1426]

Individuals with a filing status of married filing separately must satisfy the following requirements to claim the credit, in addition to the criteria above:[1427]

- the care must be provided so the individual claiming the credit can work or look for work (the individual cannot claim the credit if s/he did not work and has no earned income for the year);
- the care must be for one or more qualifying persons;
- the person who provided the care cannot be the credit-claimant's spouse, the parent of the qualifying person, or a person whom the credit-claimant claims as a dependent;
- the credit-claimant must report information about the care provider and information about the qualifying person on Form 2441;
- the credit-claimant lived apart from his/her spouse during the last six months of the year;
- the credit-claimant's home was the qualifying person's main home for more than half of the year; and
- the credit-claimant paid more than half of the cost of keeping up that home for the year.

Comment: The preceding conditions are almost identical to those prescribed in §7703(b) for a married individual to qualify as unmarried and be eligible to use head of household filing status. The difference is that for §21 purposes, the household must be maintained for a qualifying *individual*, whereas for §7703(b) purposes, the household must be must be maintained for a qualifying *child*.[1428]

If either spouse dies during the tax year and a joint return may be filed, the §21 credit is allowable only if the joint return is filed.[1429] If the surviving spouse remarries before the end of the tax year in which the first spouse dies, the §21 credit is allowable on the decedent spouse's separate return.[1430]

6. Substantiation and Recordkeeping

Any taxpayer who claims the §21 credit must substantiate by adequate records or other sufficient evidence the claimed

[1414] Reg. §1.21-1(j)(1).
[1415] *See* Reg. §1.21-1(j)(2) *Ex.* 1.
[1416] *See* Reg. §1.21-1(j)(2) *Ex.* 2.
[1417] *See* Reg. §1.21-1(j)(2) *Exs.* 1, 2.
[1418] §21(e)(2); Reg. §1.21-3(a); *Casey v. Commissioner*, 55 T.C.M. 664, 666 (1988), *aff'd without op.*, 876 F.2d 899 (11th Cir. 1989); *Hilliard v. Commissioner*, 49 T.C.M. 504, 506 (1985); *Copeland v. Commissioner*, 48 T.C.M. 147, 148–49 (1984); *Straw v. Commissioner*, 47 T.C.M. 114, 123 (1983).
[1419] §21(e)(3); Reg. §1.21-3(b).
[1420] §21(e)(4); Reg. §1.21-3(b) (reference to §7703(b) and the regulations thereunder). *See Sharer v. Commissioner*, 68 T.C.M. 686 (1994), *aff'd*, 124 F.3d 212 (9th Cir. 1997).
[1421] §21(e)(4)(A); Reg. §1.21-3(b) (reference to §7703(b) and the regulations thereunder).
[1422] §21(e)(4)(A)(i); Reg. §1.21-3(b) (reference to §7703(b) and the regulations thereunder).
[1423] §21(e)(4)(A)(ii); Reg. §1.21-3(b) (reference to §7703(b) and the regulations thereunder).
[1424] §21(e)(4)(B); Reg. §1.21-3(b) (reference to §7703(b) and the regulations thereunder).
[1425] *Hopkins v. Commissioner*, 63 T.C.M. 3113, 3114–15 (1992), *appeal dismissed* (9th Cir. 1993).
[1426] *Pilgram v. Commissioner*, T.C. Summ. Op. 2001-43 (citing Reg. §1.7703-1(b)(5)).
[1427] §21(e); *See also* Instructions for Form 2441.
[1428] *See* §7703(b)(1).
[1429] Reg. §1.21-3(c).
[1430] Reg. §1.21-3(c).

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credit.[1431] If requested, the taxpayer must furnish information with respect to the nature and period of the physical or mental incapacity of the qualifying individual.[1432] This information would include the attending physician's description and other details concerning the nature of the physical or mental incapacity.[1433] If a taxpayer fails to supply information on the value of services provided by a relative who is not a related individual as described in III.D.3.c.(6)(b), above, it is likely that the amount the IRS or the courts considers to be employment-related expenses will be less than the amount that would have been taken into account had adequate records been maintained.[1434]

No credit is allowable if the taxpayer fails to provide a list of expenses or documentation with respect to the expenses.[1435] The Tax Court has applied the *Cohan* doctrine[1436] to estimate the amount of expenses where taxpayers failed to provide adequate information about the payments or the services obtained but demonstrated that they were gainfully employed and maintained a household for qualifying individuals.[1437] In another case, the credit was allowed with respect to payments for child care made to an illegal alien who would accept only cash payments.[1438] However, a court is unlikely to increase the amount the IRS allows without some persuasive testimony or other evidence from the taxpayer.[1439] Likewise, if the evidence suggests that the taxpayer's financial situation is inconsistent with a claim of having made otherwise unsubstantiated payments, the credit is disallowed.[1440]

Employment-related expenses do not include payments to tax-exempt charitable organizations[1441] unless the tax return on which the §21 credit is claimed includes the name and address of that organization[1442] and an indication that the organization is tax-exempt.[1443] Employment-related expenses do not include payments to any other person unless the return on which the §21 credit is claimed includes the name, address, and taxpayer identification number of that person.[1444] This limitation does not apply if it is shown that the taxpayer exercised due diligence in attempting to provide the identification information.[1445] Due diligence would include such actions as retaining a copy of the person's social security card or driver's license, obtaining information from the person's letterhead or printed invoice, or relying on a form authorized by the IRS and provided by the person to the taxpayer.[1446]

Note: Technically, "no credit is allowed" for unidentified payments. In effect, though, this is equivalent to excluding these payments from the definition of employment-related expenses.

E. Credit for the Elderly and Disabled

1. In General

Under §22, taxpayers who are qualified individuals are allowed a credit on account of being elderly or permanently and totally disabled.[1447] The §22 credit for the elderly and disabled is discussed in detail in 2. through 4., below. The IRS forms and schedules used to claim and/or provide information about this credit are listed in the worksheets, below.

Note: The credit for the elderly and disabled was previously contained in §37, but was relocated to §22 by the Deficit Reduction Act of 1984.[1448] Regulations under pre-1984 Act §37 continue to apply to the credit, except to the extent intervening legislation has amended it. Thus, the citations to the regulations do not conform to the usual pattern in which the code section number is reflected in the regulations section number.

2. Qualified Individuals

A qualified individual is any individual who is elderly or disabled.[1449] An elderly individual is 65 before the close of the tax year.[1450] A disabled individual is permanently and totally disabled and retired on disability before the close of the tax year.[1451] A nonresident alien is not a qualified individual.[1452]

Permanent and total disability means the individual is unable to engage in any substantial gainful activity because of medically determinable physical or mental impairments expected to cause death or that has lasted, or can be expected to last, continuously or at least 12 months.[1453] Individuals must provide proof of the disability.[1454]

3. Computation of Credit

a. In General

The credit equals 15% of the taxpayer's §22 amount for the tax year, which is[1455] the initial §22 amount reduced by the benefits amount, and the excess adjusted gross income amount.[1456]

Note: The IRS will compute the taxpayer's §22 credit.[1457]

[1431] Reg. §1.21-1(k). *See*, *e.g.*, *Webb v. Commissioner*, 60 T.C.M. 1229, 1233 (1990).

[1432] *See* former Reg. §1.44A-1(e); *Douglas v. Commissioner*, 68 T.C.M. 963 (1994), *aff'd*, 86 F.3d 1161 (9th Cir. 1996) (taxpayer failed to prove parent's inability to care for self).

[1433] *See* former Reg. §1.44A-1(e).

[1434] *See*, *e.g.*, *Langlois v. Commissioner*, 56 T.C.M. 36, 39 (1988), *aff'd*, 886 F.2d 1316 (6th Cir. 1989).

[1435] *See*, *e.g.*, *Turay v. Commissioner*, 78 T.C.M. 480 (1999); *Collins v. Commissioner*, 73 T.C.M. 2305 (1997); *Walker v. Commissioner*, 70 T.C.M. 798 (1995); *McKinney v. Commissioner*, 54 T.C.M. 103, 104 (1987).

[1436] *Cohan v. Commissioner*, 39 F.2d 540 (2d Cir. 1930), *aff'g in part and rev'g in part*, 11 B.T.A. 743 (1928).

[1437] *Gettings v. Commissioner*, 55 T.C.M. 1361, 1363–64 (1988). *See Nwachukwu v. Commissioner*, 79 T.C.M. 1411 (2000).

[1438] *Scull v. Commissioner*, 45 T.C.M. 540, 541 (1983).

[1439] *See*, *e.g.*, *Brown v. Commissioner*, 71 T.C.M. 1974 (1996) (witness testimony supporting claimed expenditures); *Irby v. Commissioner*, 42 T.C.M. 556, 563 (1981).

[1440] *See Bowman v. Commissioner*, 65 T.C.M. 2069 (1993).

[1441] *See* §501(a), §501(c)(3).

[1442] §21(e)(9)(B).

[1443] *See* H.R. Rep. No. 998, 100th Cong., 2d Sess. 200 (1988) (Conf. Rep.).

[1444] §21(e)(9)(A).

[1445] §21(e)(9) (flush language).

[1446] *See* H.R. Rep. No. 998, 100th Cong., 2d Sess. 200 (1988) (Conf. Rep.).

[1447] §22(a).

[1448] Pub. L. No. 98-369 §471(c), §474(d).

[1449] §22(b).

[1450] §22(b)(1).

[1451] §22(b)(2).

[1452] §22(f); Reg. §1.37-1(d).

[1453] §22(e)(3).

[1454] §22(e)(3).

[1455] §22(a).

[1456] §22(c)(1). *See* Reg. §1.37-2(b).

[1457] *See* Instructions for Schedule R (Form 1040), *Credit for the Elderly or the Disabled.*

ISBN 978-1-55871-737-4

Observation: Because the maximum possible §22 amount is $7,500, the maximum credit allowable under §22 is $1,125 ($7,500 × .15).

b. Initial §22 Amount

(1) In General

The initial §22 amount equals $5,000 for single taxpayers and for married taxpayers filing joint returns if only one of the spouses is a qualified individual as defined in III.E.2., above.[1458] It equals $7,500 for married taxpayers filing joint returns if both spouses are qualified individuals.[1459] It equals $3,750 for married taxpayers who file separate returns.[1460]

Observation: Though determination of the initial §22 amount is based on the taxpayer's filing status, the taxpayer's status as head of household does not matter.

(2) Disability Income Limitation

If the taxpayer is not an elderly individual, the initial §22 amount is limited to the taxpayer's disability income for the tax year.[1461] Disability income equals the aggregate amount included in the taxpayer's gross income under §72 or §105(a) to the extent it constitutes wages or payments in lieu of wages for the period during which the taxpayer is absent from work because of permanent and total disability.[1462]

> *Example (1):* T, a 52-year-old single person, is a disabled individual. During Year 1, T received payments from a former employer in lieu of wages, of which $4,500 was included in T's gross income. Because T is not an elderly individual, T's initial §22 amount is limited to $4,500.

Special rules apply to married taxpayers who file joint returns if both spouses are qualified individuals and at least one spouse is not an elderly individual.[1463] If neither spouse is an elderly individual, the initial §22 amount is limited to the sum of both spouses' disability incomes.[1464] If one spouse is not an elderly individual, the initial §22 amount is limited to the sum of $5,000 plus the disability income for the tax year of the spouse who is not an elderly individual.[1465]

> *Example (2):* H and W are married. H is age 57. W is age 53. Both H and W are disabled individuals. During Year 1, H received payments from a former employer in lieu of wages, of which $2,400 was included in H's gross income. During Year 1, W received payments from a former employer in lieu of wages, of which $1,800 was included in W's gross income. H and W file a joint return. Because neither H nor W is an elderly individual, the initial §22 amount for H and W is limited to $4,200 ($2,400 plus $1,800).

> *Example (3):* Refer to *Example (2).* Assume that W also is an elderly individual. Because W is an elderly individual and H is not, the initial §22 amount for H and W is limited to $7,400 ($5,000 plus $2,400).

Observation: The special rules do not apply if both spouses are elderly individuals. In that case, the initial §22 amount is $7,500.[1466]

> *Example (4):* Refer to *Example (3).* Assume that H also is an elderly individual. Because both H and W are elderly individuals, the initial §22 amount for them is $7,500 and the disability income limitation does not apply.

c. Benefits Amount Reduction

The benefits amount reduction equals the sum of the specified benefits received by the taxpayer, or if a joint return is filed, by both spouses.[1467] Specified benefits are amounts received as a pension, annuity, or disability benefit that satisfies either one of two conditions.[1468] First, the amount is excluded from gross income[1469] and is payable under title II of the Social Security Act,[1470] under the Railroad Retirement Act of 1974,[1471] or under a law administered by the Department of Veterans Affairs.[1472] Second, the amount is excluded from gross income under any provision of law not contained in the Code.[1473] These exclusions from gross income are discussed in 501 T.M., *Gross Income: Overview and Conceptual Aspects.*

Amounts received as pensions, annuities, or similar allowances for personal injuries or sickness resulting from active service in the armed forces of any country, in the Coast and Geodetic Survey, or in the Public Health Service, or as a disability annuity payable under §808 of the Foreign Service Act of 1980 are not treated as specified benefits and do not reduce the §22 amount.[1474] Disability benefits payable under Title II of the Social Security Act include benefits received under workers' compensation acts to the extent social security benefits are reduced under §224 of the Social Security Act or §3(a)(1) of the Railroad Retirement Act of 1974 on account of the receipt of the workers' compensation payment.[1475]

d. Excess Adjusted Gross Income Amount Reduction

The excess adjusted gross income amount reduction equals one-half of the excess of the taxpayer's adjusted gross income minus the adjusted gross income limitation amount.[1476] The adjusted gross income limitation amount equals $7,500 for single taxpayers,[1477] $10,000 for married taxpayers filing joint

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[1458] §22(c)(2)(A)(i).
[1459] §22(c)(2)(A)(ii).
[1460] §22(c)(2)(A)(iii).
[1461] §22(c)(2)(B)(i).
[1462] §22(c)(2)(B)(iii).
[1463] §22(c)(2)(B)(ii).
[1464] §22(c)(2)(B)(ii)(I).
[1465] §22(c)(2)(B)(ii)(II).
[1466] §22(c)(2)(A)(ii).
[1467] §22(c)(3)(A).
[1468] §22(c)(3)(A).
[1469] §22(c)(3)(A)(i).
[1470] §22(c)(3)(A)(i)(I).
[1471] §22(c)(3)(A)(i)(II).
[1472] §22(c)(3)(A)(i)(III).
[1473] §22(c)(3)(A)(ii).
[1474] §22(c)(3)(A) (flush language).
[1475] §22(c)(3)(B).
[1476] §22(d).
[1477] §22(d)(1).

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returns,[1478] and $5,000 for married taxpayers who file separate returns.[1479]

Example (1): T, a single taxpayer, is an elderly individual. T receives no specified benefits. T's adjusted gross income is $6,000. T's initial §22 amount is $5,000. There is no benefits amount reduction. There is no excess adjusted gross income amount reduction because T's adjusted gross income does not exceed the $7,500 adjusted gross income limitation. T's §22 amount equals $5,000.

Example (2): Refer to *Example (1).* Assume T's adjusted gross income is $12,000. The excess adjusted gross income amount reduction equals $2,250 (one-half of ($12,000 – $7,500)). Therefore, T's §22 amount equals $2,750 ($5,000 – $2,250).

Example (3): Refer to *Example (1).* Assume T's adjusted gross income is $22,000. The excess adjusted gross income amount reduction equals $7,250 (one-half of ($22,000 – $7,500)). Therefore, T's §22 amount equals zero ($5,000 – $7,250).

4. Failure to File Joint Return

An individual who is married at the close of a tax year is not allowed to claim the §22 credit for that tax year unless the individual and the individual's spouse file a joint return.[1480] This limitation does not apply if the individual and the spouse live apart at all times during the tax year.[1481] The determination of marriage is made as of the close of the tax year, except that if either spouse dies during the tax year, the determination is made on the date of death.[1482]

An individual who is legally separated under a decree of divorce or separate maintenance is not considered to be married.[1483] A married individual is not considered to be married if he or she satisfies four conditions.[1484] First, the individual must file a separate return.[1485] Second, the individual must maintain as his or her home a household that constitutes for more than one-half of the tax year the principal place of abode of a child with respect to whom the individual meets one of three tests.[1486] The first test is met if the individual is allowed to claim a dependency exemption deduction with respect to the child.[1487] The second test is met if the individual would be allowed to claim a dependency exemption deduction but for the application of the exception that permits the custodial parent to waive any dependency exemption deduction with respect to the child.[1488] The third test is met if the individual would be allowed to claim a dependency exemption deduction but for the exceptions applicable to pre-1985 instruments.[1489] Third, the individual must furnish more than one-half of the cost of maintaining that household during the tax year.[1490] Fourth, the individual's spouse must not be a member of that household during the last six months of the tax year.[1491] Spouses who live in the same house are members of the same household even if they are emotionally estranged and do not share a bedroom.[1492]

5. Tax Compliance

The elderly credit is claimed by attaching Schedule R to Form 1040 or Form 1040-SR.[1493]

If a taxpayer is claiming the credit as disabled, a physician's statement generally is required to support the condition.[1494] The statement can be found on page R-4 of the Instructions for Schedule R (Form 1040), or it can be a separate statement containing the same information.[1495]

Subsequent statements are not required if a physician's statement was filed for 1983 or an earlier year, or if a statement was filed in 1984 or later stating the taxpayer is unable to engage in any substantial gainful activity.[1496]

F. Adoption Credit

1. In General

An individual taxpayer may claim a credit for qualified adoption expenses paid or incurred during the tax year.[1497] The maximum amount of the credit is $10,000 (adjusted for inflation).[1498] Beginning in 2025, up to $5,000 of the maximum credit amount is refundable.[1499] Any unused portion of the nonrefundable credit amount can be carried forward for up to five years.[1500]

For any expense paid or incurred before the tax year in which the adoption becomes final, the credit is allowed for the tax year following the tax year during which the expense is paid or incurred (one-year delay rule).[1501] For any expense paid or incurred during or after the tax year in which the adoption becomes final, the credit is allowed for the tax year in which the expense is paid or incurred.[1502]

In the case of an adoption of a child with special needs that becomes final during a tax year, the taxpayer is treated as having paid, during the tax year in which the adoption becomes final, qualified adoption expenses for the adoption in an amount equal to the excess (if any) of the credit amount for that year

[1478] §22(d)(2).
[1479] §22(d)(3).
[1480] §22(e)(1); Reg. §1.37-1(c).
[1481] §22(e)(1); Reg. §1.37-1(c).
[1482] §22(e)(2) (reference to §7703(a)(1)).
[1483] §22(e)(2) (reference to §7703(a)(2)).
[1484] §22(e)(2) (reference to §7703(b)).
[1485] §22(e)(2) (reference to §7703(b)(1)).
[1486] §22(e)(2) (reference to §7703(b)(1) (reference to §152(e))).
[1487] §22(e)(2) (reference to §7703(b)(1) (reference to §152(e))).
[1488] §22(e)(2) (reference to §7703(b)(1)).
[1489] §22(e)(2) (reference to §7703(b)(1) (reference to §152(e))).
[1490] §22(e)(2) (reference to §7703(b)(2)).
[1491] §22(e)(2) (reference to §7703(b)(3)).
[1492] *Chiosie v. Commissioner*, 79 T.C.M. 1812 (2000).
[1493] Form 1040-SR was introduced for the 2019 tax year. Forms 1040A and 1040EZ are no longer available.
[1494] §22(e)(3).
[1495] See the Instructions for Form 1040 or the Instructions for Schedule R (Form 1040) for more information.
[1496] Instructions for Schedule R (Form 1040).
[1497] §23.
[1498] *See* §23.
[1499] §23(a)(4), added by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70402.
[1500] §23(c), amended by the OBBBA, §70402, effective for tax years beginning after Dec. 31, 2024.
[1501] §23(a)(2)(A). *See* Notice 97-9, *modified by* Notice 97-70.
[1502] §23(a)(2)(B). *See* Notice 97-9, *modified by* Notice 97-70.

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over the aggregate qualified adoption expenses actually paid or incurred for that adoption during that and all prior tax years.[1503]

If the adopted child is not a U.S. citizen or resident,[1504] the credit is not allowed for any qualified adoption expense for the adoption unless it becomes final,[1505] and any adoption expense paid or incurred before the tax year in which the adoption becomes final is accounted for as if it were paid or incurred during the tax year in which the adoption becomes final.[1506]

If a credit is allowed for any expenditure for property, the increase in the basis of that property which otherwise would result from the expenditure must be reduced by the amount of the credit.[1507] The reduction of basis on account of credits is discussed in 560 T.M., *Income Tax Basis: Overview and Conceptual Aspects.*

The IRS can issue regulations as needed for the adoption credit, including rules treating unmarried individuals who pay or incur qualified adoption expenses for the same child as one taxpayer for purposes of applying the dollar amounts for the adoption of a child with special needs and the aggregate amount of qualified adoption expenses.[1508]

2. Limitations

a. Dollar Limitation

As noted above, the aggregate amount of qualified adoption expenses that may be taken into account for all tax years is limited to $10,000, indexed for inflation.[1509] For recent tax years, the aggregate amount of qualified adoption expenses are listed in Tables, Charts & Lists, ***Adoption Expenses.***

This amount is the same for children with and without special needs, although taxpayers adopting a child with special needs are deemed to have incurred expenses up to the maximum credit amount regardless of whether they actually pay or incur those amounts.[1510]

> *Example:* Taxpayer (T) adopted a child with special needs and the applicable government provided car seats, diapers, and other adoption related services. The adoption was finalized and throughout the adoption process T did not incur or pay any adoption related expenses. If all other adoption tax credit requirements are met, T qualifies for the credit even though T did not incur or pay any qualified adoption expenses. T will be treated as having paid the maximum amount of expenses allowable because the adoption (1) involved a child with special needs and (2) was finalized.[1511]

Although the limitation applies to each adopted child, it also applies to the combined expenses of an unsuccessful attempt to adopt a child that is followed by the successful attempt to adopt another child.[1512]

b. Income Limitation

The amount allowed as an adoption credit for any tax year, apart from any carryforward from previous years, is reduced, but not below zero, by the income limitation amount.[1513] The income limitation amount equals the credit that otherwise would be allowable, multiplied by a fraction, the numerator of which is the amount, if any, by which the taxpayer's adjusted gross income exceeds $150,000, and the denominator of which is $40,000. For these purposes, adjusted gross income is determined disregarding the §911 foreign earned income exclusion, the §931 possessions income exclusion, and the §933 Puerto Rico income exclusion.[1514]

The $150,000 income limit is adjusted for inflation.[1515] Recent beginning and completed (i.e., no credit is allowed) phaseout inflation adjusted amounts are listed in Tables, Charts & Lists, ***Adoption Expenses.***

> *Example (1)* — Assume that the maximum credit is the amount of qualified adoption expenses up to $15,950, and that the exclusion begins to phase out for taxpayers with MAGI in excess of $239,230 and is completely phased out at MAGI of $279,230. In Year 1, T, an unmarried individual, had an AGI of $249,230 and paid $5,000 of qualified adoption expenses. The adoption became final in Year 1. The reduction percentage is 25% (($249,230 − $239,230) ÷ $40,000). The maximum credit available in Year 1 is $3,750 ($5,000 − ($5,000 × 25%)), and is claimed in that year.

> *Example (2)* — In an effort to adopt an eligible child, H and W pay $2,000 of qualified adoption expenses in Year 1, an additional $46,000 of qualified adoption expenses in Year 2, and $89,000 of qualified adoption expenses in Year 3 when the adoption becomes final. H and W may not claim any qualified adoption expenses as a credit in Year 1 because of the one-year delay rule. On their Year 2 joint federal income tax return, H and W may take in-

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[1503] §23(a)(3).

[1504] As defined in §217(h)(3).

[1505] §23(e)(1). *See* Rev. Proc. 2010-31 (safe harbors for adoption credit where foreign adoption is governed by Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption and subject to Intercountry Adoption Act, as Rev. Proc. 2005-31 did not apply to such adoptions), Rev. Proc. 2005-31 (safe harbors for determining finality of adoption of foreign-born child and guidance on treatment of expenses for adoption proceeding under home state law after entry of foreign-born child into United States under an "immediate relative" (IR) visa). *See also* CCA 201509037 (advising that Rev. Proc. 2005-31 allows taxpayer to choose year of finality if there is re-adoption, but does not require re-adoption. In the absence of re-adoption, year of finality is tax year in which foreign country's competent authority issues decree of adoption).

[1506] §23(e)(2). *See* Notice 97-9, *modified by* Notice 97-70.

[1507] §23(g).

[1508] §23(i).

[1509] §23(b)(1), §23(h), amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70402, effective for tax years beginning after Dec. 31, 2024.

[1510] §23(a)(3). See III.F.5., below, for further discussion of a child with special needs.

[1511] IRS FAQ, *Questions and Answers about Refundability and Recognizing Indian Tribal Governments for Purposes of Making a Special Needs Determination for the Adoption Tax Credit, Topic B, Q6* (FS-2026-03, Feb. 2026).

[1512] *See* Notice 97-9. *See also* IRS FAQ, *Questions and Answers about Refundability and Recognizing Indian Tribal Governments for Purposes of Making a Special Needs Determination for the Adoption Tax Credit, Topic A, Q2* (FS-2026-03, Feb. 2026).

[1513] §23(b)(2)(A). *See* Notice 97-9, *modified on other issues,* Notice 97-70.

[1514] §23(b)(2)(B).

[1515] §23(h).

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to account the $2,000 of qualified adoption expenses paid in Year 1, subject to any reduction under the income limitation. Assume that in Year 2, the maximum credit is the amount of qualified adoption expenses up to $14,890, and that the exclusion begins to phase out for taxpayers with MAGI in excess of $223,410 and is completely phased out at MAGI of $263,410. Assume further that H and W have modified AGI in Year 2 of $233,410, so the income limitation applies. H and W's reduction percentage for Year 2 under the income limitation is 25% (($233,410 − $223,410) ÷ $40,000). H and W's allowable credit for Year 2 is $1,500 ($2,000 − ($2,000 × 25%)).

Assume that in Year 3, the maximum credit is the amount of qualified adoption expenses up to $15,950, and that the exclusion begins to phase out for taxpayers with MAGI in excess of $239,230 and is completely phased out at MAGI of $279,230. Assume further that H&W have modified AGI of $244,230 in Year 3. On their joint federal income tax return for Year 3, H and W first reduce the $15,590 dollar limitation by the $2,000 amount of qualified adoption expenses accounted for in all prior years to obtain a $13,590 dollar limitation applicable in Year 3. Thus, on their Year 3 joint federal income tax return, H and W may account for only $13,590 of the $15,000 of qualified adoption expenses paid in Year 2 and Year 3, before applying the income limitation. H and W's reduction percentage for Year 3 under the income limitation is 12.5% (($244,230 − $239,230) ÷ $40,000). Thus, H and W's allowable credit for Year 3 is $11,891.25 ($13,590 − ($13,590 × 12.5%)).[1516]

c. Limitation Based on Amount of Tax

Beginning in 2025, a portion of the adoption credit is refundable. The maximum refundable amount is $5,000, adjusted for inflation.[1517] Thus, the remaining amount of the credit allowable under §23(a)(1) is nonrefundable. For tax years before 2025, the entire adoption credit was generally nonrefundable.

Any nonrefundable amount of the allowable adoption credit for any tax year that exceeds the tax liability limitation for that year is reduced by the sum of the taxpayer's nonrefundable personal credits (other than §23 and §25D) and the excess is carried over to the succeeding tax year and added to the adoption credit allowable for that year.[1518] The refundable portion of the credit cannot be carried forward.

Example (1): In Year 1, Taxpayer (T) finalized the adoption of her child and had qualified adoption expenses of $12,000. The maximum adoption credit was $15,000 and the refundable portion of the adoption credit was $5,000 for the year. T's tax liability for the year was $2,500. For Year 1, T's tax liability was reduced to zero resulting in $9,500 of unused adoption credit. That year, T also claimed a $5,000 refundable adoption credit. The remaining $4,500 unused credit can be carried forward for up to five years and can only be used to calculate the nonrefundable portion of the credit in those subsequent years.[1519]

Example (2): In addition to the facts above, in Year 2 the maximum adoption credit and refundable portion of the credit were the same as in Year 1. In Year 2, T had no qualified adoption expenses, and her tax liability was $4,000. T cannot claim the refundable portion of the adoption credit, but she can apply the unused nonrefundable credit carried over from Year 1 to reduce her Year 2 tax liability to zero. T can then carry forward the remaining $500 unused credit to determine any nonrefundable portion of the credit in the allowable subsequent years.[1520]

Example (3): In Year 1, T finalized the adoption of his child and had $5,000 in qualified adoption expenses. For that year, the maximum adoption credit was $15,000 and the refundable portion of the adoption credit was $5,000. In Year 1, T's tax liability was zero because T's income was excluded from gross income under an applicable treaty. T can still claim a $5,000 refundable adoption credit for the year because T had qualified adoption expenses that year.[1521]

The adoption credit can be used to offset a taxpayer's alternative minimum tax liability.[1522]

The expiration of the statute of limitations for a refund claim (typically three years) may bar the carryforward of the taxpayer's "unused adoption expense credit." Specifically, to the extent that a taxpayer did not avail themselves of the credit in the year they were entitled to claim the adoption expenses (or file a timely claim for refund to do so) the taxpayer is barred from carrying forward the adoption expenses to claim the credit. However, to the extent that no tax benefit would have been obtained had the taxpayer claimed the credit (or filed a timely refund claim, in order to do so), the taxpayer may carry her "unused credit" forward to successive years.[1523]

3. Qualified Adoption Expenses

Qualified adoption expenses are reasonable and necessary adoption fees, court costs, attorney fees, and other expenses that satisfy five conditions.[1524] First, they must be directly related to the legal adoption of an eligible child by the taxpayer. Second, their principal purpose must be for the legal adoption

1516 *See* Notice 97-9, §I.G.4.

1517 §23(a)(4), §23(h), amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70402. The refundable portion of the adoption credit is adjusted for inflation beginning in 2026. §23(h)(3).

1518 §23(c)(1), amended by the OBBBA, §70402, applicable to tax years beginning after Dec. 31, 2024.

1519 IRS FAQ, *Questions and Answers about Refundability and Recognizing Indian Tribal Governments for Purposes of Making a Special Needs Determination for the Adoption Tax Credit, Topic A, Q1* (FS-2026-03, Feb. 2026).

1520 IRS FAQ, *Questions and Answers about Refundability and Recognizing Indian Tribal Governments for Purposes of Making a Special Needs Determination for the Adoption Tax Credit, Topic A, Q3* (FS-2026-03, Feb. 2026).

1521 IRS FAQ, *Questions and Answers about Refundability and Recognizing Indian Tribal Governments for Purposes of Making a Special Needs Determination for the Adoption Tax Credit, Topic B, Q7* (FS-2026-03, Feb. 2026).

1522 §26(a).

1523 *See, e.g.*, CCA 201211021.

1524 §23(d)(1); Notice 97-9, *modified on other issues*, Notice 97-70.

ISBN 978-1-55871-737-4

of an eligible child by the taxpayer. Third, they must not be incurred in violation of state or federal law or in carrying out any surrogate parenting arrangement. Fourth, they must not be expenses for the adoption by an individual of a child who is the child of that individual's spouse. Fifth, they must not be reimbursed under an employer program or otherwise.[1525]

No credit is allowed for any expense for which a deduction or credit is allowed under any other income tax provision.[1526] No credit is allowed for any expense to the extent that funds for that expense are received under any federal, state, or local program.

4. *Eligible Child*

An eligible child is any individual who either has not attained age 18, or is physically or mentally incapable of self-care.[1527]

No credit is allowed for any eligible child unless the taxpayer includes, if known, the name, age, and TIN of the child on the taxpayer's return for the tax year for which the credit is claimed.[1528] In lieu of this information, the IRS may require other information that satisfies the same purposes, including identification of an agent assisting with the adoption.[1529] Prospective adoptive parents may apply for an Adoption Taxpayer Identification Number (ATIN) for a prospective adoptive child as a temporary measure to satisfy the identification requirement.[1530] When the adoption becomes final, the adoptive parent must apply for a social security number for the child.[1531]

The IRS provided guidance with respect to the substantiation requirements, pending the issuance of regulations. The guidance requires different types of documentation for: (a) domestic and foreign adoptions that have been finalized; (b) domestic adoptions that are not final; and (c) the adoption of special needs children. Taxpayers must attach the required documentation to the taxpayer's income tax return for the tax year that the taxpayer claims the credit.[1532]

With respect to domestic and foreign adoptions that have been finalized in the United States, the IRS requires an adoption order or decree.[1533] With respect to foreign adoption governed by the Hague Convention and finalized in another country, the IRS requires the following documentation: (a) a Hague Adoption Certificate (Immigrating Child); (b) an IH-3 visa; or (c) a foreign adoption decree, translated into English. With respect to a foreign adoption from a country that is not party to the Hague Convention, the IRS requires the following documentation: (a) a foreign adoption decree, translated into English; or (b) an IR-2 or IR-3 visa.

With respect to domestic adoptions that are not final, the IRS requires the following: (a) an adoption taxpayer identification number, obtained by the taxpayer for the child, included on the taxpayer's income tax return (instead of attaching a document); (b) a home study completed by an authorized placement agency; (c) a placement agreement with an authorized placement agency; (d) a document signed by a hospital official authorizing the release of a newborn child from the hospital to the taxpayer for legal adoption; (e) a court document ordering or approving the placement of a child with the taxpayer for legal adoption; or (f) an original affidavit or notarized statement signed under penalties of perjury from an adoption attorney, government official, or other person, stating that the signor: (1) placed or is placing a child with the taxpayer for legal adoption; or (2) is facilitating the adoption process for the taxpayer in an official capacity, summarizing the facilitation.

With respect to the adoption of special needs children, the IRS requires the following documentation: (a) the same documentation required with respect to a domestic or foreign adoption that has been finalized (noted above); and (b) a copy of the state determination of special needs must be attached to the taxpayer's income tax return for the tax year that the taxpayer claims the adoption credit for a child with special needs.[1534]

5. *Child with Special Needs*

A child with special needs is any child for whom three conditions are satisfied.[1535] First, a state or Indian tribal government must have determined that the child may not or should not be returned to the home of his or her parents.[1536] Second, the state or Indian tribal government must have determined that there exists for the child a specific factor or condition, such as ethnic background, age, membership in a minority or sibling group, medical conditions, or physical, mental, or emotional handicaps, because of which it is reasonable to conclude that the child be placed with adoptive parents without providing adoption assistance.[1537] Third, the child must be a citizen or resident of the United States,[1538] which includes U.S. possessions.[1539]

A state or Indian tribal government must make an individualized decision about a specific child and the existence of a specific factor or condition that necessitates adoption assistance. The fact that a child has a specific trait is alone insufficient to claim the credit; it must be due to that trait that the

[1525] §23(d)(1)(D); Notice 97-9.

[1526] §23(b)(3); Notice 97-9.

[1527] §23(d)(2); Notice 97-9, *modified on other issues*, Notice 97-70; Rev. Rul. 2003-72 (method for determining proper age of child).

[1528] §23(f)(2).

[1529] §23(f)(2)(B).

[1530] Reg. §301.6109-3(a)(1); Prop. Reg. §301.6109-3(a)(1), REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017).

[1531] Reg. §301.6109-3(a)(1); Prop. Reg. §301.6109-3(a)(1), REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017).

[1532] Notice 2010-66, §3.2.

[1533] An order or decree must include information that establishes that the taxpayer's adoption of the eligible child has been finalized and the date finalized.

[1534] A special needs determination must include information that establishes that the state has made a determination of special needs for the eligible child. A taxpayer may redact sensitive personal information from an adoption order or decree or a special needs determination. However, the IRS may require the taxpayer to provide an unredacted copy of the document if needed to substantiate the claim for the credit.

[1535] §23(d)(3); Notice 97-9, *modified on other issues*, Notice 97-70.

[1536] §23(d)(3)(A), amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70403, applicable to tax years beginning after Dec. 31, 2024; Notice 97-9, §II.B.2.

[1537] §23(d)(3)(B), amended by the OBBBA, §70403; Notice 97-9, §II.B.2. *See* IRS FAQ, *Questions and Answers about Refundability and Recognizing Indian Tribal Governments for Purposes of Making a Special Needs Determination for the Adoption Tax Credit, Topic B, Q3 and Q4* (FS-2026-03, Feb. 2026).

[1538] §23(d)(3)(C) (references to §217(h)(3)); Notice 97-9, §II.B.2.

[1539] Notice 97-9, §II.B.2.

ISBN 978-1-55871-737-4

child could not have been placed with adoptive parents without financial incentive to do so.[1540]

The definition of "a child with special needs" for purposes of the adoption credit does not require that the child have a physical or mental disability. Additionally, a tribal government can determine an adoptee to be a child with special needs if the child's adoption is subject to the Indian Welfare Act.[1541]

Acceptable documentation of the state or Indian tribal government's determination of a child with special needs includes, but is not limited to:

- an adoption assistance or subsidy agreement issued by the state, Tribal court, or Tribal government representative;
- certification from the state, county or Tribal welfare agency, or Tribal government verifying that the child is approved to receive adoption assistance;
- certification from the state, county, or Tribal welfare agency, or Tribal government verifying that the child has special needs; or
- an official letter on state, county, or Tribal government letterhead confirming the special needs determination.[1542]

For further discussion of federal income taxation of tribes and tribal governments, see 615 T.M., *Income Taxation of American Indians (Including Alaska Natives).*

6. Failure to File Joint Return

An individual who is married at the close of a tax year is not allowed to claim the adoption credit for that year unless the individual and the individual's spouse file a joint return.[1543] An individual who is legally separated under a decree of divorce or separate maintenance is not considered to be married.[1544]

Observation: Because the statute applies to the adoption credit the same joint return requirements that apply for purposes of the §21 household and dependent care credit, regulations, cases, and rulings interpreting §21 should be authoritative for purposes of the adoption credit.[1545]

Comment: Unlike the joint return requirement for the §22 credit for the elderly and disabled, the joint return requirement for the §23 adoption credit, like its counterpart provision for the §21 household and dependent care credit, does not include an exception for married taxpayers who live apart from their spouses for the entire tax year.[1546]

If either spouse dies during the tax year and a joint return may be filed, the §23 credit is allowable only if the joint return is filed.[1547] If the surviving spouse remarries before the end of the tax year in which the first spouse dies, the §23 credit is allowable on the decedent spouse's separate return.[1548]

A married individual is not considered to be married if he or she satisfies four conditions.[1549] First, the individual files a separate return.[1550] Second, the individual maintains as his or her home a household that constitutes for more than one-half of the tax year the principal place of abode of a qualifying individual.[1551] Third, the individual furnishes more than one-half of the cost of maintaining that household during the tax year.[1552] Fourth, the individual's spouse is not a member of that household during the last six months of the tax year.[1553] Thus, if the individual is estranged from his or her spouse but permits the spouse to remain living in the household, the individual is considered married and must file a joint return in order to claim the adoption credit.[1554]

Comment: The preceding conditions are almost identical to those prescribed in §7703(b) that must be met by a married individual in order to qualify as unmarried and eligible to use head of household filing status. The difference is that for §23/§36C purposes the household must be maintained for a qualifying individual, whereas for §7703(b) purposes it must be maintained for a child.[1555]

G. *Adoption Assistance Exclusion*

1. In General

Under §137, gross income does not include amounts paid or incurred by an employer for qualified adoption expenses related to an employee's adoption of a child if those amounts are furnished under an adoption assistance program.[1556] Qualified adoption expenses are expenses that are qualified adoption expenses for purposes of the adoption assistance credit, as discussed in III.F.3., above, determined without regard to employer reimbursements.[1557]

If a taxpayer adopts a child with special needs, and the adoption becomes final, the taxpayer's qualified adoption expenses for that adoption for that year are increased by an amount equal to the excess (if any) of the maximum exclusion

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[1540] *See Lahmeyer v. United States*, No. 1:13-cv-23288-CMA, 2014 BL 227541 (S.D. Fla. 2014) (taxpayers unsuccessfully argue that Florida law has determined that the definition of a "special needs child" includes a child of black or racially mixed parentage, and based solely on this fact, they are entitled to the adoption credit).

[1541] IRS FAQ, *Questions and Answers about Refundability and Recognizing Indian Tribal Governments for Purposes of Making a Special Needs Determination for the Adoption Tax Credit, Topic B, Q1 and Q2* (FS-2026-03, Feb. 2026).

[1542] IRS FAQ, *Questions and Answers about Refundability and Recognizing Indian Tribal Governments for Purposes of Making a Special Needs Determination for the Adoption Tax Credit, Topic B, Q5* (FS-2026-03, Feb. 2026).

[1543] §23(f)(1) (references to §21(e)(2)). *See, e.g., Field v. Commissioner*, T.C. Memo 2013-111 (married taxpayer filing separate return ineligible to claim adoption expense credit, and joint filing requirement is valid under Fifth Amendment Equal Protection Clause).

[1544] §23(f)(1) (references to §21(e)(3)).

[1545] *See, e.g.* Reg. §1.21-3(a), §1.21-3(b), §1.21-3(c) (interpreting §21); *Casey v. Commissioner*, 55 T.C.M. 664, 666 (1988), *aff'd*, 876 F.2d 899 (11th Cir. 1989) (interpreting §21).

[1546] *Cf.* §22(e)(1); Reg. §1.37-1(c).

[1547] *See* Reg. §1.21-3(c) (interpreting §21).

[1548] Reg. §1.21-3(c) (interpreting §21).

[1549] §23(f)(1) (references to §21(e)(4)); Reg. §1.21-3(b) (interpreting §21) (reference to §7703(b)). *See Sharer v. Commissioner*, 68 T.C.M. 686 (1994).

[1550] §23(f)(1) (references to §21(e)(4)(A)); Reg. §1.21-3(b) (interpreting §21) (reference to §7703(b)).

[1551] §23(f)(1) (references to §21(e)(4)(A)(i)); Reg. §1.21-3(b) (interpreting §21) (reference to §7703(b)).

[1552] §23(f)(1) (references to §21(e)(4)(A)(ii)); Reg. §1.21-3(b) (interpreting §21) (reference to §7703(b)).

[1553] §23(f)(1) (references to §21(e)(4)(B)); Reg. §1.21-3(b) (interpreting §21) (reference to §7703(b)).

[1554] *Hopkins v. Commissioner*, 63 T.C.M. 3113 (1992), *appeal dismissed* (9th Cir. April 7, 1993) (interpreting §21).

[1555] *See* §7703(b)(1).

[1556] §137(a)(1).

[1557] §137(d).

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amount for that year over the actual aggregate qualified adoption expenses with respect to that adoption during that tax year and all prior tax years.[1558] The exclusion amount varies from year to year because it is adjusted for inflation.[1559]

Identification of a special needs child is discussed in III.F.4., above.

If the adopted child is not a U.S. citizen or resident,[1560] the exclusion is not allowed for any qualified adoption expense for the adoption unless it becomes final,[1561] and any adoption expense paid or incurred before the tax year in which the adoption becomes final is taken into account as if it were paid or incurred during the tax year in which the adoption becomes final.[1562] The issue of when an adoption becomes final for this purpose is discussed in III.F.1., above, in connection with the identical requirement for the adoption credit.

If an exclusion is allowed for any expenditure with respect to property, the increase in the basis of that property, which otherwise would result from the expenditure, is reduced by the amount of the exclusion.[1563] The reduction of basis on account of exclusions is discussed in 560 T.M., *Income Tax Basis: Overview and Conceptual Aspects*.

An individual who is married at the close of a tax year is not allowed to apply the §137 exclusion for that tax year unless the individual and the individual's spouse file a joint return.[1564] Whether an individual is married for these purposes is discussed in III.F.5., above, in connection with the identical requirement for the adoption credit.

2. Limitations

a. Dollar Limitation

The aggregate exclusion for the adoption of a child is $10,000, adjusted for inflation.[1565]

To calculate the inflation-adjusted exclusion amount, first multiply the §137(b)(1) amount by the cost-of-living adjustment applicable to the §1 rate brackets.[1566] Subtract the §137(b)(1) amount from the product and round the result to the nearest multiple of $10 — this is the "increase" to the §137(b)(1) amount.[1567] Finally, to arrive at the inflation-adjusted exclusion amount, add the increase to the §137(b)(1) amount.

b. Income Limitation

The exclusion is reduced (phased out), but not below zero, by the income limitation amount.[1568] The income limitation amount equals the exclusion that otherwise would apply, multiplied by a fraction, the numerator of which is the amount, if any, by which the taxpayer's adjusted gross income exceeds $150,000,[1569] and the denominator of which is $40,000.[1570] For these purposes, adjusted gross income is determined without regard to the §85(c) exclusion of unemployment compensation received in tax year 2020, the §137 adoption assistance exclusion, the §221 education loan interest deduction, the §222 qualified tuition deduction (tax years 2020 and earlier), the §911 foreign earned income exclusion, the §931 possessions income exclusion, and the §933 Puerto Rico income exclusion.[1571] It is computed after application of the §86 social security gross income inclusion, the §135 higher education savings bond interest exclusion, the §219 retirement savings deduction, and the §469 passive loss limitation.[1572]

The $150,000 amount is adjusted for inflation.[1573] It is increased by an amount equal to $150,000[1574] multiplied by the cost-of-living adjustment applicable to the §1 rate brackets, determined by substituting "calendar year 2001" for "calendar year 2016."[1575] The inflation-adjusted dollar limitation is rounded to the nearest multiple of $10.[1576] The inflation adjusted amounts for recent years are provided in *Tables, Charts & Lists, Income Tax and Accounting,* ***Adoption Expenses***.

> *Example (1):* Assume that the maximum amount that may be excluded from an employee's gross income for adoption of a child with special needs is $15,950, and that the exclusion begins to phase out for taxpayers with MAGI in excess of $239,230 and is completely phased out at MAGI of $279,230. T's employer has in place an adoption assistance program, under which T is reimbursed for $17,500 of qualified adoption expenses with respect to T's adoption of a child without special needs. T's AGI is $100,000. Because T's MAGI does not exceed $239,230, there is no phase-out, but T's exclusion is subject to a dollar limitation of $15,950. Thus, T must include $1,550 of the employer's reimbursement in gross income.

> *Example (2):* Assume that the maximum amount that may be excluded from an employee's gross income for adoption of a child with no special needs is $15,950, and that the exclusion begins to phase out for taxpayers with MAGI in excess of $239,230 and is completely phased out at MAGI of $279,230. T's employer has in place an adoption assistance program, under which T is reimbursed for $17,500 of qualified adoption expenses with respect to T's adoption of a child without special needs. T's AGI is $249,230. T must reduce the $15,950 that otherwise would be excluded. The reduction percentage is 25% (($249,230 − $239,230) ÷ $40,000). The maximum exclusion available is $11,962.50 ($15,950 − [$15,950 × 25%]). Thus, T

[1558] §137(a)(2). Taxpayers should use Form 8839, *Qualified Adoption Expenses*, to report their qualified adoption expenses.

[1559] §137(a)(2), §137(b)(1), §137(f). The inflation adjusted amounts for recent years are provided in *Tables, Charts & Lists, Income Tax and Accounting,* ***Adoption Expenses***.

[1560] *See* §217(h)(3).

[1561] §137(e) (reference to §23(e)(1)).

[1562] §137(e) (reference to §23(e)(2)).

[1563] §137(e) (reference to §23(g)).

[1564] §137(e) (reference to §23(f)(1) (reference to §21(e)(2))).

[1565] §137(b)(1). The inflation adjusted amounts for recent years are provided in *Tables, Charts & Lists, Income Tax and Accounting,* ***Adoption Expenses***.

[1566] *See* §137(f)(1). The base year is 2001. §137(f)(1).

[1567] §137(f)(1) (flush language).

[1568] §137(b)(2).

[1569] §137(b)(2)(A).

[1570] §137(b)(2)(B).

[1571] §137(b)(3)(A). Before the repeal of §199 by the TCJA, the determination was also made without the §199 domestic production activities deduction.

[1572] §137(b)(3)(B).

[1573] §137(f)(2).

[1574] §137(f)(2)(A).

[1575] §137(f)(2)(B) (reference to §1(f)(3)).

[1576] §137(f)(2) (flush language).

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must include $5,537.50 ($17,500 – $11,962.50) of the employer's reimbursement in gross income.

Example (3): Apply the same assumptions as in Example 2. T's MAGI is $285,000. Because Z's MAGI exceeds $279,230, the entire exclusion is phased out. Thus, Z must include all $17,500 of the employer's reimbursement in gross income.

3. Adoption Assistance Program

An adoption assistance program is a separate written plan of an employer for the exclusive benefit of its employees under which the employer provides its employees with adoption assistance.[1577] The program need not be funded,[1578] but it must meet four requirements, discussed below.[1579]

Observation: These four requirements are "similar" to the comparable requirements applicable to the §127 educational assistance exclusion, and thus the regulations under §127 should provide guidance until regulations under §137 are issued. The educational assistance exclusion is discussed in 394 T.M., *Employee Fringe Benefits*.

First, the program must benefit employees who qualify under a classification set up by the employer and found by the IRS not to be discriminatory in favor of highly compensated employees or their dependents.[1580] Highly compensated employees are those so classified for purposes of qualified employee retirement plans.[1581] In making this determination, there must be excluded from consideration employees who are included in a unit of employees covered by an agreement that the Department of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that adoption assistance benefits were the subject of good faith bargaining between the parties.[1582]

Second, not more than 5% of the amounts paid or incurred by the employer for adoption assistance during the year may be provided for the class of individuals, each of whom owns more than 5% of the stock or of the capital or profits interest in the employer, or is a spouse or dependent of such a person.[1583]

Third, the program must not provide eligible employees with a choice between adoption assistance and other remuneration includible in gross income.[1584] The business practices of the employer, as well as the written plan, are taken into account in determining whether this requirement is met.[1585]

Fourth, reasonable notification of the availability and terms of the program must be provided to eligible employees.[1586]

Military and Coast Guard adoption reimbursement programs[1587] are treated as adoption assistance programs.[1588]

H. Dependent Care Assistance

1. In General

Under §129(a)(1), an employee's gross income does not include amounts paid or incurred by the employer for dependent care assistance provided to the employee if the assistance is furnished pursuant to a dependent care assistance program.

Note: No deduction or credit is allowed to the employee for amounts excluded under §129.[1589]

No exclusion is permitted for amounts paid or incurred during the employee's tax year to certain relatives of the employee for dependent care assistance provided to the employee.[1590] Relatives within this restriction are persons for whom the employee or spouse are permitted to claim dependency exemptions[1591] and children of the employee who are under age 19 at the close of the tax year.[1592]

Note: For this purpose, the IRS has ruled that a child attains a given age on the child's birthday.[1593]

The §129 exclusion is described below, and discussed in detail 394 T.M., *Employee Fringe Benefits*.

2. Limitations on Exclusion

The §129 exclusion is limited to $7,500 of dependent care assistance ($3,750 for a married person[1594] filing a separate return).[1595] For tax years beginning in 2021 only, the §129 exclusion applies to the first $10,500 of dependent care assistance ($5,250 for a married person[1596] filing a separate return).[1597]

Any amount that is not excluded is included in the employee's gross income for the tax year in which the dependent care assistance is provided even if the employer's payment occurs in a later tax year.[1598]

If the employee is not married at the close of the tax year, the amount excluded under §129 cannot exceed the employee's earned income.[1599] If the employee is married at the close of the tax year, the amount excluded under §129 cannot exceed the lesser of the employee's earned income or the earned income of the employee's spouse.[1600] If a spouse is a student or incapable of self-care, the spouse is deemed to be gainfully employed and to have earned income of $250 per month for each month the spouse is a student or incapable of self-care, or $500 per month if there are two or more individuals qualifying for dependent

[1577] §137(c)(1).
[1578] §137(c)(2) (reference to §127(b)(5)).
[1579] §137(c)(2) (reference to §127(b)(1)).
[1580] §137(c)(2) (reference to §127(b)(2)).
[1581] §137(c)(2) (reference to §127(b)(2) (incorporating §414(q)(1))).
[1582] §137(c)(2) (reference to §127(b)(2)).
[1583] §137(c)(2) (reference to §127(b)(3)). *See* Reg. §1.127-2(f).
[1584] §137(c)(2) (reference to §127(b)(4)). *See* Reg. §1.127-2(c)(2).
[1585] §137(c)(2) (reference to §127(b)(4)).
[1586] §137(c)(2) (reference to §127(b)(6)). *See* Reg. §1.127-2(g).
[1587] *See* 10 U.S.C. §1052, 14 U.S.C. §541.
[1588] §137(c) (flush language).
[1589] §129(e)(7).
[1590] §129(c).
[1591] §129(c)(1).
[1592] §129(c)(2).
[1593] Rev. Rul. 2003-72.
[1594] *See* §129(a)(2)(C) (reference to §21(e)(3), §21(e)(4)).
[1595] §129(a)(2)(A), amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70404(a), effective for tax years beginning after 2025. For tax years beginning in 2026, the §129 exclusion was limited to $5,000 ($2,500 for a married person filing a separate return). Former §129(a)(2)(A).
[1596] *See* §129(a)(2)(C) (reference to §21(e)(3), §21(e)(4)).
[1597] *See* §129(a)(2)(D), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9632(a) (reference to §129(a)(2)(A)) with respect to 2021 only.
[1598] §129(a)(2)(B).
[1599] §129(b)(1)(A).
[1600] §129(b)(1)(B).

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care assistance.[1601] Earned income has the same meaning it has for purposes of the earned income tax credit.[1602]

3. Dependent Care Assistance Program

A dependent care assistance program is a separate written plan of the employer for the exclusive benefit of its employees to provide the employees with dependent care assistance.[1603] Dependent care assistance is the payment for, or provision of, those services that, if paid for by the employee, would be considered employment-related expenses eligible for the credit for household and dependent care services.[1604]

The program does not have to be funded,[1605] but it must meet the following six requirements.[1606] First, the contributions or benefits provided under the plan must not discriminate in favor of highly compensated employees.[1607] Highly compensated employees are those so classified for purposes of qualified employee retirement plans.[1608]

Second, the plan must benefit employees who qualify under a classification set up by the employer and found by the IRS not to discriminate in favor of highly compensated employees.[1609] In making this determination, employees who have not attained the age of 21 and completed one year of service are excluded from consideration, using rules similar to those applicable to qualified employee retirement plans.[1610] Also excluded from consideration are employees who are included in a unit of employees covered by an agreement that the Department of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if there is evidence that dependent care assistance benefits were the subject of good faith bargaining between the parties.[1611]

Third, no more than 25% of the amounts paid or incurred by the employer for dependent care assistance during the year may be provided for the class of individuals, each of whom owns more than 5% of the stock or of the capital or profits interest in the employer.[1612]

Fourth, reasonable notification of the availability and terms of the program must be provided to eligible employees.[1613]

Fifth, the plan must furnish to an employee, on or before January 31, a written statement showing the amount paid or expenses incurred by the employer in providing dependent care assistance to the employee during the previous calendar year.[1614]

Sixth, the average benefits under the plan provided to employees who are not highly compensated employees under all plans of the employer must be at least 55% of the average benefits provided to highly compensated employees under all plans of the employer.[1615] In analyzing benefits provided through a salary reduction plan, employees whose compensation is less than $25,000 may be disregarded.[1616] In making these determinations, the same employees are excluded who are excluded for purposes of determining whether the second requirement is met.[1617]

Special rules define compensation for purposes of the average benefit requirement,[1618] determine who is an employee for purposes of the exclusion,[1619] specify the treatment of self-employed proprietors,[1620] describe the application of attribution rules in determining ownership interests in employers and proprietorships,[1621] the impact of differing utilization rates,[1622] the treatment of on-site facilities,[1623] and the providing of information to the IRS concerning the dependent care assistance.[1624]

I. Health Insurance Premium Tax Credit (Affordability Credit)

Individuals and small businesses are able to purchase private health insurance through state-based competitive marketplaces called Affordable Insurance Exchanges.

Also, a taxpayer who pays premiums for a "qualified health plan" purchased through an Affordable Insurance Exchange and whose household income for the tax year equals or exceeds 100% but does not exceed 400% of the federal poverty line for a family of the size involved is allowed a refundable health insurance premium tax credit.[1625] This premium assistance credit may be used for any plan purchased through a health exchange, including bronze, silver, gold, and platinum level plans. The credit is intended to make a qualified health plan affordable by reducing a taxpayer's out-of-pocket premium cost. For a discussion of the refundable health insurance premium tax credit (§36B), see 335 T.M., *Health Care Reforms — Implications for Employee Benefit Plans.*

J. ABLE Programs and Accounts

1. Background

The Stephen Beck, Jr., ABLE Act of 2014 (2014 ABLE Act)[1626] added to the Code §529A, which permits the establishment of so-called qualified "ABLE" programs and accounts in tax years beginning after December 31, 2014.[1627] ABLE programs are intended as a tax-advantaged means of providing private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life.[1628] An ABLE account is established by an eligible individ-

[1601] §129(b)(2) (reference to §21(d)(2)).
[1602] §129(e)(2) (incorporating §32(c)(2)). The earned income tax credit is discussed in detail in III.K.
[1603] §129(d)(1).
[1604] §129(e)(1). *See* §21(b)(2).
[1605] §129(d)(5).
[1606] §129(d)(1).
[1607] §129(d)(2).
[1608] §129(d)(2) (incorporating §414(q)).
[1609] §129(d)(3).
[1610] §129(d)(9)(A) (incorporating §410(a)(3), §410(b)(4)).
[1611] §129(d)(9)(B).
[1612] §129(d)(4).
[1613] §129(d)(6).
[1614] §129(d)(7).
[1615] §129(d)(8)(A).
[1616] §129(d)(8)(B).
[1617] §129(d)(9).
[1618] §129(d)(8)(B).
[1619] §129(e)(3) (incorporating §401(c)(1)).
[1620] §129(e)(4).
[1621] §129(e)(5).
[1622] §129(e)(6).
[1623] §129(e)(8).
[1624] §129(e)(9).
[1625] §36B. *See* Reg. §1.36B-1 through §1.36B-6.
[1626] Pub. L. No. 113-295, Div. B §102(a).
[1627] Pub. L. No. 113-295, Div. B §102(f) (effective date).
[1628] Pub. L. No. 113-295, Div. B §101.

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ual, owned by that individual, and maintained under a qualified ABLE program.[1629] It is possible that an individual might be eligible to have an ABLE account in one year, but not be eligible in another year.[1630]

ABLE accounts may be used to pay for disability-related expenses on behalf of designated beneficiaries with disabilities. This funding does not replace private insurance, Medicaid, Social Security, or other benefits.[1631] Qualified ABLE programs are exempt from Subtitle A income taxation, but are subject, under §511, to the tax on unrelated business income of charities.[1632]

2. *ABLE Program Qualification*

The final regulations provide that a qualified ABLE program is a program "established and maintained" by a State, or an agency or instrumentality of a State, that satisfies all of the requirements of Reg. §1.529A-2 and under which (1) an ABLE account may be established for the purpose of meeting the qualified disability expenses of the designated beneficiary of the account, (2) a designated beneficiary is limited to only one ABLE account at a time, (3) any person may make contributions to such an ABLE account, and (iv) distributions may be used only to or for the benefit of the designated beneficiary.[1633] A qualified ABLE program is one that is established by a state or its agency or instrumentality if the program is initiated by State statute or regulation or by an act of a State official or agency with authority to act on behalf of the state.[1634] Qualified programs allow for the establishment of only one ABLE account for each eligible individual, and the account may be used only to meet the qualified disability expenses of the designated beneficiary.[1635] A program is "maintained" by a State or an agency or instrumentality of a State if (1) the State or its agency or instrumentality sets all of the terms and conditions of the program, including but not limited to who may contribute to the program, who may be a designated beneficiary of the program, and what benefits the program may provide, and (2) the State or its agency or instrumentality is actively involved on an ongoing basis in the administration of the program.[1636]

States can contract with third parties to assist in meeting administrative obligations, including Community Development Financial Institutions (CDFIs).[1637]

3. *Eligible Beneficiaries*

The designated beneficiary of an ABLE account is the eligible person who establishes the account or an eligible individual who succeeds the original designated beneficiary.[1638] The ABLE account may be established by a person selected by the eligible individual and such person will have signature authority over the account. If an eligible individual (whether a minor or adult) is unable to establish his or her own ABLE account, an ABLE account may be established on behalf of the eligible individual by the eligible individual's agent under a power of attorney or, if none, by a conservator or legal guardian, spouse, parent, sibling, grandparent of the eligible individual, or a representative payee appointed for the eligible individual by the Social Security Administration, in that order. The selected person in either scenario will have signature authority over the ABLE account.[1639]

At the time an ABLE account is created, the designated beneficiary of the account must provide evidence that the individual is an "eligible individual." An "eligible individual" for a tax year means an individual who either: (1) receives benefits under title II or XVI of the Social Security Act based on blindness or disability or whose entitlement to such benefits under title XVI has been suspended solely due to excess income or resources, provided that such blindness or disability occurred before the date on which the individual attained age 26 (age 46 for tax years beginning after December 31, 2025); or (2) is the subject of a disability certification filed with the IRS for that tax year.[1640] This means that the disability certification must be provided at the time the account is opened.

Whether an individual is an eligible individual is determined for each tax year of that individual, and that determination applies for the entire year. A qualified ABLE program must specify the documentation that an individual must provide, both at the time an ABLE account is established and thereafter, in order to ensure that the designated beneficiary of the ABLE account is, and continues to be, determined an eligible individual.[1641] For purposes of determining whether an individual is an eligible individual, a disability certification[1642] will be deemed to be filed with the IRS once the qualified ABLE program has received the disability certification or a disability certification has been deemed to have been received under the rules of the qualified ABLE program, which information the qualified ABLE program will file in accordance with the filing requirements[1643] set forth in the final regulations.[1644]

Under a safe harbor, a qualified ABLE program can establish that an individual is an eligible individual if the person establishing the ABLE account certifies under penalties of perjury:[1645]

[1629] §529A(e)(6).

[1630] §529A(e)(2)(A)(i) (certificate of disability for condition lasting at least 12 months).

[1631] Pub. L. No. 113-295, Div. B §101.

[1632] §529A(a).

[1633] Reg. §1.529A-2(a).

[1634] §529A(b)(1); Reg. §1.529A-2(b)(1).

[1635] §529A(b)(1); §529A(c)(4).

[1636] Reg. §1.529A-2(b)(2).

[1637] Reg. §1.529A-2(b)(2)(B), Reg. §1.529A-2(b)(3).

[1638] Reg. §1.529A-1(b)(3).

[1639] Reg. §1.529A-2(c)(2). Note that, a person other than the designated beneficiary with signature authority over the account of the designated beneficiary may neither have nor acquire any beneficial interest in the account during the designated beneficiary's lifetime and must administer the account for the benefit of the designated beneficiary. Reg. §1.529A-2(c)(4). *See also* Notice 2015-18.

[1640] *See* §529A(e)(1), amended by SECURE 2.0 Act of 2022, Pub. L. No. 117-328, §124(a); Reg. §1.529A-1(b)(8) (an individual is deemed to attain age 26 on their 26th birthday).

[1641] Reg. §1.529A-2(d)(1)(i).

[1642] Reg. §1.529A-2(e)(1).

[1643] Reg. §1.529A-5(c)(2)(iv), Reg. §1.529A-8(b), Reg. §1.529A-8(a).

[1644] Reg. §1.529A-2(d)(1)(i).

[1645] Reg. §1.529A-2(d)(1)(ii). Prior to the final regulations, Notice 2015-81 suggested that the documentation requirement would be relaxed with respect to concerns about responsibilities and liabilities for record-keeping of medical records by ABLE program administrators. Designated beneficiaries (or the individual's parent, legal guardian, or holder of power of attorney) would be allowed to certify these conditions under penalty of perjury, rather than providing a copy of the physician's disability diagnosis.

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• the basis for the individual's status as an eligible individual;[1646]

• that the individual is blind or has a medically determinable physical or mental impairment;[1647]

• that such blindness or disability occurred before the date on which the individual attained age 26 (age 46 for tax years beginning after December 31, 2025);[1648]

• if the basis of the individual's eligibility is a disability certification, that the individual has received and agrees to retain a written diagnosis,[1649] accompanied by the name and address of the diagnosing physician and the date of the written diagnosis;

• the applicable diagnostic code from those listed on Form 5498-QA (or in the instructions for such form) identifying the type of the individual's impairment;

• that the person establishing the account is the individual who will be the designated beneficiary of the account or is the person authorized[1650] to establish the account; and

• if required by the qualified ABLE program, the information provided by the diagnosing physician as to the categorization of the disability that can be used to determine, under the particular state's program, the appropriate frequency of required recertifications.

a. Disability Determination/Certification

Pursuant to §529A(e)(2), the final regulations provide that a disability certification is a certification by the designated beneficiary that he/she: (1) has a medically determinable physical or mental impairment, which results in marked or severe functional limitations,[1651] and which (i) can be expected to result in death or (ii) has lasted or can be expected to last for a continuous period of not less than 12 months; or (2) is blind (within the meaning of §1614(a)(2) of the Social Security Act) and that such blindness or disability occurred before the date on which the individual attained age 26 (age 46 for tax years beginning after December 31, 2025).[1652] The certification must include a copy of the individual's diagnosis relating to the individual's relevant impairment or impairments, signed by a licensed physician (as defined in §1861(r) of the Social Security Act, 42 U.S.C. §1395x(r)). The certification must be signed under penalties of perjury.[1653]

b. Change in Eligibility Status

If at any time a designated beneficiary no longer meets the definition of an eligible individual, his/her ABLE account will remain an ABLE account and no (taxable) distribution of the account balance will be deemed to occur. However, beginning on the first day of the tax year following the tax year in which the designated beneficiary ceased to be an eligible individual, no contributions to the ABLE account are allowed until the designated beneficiary subsequently regains eligibility.[1654] Thus, for example, if, the disease that caused the impairment goes into remission but later resumes, the account resumes. Additionally, no expense incurred at a time when a designated beneficiary is neither disabled nor blind,[1655] whichever had applied, is a qualified disability expense even if the individual is an eligible individual for the rest of the year under Reg. §1.529A-2(d)(1)(i).[1656]

c. Recertification of Eligibility Status

A determination of eligibility must be made annually unless the qualified ABLE program adopts a different method of ensuring a designated beneficiary's continuing status as an eligible individual. Alternative methods may include, without limitation, the use of certifications by the designated beneficiary under penalties of perjury, and the imposition of different recertification frequencies for different types of impairments.[1657]

4. Account Contributions

a. Annual Contribution Limit

A beneficiary is limited to one ABLE account at a time, regardless of where it is located.[1658] Only cash contributions may be made to an ABLE account.[1659]

Contribution means any payment directly allocated to an ABLE account for the benefit of a designated beneficiary, including amounts transferred to an ABLE account after December 22, 2017, from a qualified tuition program (QTP) described in §529.[1660] A QTP distribution may be transferred to the ABLE account of the designated beneficiary or a member of the family of the designated beneficiary, but cannot exceed the limitation under §529A(b)(2)(B)(i), discussed below, when added to

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[1646] *See* Reg. §1.529A-2(e)(1).

[1647] *See* Reg. §1.529A-2(e)(1)(i).

[1648] §529A(e)(2)(A)(i)(II), amended by SECURE 2.0 Act of 2022, Pub. L. No. 117-328, §124(a); Reg. §1.529A-1(b)(8) (an individual is deemed to attain age 26 on their 26th birthday).

[1649] *See* Reg. §1.529A-2(e)(1)(iii).

[1650] *See* Reg. §1.529A-2(c)(1)(i).

[1651] The phrase "marked and severe functional limitations" means the standard of disability in the Social Security Act for children claiming benefits under the Supplemental Security Income for the Aged, Blind, and Disabled (SSI) program based on disability, but without regard to the age of the individual. This phrase refers to a level of severity of an impairment that meets, medically equals, or functionally equals the listings in the Listing of Impairments (the listings) in appendix 1 of subpart P of 20 C.F.R. part 404. (*See* 20 C.F.R. §416.906, 20 C.F.R. §416.924 and 20 C.F.R. §416.926a). Reg. §1.529A-2(e), T.D. 9923, 85 Fed. Reg. 74,010 (Nov. 19, 2020).

[1652] §529A(e)(2)(A)(i)(II), amended by SECURE 2.0 Act of 2022, Pub. L. No. 117-328, §124(a).

[1653] Reg. §1.529A-2(e)(1). In addition, certain conditions, specifically those listed in the Compassionate Allowances Conditions list maintained by the Social Security Administration, are deemed to meet the requirements of an impairment sufficient for a disability certification without a physician's diagnosis so long as the condition was present before the date on which the individual attained age 26. *See* Reg. §1.529A-2(e)(2) and Reg. §1.529A-2(e)(3). Note that the regulations have not yet been updated to reflect the code's amendment of "age 26" to "age 46" for tax years beginning after December 31, 2025. *See* §529A(e)(2)(A)(i)(II), amended by SECURE 2.0 Act of 2022, Pub. L. No. 117-328, §124(a).

[1654] Reg. §1.529A-2(d)(3).

[1655] Within the meaning of Reg. §1.529A-1(b)(8)(i) or Reg. §1.529A-2(e)(1)(i).

[1656] Reg. §1.529A-2(d)(3).

[1657] Reg. §1.529A-2(d)(2).

[1658] §529A(b)(1)(B).

[1659] §529A(b)(2)(A).

[1660] Reg. §1.529A-1(b)(2). The One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70117(a), removed the prior law January 1, 2026, expiration from prior law §529(c)(3)(C)(i)(III) to permanently allow QTP transfers to an ABLE account.

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all other contributions for the tax year.[1661] Certain QTP rollovers to an ABLE account within 60 days of distribution are not required to be included in the distributee's gross income.[1662]

Contributions to an ABLE account are subject to an annual limit.[1663] For tax years beginning after December 22, 2017, aggregate contributions from all contributors to an account may not exceed the sum of:

- for tax years beginning before 2026, the §2503(b) annual gift tax exclusion in effect for the calendar year in which the tax year begins; for tax years beginning after 2025, the annual gift tax exclusion in effect for the calendar year but with a different inflation adjustment;[1664] plus
- for contributions by a designated beneficiary, the lesser of (1) compensation (as defined in §219(f)) includible in the designated beneficiary's gross income for the tax year, or (2) an amount equal to the poverty line for a one-person household, as determined for the calendar year preceding the calendar year in which the tax year begins.[1665]

Example: Contribution Limit by a Designated Beneficiary
In Year 2, A, the designated beneficiary of an ABLE account, lives in Hawaii. A's compensation for Year 2 is $20,000. The poverty line for a one-person household in Hawaii was $14,380 in Year 1. Because A's compensation exceeded the applicable poverty line amount, A's additional permissible contribution in Year 2 is limited to $14,380, the amount of the Year 1 applicable poverty line.[1666]

For tax years beginning before December 23, 2017, aggregate contributions from all contributors to an account could not exceed in the aggregate the annual gift tax exclusion in effect for the calendar year in which the tax year begins.[1667]

Note: Qualifying rollovers from other ABLE accounts and from a Trump account and qualifying changes in designated beneficiaries are excluded from the annual contribution limit.[1668] Rollovers and beneficiary designation changes are discussed in III.J.5.c., below.

For purposes of a compensation contribution by a designated beneficiary, a designated beneficiary is an employee, including a §401(c) employee, with respect to whom no contribution is made for the tax year to:

- a defined contribution plan (within the meaning of §414(i)) with respect to which the requirements of §401(a) or §403(a) are met;
- an annuity contract described in §403(b); and
- an eligible deferred compensation plan described in §457(b).[1669]

The employed designated beneficiary, or someone acting on the designated beneficiary's behalf, is required to maintain adequate records to ensure the contribution requirements of §529A(b)(2)(B)(ii) are met.[1670] A qualified ABLE program may allow a designated beneficiary (or the person acting on his or her behalf) to certify, under penalties of perjury, and in the manner specified by the qualified ABLE program that: (i) the designated beneficiary is an employed designated beneficiary; and (ii) the designated beneficiary's contributions of compensation are not excess compensation contributions.[1671]

A contribution will be considered to not have been made at all if the contribution and any net earnings on the contribution are withdrawn before the due date (including extensions) for filing the contributor's tax return for that year.[1672] Thus, violation of either the cash-only rule or the excess contribution rule may be avoided by timely withdrawal of the offending contribution. Likewise any excess contribution tax that otherwise would apply to the contribution may be avoided by returning it.[1673] Contributions in excess of the annual limit under §529A(b)(2)(B) are subject to an excise tax on excess contributions, as discussed in III.J.4.d., below.

Comment: In some cases, this annual contribution limit may prevent adequate contributions to an ABLE account to satisfy all of the beneficiary's qualified disability expenses. This would be particularly likely where the beneficiary's disability gives rise to extraordinary medical expenses or costs for daily care. Where the annual ABLE contribution limit is a concern, it may be desirable to satisfy some or all of the beneficiary's medical and tuition expenses outside of the ABLE regime by paying them on behalf of the ABLE beneficiary directly to the provider. This strategy would reserve ABLE account funds to pay for other qualified expenses. Direct payments to certain medical service providers and education institutions on behalf of a donee are not gifts subject to gift tax and do not reduce

[1661] §529(c)(3)(C)(i)(III) (flush language), amended by the OBBBA, §70117(a).

[1662] §529(c)(3)(C)(i) (reference to §529(c)(3)(A)), §529(c)(3)(C)(i)(III). For a discussion of §529 qualified tuition programs, see 518 T.M., *Exclusion of Scholarships and Other Receipts for Education.*

[1663] §529A(b)(2)(B), amended by the OBBBA, §70115(a), applicable to contributions made after Dec. 31, 2025, and §70204(a)(2), applicable to tax years beginning after Dec. 31, 2025.

[1664] §529A(b)(2)(B)(i), amended by the OBBBA, §70115(a)(1), applicable to tax years beginning after Dec. 31, 2025. §529A(b)(2)(B)(i) references the §2503(b) annual gift tax exclusion amounts; the amounts for recent years are provided in *Tables, Charts & Lists*, ***Gift Tax Annual Exclusion.*** As noted, for tax years beginning after 2025, a different inflation adjustment applies for §529A(b)(2)(B)(i) purposes. For tax years beginning in 2026, the §529A(b)(2)(B)(i) annual limit is $20,000. Rev. Proc. 2025-32, §4.34.

[1665] §529A(b)(2)(B)(ii), amended by the OBBBA, §70115(a)(2), applicable to contributions made after Dec. 31, 2025. §529A(b)(7)(B) provides that the applicable poverty line is the poverty guideline applicable in the state of the designated beneficiary's residence. If the designated beneficiary lives in more than one state during the tax year, the applicable poverty line is the poverty line for the state in which the designated beneficiary resided longer than in any other state during that year. *See* Reg. §1.529A-2(g)(2)(iii)(B). The poverty guidelines for recent years are provided in *Tables, Charts & Lists*, ***HHS Poverty Guidelines.***

[1666] Reg. §1.529A-2(g)(2)(iv) *Ex.*

[1667] Former §529A(b)(2)(B) (reference to amount in effect under former §2503(b)). The annual gift tax exclusion amounts for recent years are provided in *Tables, Charts & Lists*, ***Gift Tax Annual Exclusion.***

[1668] §529A(b)(2)(B) (reference to §529A(c)(1)(C)), amended by the OBBBA, §70115(a), applicable to contributions after Dec. 31, 2025, and §70204(a)(2), applicable to tax years beginning after Dec. 31, 2025.

[1669] §529A(b)(2)(B)(ii) (referencing §529A(b)(7)(A)), amended by the OBBBA, §70115(a), applicable to contributions after Dec. 31, 2025, and by §70204(a)(2), applicable to tax years beginning after Dec. 31, 2025.

[1670] §529A(b)(2) (flush language). *See* Reg. §1.529A-2(g)(2)(v).

[1671] Reg. §1.529A-2(g)(2)(v)(B). An excess compensation contribution is defined in Reg. §1.529A-2(g)(2)(v)(C) and is discussed in III.J.4.d., below.

[1672] §529A(b)(2) (flush language) (applying rules similar to those in §408(d)(4), except for §408(d)(4)(B)).

[1673] §4973(h)(2) (reference to §529A(b)(2)).

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the donor's annual gift tax exclusion.[1674] Nor would they count against the annual contribution limit for ABLE accounts. This strategy requires a determination whether amounts paid on behalf of the beneficiary are excludible from the donee's income under §102(a). For medical expenses, consideration also must be given to the question whether the amount paid will give rise to a medical expense deduction for the donee under §213(a).[1675]

A designated beneficiary under a qualified ABLE program may, directly or indirectly, direct the investment of any contributions to the program (or any earnings thereon) no more than twice in a calendar year.[1676] The IRS clarified that an investment direction does not include (i) a request to transfer any part of the account balance from an investment option to a cash equivalent option to effectuate a distribution; or (ii) the automatic rebalancing of the assets of an ABLE account to maintain the asset allocation level chosen when the account was established or by a subsequent investment direction.[1677] However, upon a change of designated beneficiary, or upon a rollover or program-to-program transfer to the ABLE account of a different designated beneficiary who is both a member of the family and an eligible individual, the number of investment directions made for the prior designated beneficiary's ABLE account are not included in determining the number of investment directions made for the new designated beneficiary's ABLE account in that same year.[1678]

Note: Designated beneficiaries can take the §25B qualified retirement savings contribution credit for contributions to their own ABLE account made after December 22, 2017.[1679]

b. Aggregate Cumulative Account Limit

In addition to the annual limit on contributions to an ABLE account, a qualified ABLE program must provide adequate safeguards to prevent aggregate contributions on behalf of a designated beneficiary (including those made under any prior qualified ABLE program) from exceeding the limit set by the state on contributions to a §529 qualified higher education expense account. The transfer of a designated beneficiary's ABLE account from one qualified ABLE program to another with a lower cumulative limit will not violate this rule, but qualified ABLE programs must prohibit subsequent contributions under this general rule. For purposes of the aggregate contribution limit, contributions do not include rollovers, program-to-program transfers or a designated beneficiary change to a new designated beneficiary who is an eligible individual and member of the family of the former designated beneficiary.[1680]

c. Gift Tax Consequences

For purposes of the gift and generation skipping (GST) tax, any contribution to a qualified ABLE program on behalf of a designated beneficiary is treated as a completed gift to the beneficiary that is not a future interest in property and will not be treated as a qualified transfer for gift tax purposes.[1681] Thus, contributions to a qualified ABLE account are eligible for the annual gift tax exclusion but not for the exclusion for amounts paid for educational or medical expenses of a beneficiary.[1682] In addition, a designated beneficiary may make a contribution to fund his or her own ABLE account.[1683]

Note: Gift tax consequences may arise from contributions to an ABLE account even though the amount contributed to such an account does not itself exceed the annual exclusion amount. If a contributor makes other gifts to a designated beneficiary in addition to the gift to the ABLE account, the contributor's total gifts made to the beneficiary in that year could give rise to a gift tax liability.

d. Excise Tax on Excess Contributions

A 6% excise tax is imposed on excess contributions to an ABLE account.[1684] The amount of the tax in any year cannot exceed 6% of the value of the account (determined as of the close of the tax year), and must be paid by the owner of the account.[1685]

An excess contribution to an ABLE account is the amount contributed for the year (other than rollovers and beneficiary changes) that exceeds the annual contribution limit, i.e., generally the annual gift tax exclusion amount under §2503(b) plus any compensation contribution by the designated beneficiary.[1686] Excess compensation contribution means the amount by which the amount contributed during the tax year of an employed designated beneficiary to the designated beneficiary's ABLE account exceeds the limit in effect under §529A(b)(2)(B)(ii) for the calendar year in which the tax year of the employed designated beneficiary begins.[1687]

The excess contribution tax may be avoided by returning an excess contribution to the contributor, in the manner discussed below. The returned contribution will be treated as though never made.[1688]

e. Return of Excess Contributions, Excess Compensation Contributions, and Excess Aggregate Contributions

An ABLE program must return that excess contributions,[1689] excess compensation contributions,[1690] or excess aggregate contributions,[1691] i.e., those exceeding the limits set in

[1674] §2503(e)(1), §2503(e)(2)(B).
[1675] For a detailed discussion of the medical expense deduction, see III.A., above.
[1676] §529A(b)(4).
[1677] Reg. §1.529A-2(l).
[1678] Reg. §1.529A-2(k)(3) (referencing Reg. §1.529A-1(b)(12)).
[1679] §25B(d)(1), amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70116(a). For further discussion of the §25B credit, see 367 T.M., *IRAs*.
[1680] Reg. §1.529A-2(g)(3)(i).
[1681] §529A(c)(2)(A); Reg. §1.529A-4(a)(1). Qualified transfer is defined in §2503(e)(2).
[1682] *See* §2503(e); §2503(b).
[1683] *See* Reg. §1.529A-4(a)(3).
[1684] §4973(a).
[1685] *See* §4973(a).
[1686] *See* §4973(h), amended by the OBBBA, §70204(a), applicable to tax years beginning after Dec. 31, 2025, §529A(b)(2)(B). The annual contribution limit under §529A(b)(2)(B) is discussed in III.J.4.a., above.
[1687] Reg. §1.529A-2(g)(2)(iii)(C).
[1688] *See* §4973(h)(2) (reference to §529A(b)(2) flush language).
[1689] Reg. §1.529A-1(b)(9).
[1690] Reg. §1.529A-2(g)(2)(iii)(C).
[1691] Reg. §1.529A-1(b)(10).

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§529A(b)(2)(B),[1692] including all net income attributable to that contribution, to the person or persons who made that contribution.[1693] The employed designated beneficiary, or the person acting on the employed designated beneficiary's behalf, is responsible for identifying any excess compensation contribution and for requesting the return of the excess compensation contribution.[1694]

Each excess contribution, excess compensation contribution, and excess aggregate contribution must be returned to its contributor(s) on a last-in-first-out basis until the entire excess, along with all net income attributable to such excess, has been returned, or in the year the excess aggregate contributions cause the ABLE account to exceed the §529A(b)(6) limit. Returned contributions must be received by the contributor(s) on or before the due date (including extensions) for the federal income tax return of the designated beneficiary for the tax year in which the excess contribution or excess aggregate contribution was made.[1695] A beneficiary must be notified when excess contributions are returned to contributors other than the designated beneficiary. No notification is required if amounts are rejected by the qualified ABLE program before they are deposited into or allocated to the designated beneficiary's ABLE account.[1696]

5. Taxation of ABLE Account Distributions

a. Distributions Used for Qualified Disability Expenses

Generally, distributions from a qualified ABLE program that are used for qualified disability expenses are excluded from gross income.[1697] Qualified disability expenses are any expenses related to the eligible individual's blindness or disability that are paid for the benefit of the designated beneficiary of the account, including the following expenses: education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and other expenses that can be identified by the IRS in future published guidance.[1698] Qualified disability expenses include basic living expenses and are not limited to items for which there is a medical necessity or which solely benefit an individual with a disability.

> *Example:* X has a medically determined impairment that causes marked and severe limitations on her ability to navigate and communicate. X purchases a smart phone that enables her to navigate and communicate more safely and effectively, thus helping her to maintain her independence and to improve her quality of life. The smart phone purchase, use and maintenance would be considered a qualified disability expense.[1699]

b. Distributions Not Used for Qualified Disability Expenses

Each distribution from an ABLE account consists of earnings and investment in the account. If the total amount distributed from an ABLE account to or for the benefit of the beneficiary exceeds the qualified disability expenses for the year, the distribution must be included in gross income under the §72 annuity rules.[1700] Under §72, income tax is imposed on the earnings portion (not the entire distribution) at the recipient's tax rate. To quantify the earnings portion, both the contribution amounts and the earnings amounts must be tracked for the duration of the ABLE account. The earnings portion of the distribution includible in income is equal to the earnings portion of the distribution reduced by an amount that bears the same ratio to the earnings portion as the amount of qualified disability expenses during the year bears to the total distributions during the year.[1701] Consistent with Notice 2015-81, the final regulations provide that the designated beneficiary is responsible for categorizing distributions to properly determine use for qualified disability expenses. The ABLE programs are not required to establish safeguards to distinguish between distributions for qualified expenses and those that are not qualified, and report only aggregate distributions distinguished as basis, earnings, or returned contributions.[1702]

Note: In addition to taxation under §72, a distribution not used for disability expenses generally is subject to a penalty equal to 10% of the amount of the distribution included in gross income.[1703] The penalty does not apply if the payment or distribution is made to a beneficiary (or to the estate of the designated beneficiary) on or after the death of the designated beneficiary.[1704] The additional 10% tax also does not apply to a distribution that represents the return of a contribution made on behalf of a designated beneficiary if the contribution and any net earnings on the contribution are received before the due date (including extensions) for filing the designated beneficiary's tax return for that year.[1705] Any net earnings are included in gross income for the year in which the excess contribution was made.[1706]

[1692] The annual contribution limits under §529A(b)(2)(B) are discussed in III.J.4.a., above.

[1693] Reg. §1.529A-2(g)(4).

[1694] Reg. §1.529A-2(g)(4).

[1695] Reg. §1.529A-2(g)(4).

[1696] Reg. §1.529A-2(g)(4).

[1697] §529A(c)(1).

[1698] §529A(e)(5); Reg. §1.529A-2(h). The final regulations eliminate the requirement to request TIN's from each contributor should certain requirements be met. *See* Reg. §1.529A-6(d). In addition, ABLE distributions do not need to be designated as made for housing expenses. *See* T.D. 9923, 85 Fed. Reg. (Nov. 19, 2020).

[1699] §529A(e)(5); Reg. §1.529A-2(h), *Example*.

[1700] §529A(c)(1)(A); Reg. §1.529A-3(a). For further discussion of the operation of §72, see 529 T.M., *Income Taxation of Life Insurance and Annuity Contracts*.

[1701] Reg. §1.529A-3(a).

[1702] *See* Reg. §1.529A-6(b)(2).

[1703] §529A(c)(3)(A).

[1704] §529A(c)(3)(B).

[1705] §529A(c)(3)(C).

[1706] §529A(c)(3)(C) (flush language).

ISBN 978-1-55871-737-4

c. Rollovers and Designated Beneficiary Changes

The §72 inclusion rules discussed above do not apply to the portion of any distribution that is transferred to another qualified ABLE account for the benefit of the same designated beneficiary within 60 days, or is transferred for the benefit of an eligible individual who is a member of the family of the designated beneficiary.[1707] This exclusion does not apply to any transfer if the transfer occurs within 12 months from the date of a previous transfer to any qualified ABLE program for the benefit of the designated beneficiary.[1708]

Any change in the designated beneficiary of an interest in a qualified ABLE program during a tax year is not treated as a distribution for purposes of the §72 inclusion rule if the new beneficiary is an eligible individual for the year and a member of the family of the former beneficiary.[1709]

A member of the family is defined to be the designated beneficiary's brother, sister, stepbrother, or stepsister,[1710] and includes a legally adopted individual or an individual who is lawfully placed for adoption who is treated as a child of the designated beneficiary's parent (and therefore as a sibling of the beneficiary).[1711]

d. Gift Tax Consequences

A distribution from an ABLE account to the designated beneficiary is not treated as a taxable gift.[1712] Generation skipping and gift taxes also generally do not apply to a change in the designated beneficiary.[1713]

6. Transfer of ABLE Assets to State on Death of Beneficiary

Upon the death of the designated beneficiary, the state must receive the balance remaining in the qualified ABLE account that does not exceed the total medical assistance paid for the designated beneficiary after the establishment of the account, net of any premiums paid from the account or paid by or on behalf of the beneficiary to a Medicaid buy-in program under any state Medicaid plan established under title XIX of the Social Security Act.[1714] The final regulations provide that the payment of such claim (if any) will be made only after providing for the payment from the designated beneficiary's ABLE account of the designated beneficiary's funeral and burial expenses (including the unpaid balance of a pre-death contract for those services) and all outstanding payments due for his or her other qualified disability expenses.[1715] This transfer is subject to any outstanding payments due for qualified disability expenses. The state must file a claim for payment, and is treated as a creditor of the account rather than as a beneficiary. The additional 10% tax on distributions not used for disability expenses does not apply to the transfer.

7. Coordination with Other Government Programs

Generally, an ABLE account is disregarded for means-testing eligibility to participate in federal programs.[1716] The amount (including earnings) in the account is disregarded, as are contributions to the account and distributions for qualified disability expenses.

There are two exceptions that pertain to benefits under the supplemental security income (SSI) program. First, a distribution from an ABLE account for housing expenses is not disregarded. Second, an ABLE account is considered a resource of the designated beneficiary to the extent that the account balance (including earnings) exceeds $100,000.[1717] SSI benefits are suspended (but not terminated) because of excess resources attributable to the ABLE account balance over $100,000.[1718] An individual whose SSI benefits are suspended is treated for purposes of Medicaid eligibility as continuing to receive the suspended benefits.[1719]

8. Extent of ABLE Account Protection in Bankruptcy

Funds placed in an ABLE account are excluded from a debtor's title 11 bankruptcy estate, if they were placed in the account no later than 365 days before the date the bankruptcy petition is filed.[1720] This exclusions applies only if the designated beneficiary of the ABLE account in the year of the contribution was a child, stepchild, grandchild, or step-grandchild of the debtor, and only to the extend the funds are not pledged or promised to any entity in connection with any extension of credit, and the funds are not excess contributions.[1721] The exclusion is limited to an aggregate total of $6,225 placed in all such accounts having the same designated beneficiary during the period not earlier than 720 days nor later than 365 days before the bankruptcy petition was filed.[1722]

Further, a chapter 11 bankruptcy debtor's monthly expenses may include contributions to an account of a qualified ABLE program to the extent the contributions are not excess contributions and if the designated beneficiary of the account is a child, stepchild, grandchild, or step-grandchild of the debtor.[1723]

9. Information Reporting for ABLE Accounts

ABLE programs must report to the IRS and to designated beneficiaries certain information about contributions, distributions, earnings, return of excess distributions, and other information required by the IRS.[1724] ABLE programs use Form 5498-QA, *ABLE Account Contribution Information* to report information to the IRS and Form 1099-QA, *Distributions from ABLE Accounts.* The information reporting requirements attributable to distributions from and termination of an ABLE account are set forth in Reg. §1.529A-6. Written statements re-

[1707] §529A(c)(1)(C)(i); Reg. §1.529A-3(b).
[1708] §529A(c)(1)(C)(iii).
[1709] §529A(c)(1)(C)(ii); Reg. §1.529A-3(b)(3)(i).
[1710] §529A(e)(4) (reference to §152(d)(2)(B)).
[1711] §529A(e)(4) (applying rules similar to those in §152(f)(1)(B)); Reg. §1.529A-1(b)(12).
[1712] §529A(c)(2)(B); Reg. §1.529A-4(b).
[1713] §529A(c)(2)(C); Reg. §1.529A-4(c).
[1714] §529A(f); Reg. §1.529A-2(o).
[1715] Reg. §1.529A-2(o).
[1716] Pub. L. No. 113-295, Div. B, §103(a).
[1717] Pub. L. No. 113-295, Div. B, §103(a).
[1718] Pub. L. No. 113-295, Div. B, §103(b)(1).
[1719] Pub. L. No. 113-295, Div. B, §103(b)(2).
[1720] 11 U.S.C. §541(b)(10).
[1721] 11 U.S.C. §541(b)(10) (reference to §4973(h)) (reference to §529A(b)(2)(B)). A pledge of funds would call into question the qualification of the ABLE program. *See* §529A(b)(5).
[1722] 11 U.S.C. §541(b)(10)(C).
[1723] 11 U.S.C. §707(b)(2)(A)(ii)(II).
[1724] §529A(d). *See* Reg. §1.529A-7.

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quired to be delivered to a designated beneficiary of or contributor to an ABLE account may be furnished in an electronic format in lieu of a paper format subject to the requirements of Reg. §1.529A-7, including the requirement that consent be obtained from the recipient.

Section 6693(a) imposes a $50 penalty for each failure to file a required report, unless it is shown that the failure is due to reasonable cause.

ABLE programs also must submit reports to the Social Security Administration.

10. Ancillary Matters

The 10% penalty on distributions not used for qualified disability expenses,[1725] discussed at III.J.5.b., above, is not taken into account for purposes of the §26 limit on nonrefundable credits.[1726]

A covered expatriate is treated as receiving a distribution of his or her entire interest in an ABLE account on the day before the expatriation date.[1727] The 10% penalty on distributions not used for qualified disability expenses does not apply to this distribution.[1728]

The manager of an ABLE program participating in a prohibited tax shelter transaction must file Form 8886-T, *Disclosure by Tax-Exempt Entity Regarding Prohibited Tax Shelter Transaction*.[1729]

For further discussion of Qualified ABLE programs under §529A, see 816 T.M., *Planning for Disability* (Estates, Gifts, and Trusts Series).

K. Earned Income Tax Credit (EITC)

1. In General

Under §32 — the Earned Income Tax Credit or EITC — taxpayers who are eligible individuals are allowed a refundable credit for a portion of their earned incomes.[1730] To determine eligibility for the EITC, see the Instructions for Form 1040 or Form 1040-SR, and complete Form 15111, *Earned Income Credit Worksheet* (CP 09) (taxpayer with dependents) or Form 15112, *Earned Income Credit Worksheet* (CP 27) (taxpayer without dependents). The credit is claimed Schedule EIC, *Earned Income Credit*, attached to Form 1040 or Form 1040-SR.

Reg. §31.6051-1(h)(1) requires an employer to provide a copy of IRS Notice 797, *Possible Federal Tax Refund Due to the Earned Income Credit (EIC)*, or a written statement containing the exact language of Notice 797, to each employee with respect to whom the employer paid wages and who did not have income tax withheld. No statement is required if the employee claims an allowance from withholding under §3402(n).[1731] Further, §6402(m)[1732] requires the IRS to hold the entire refund until February 15 for persons claiming the Earned Income Tax Credit (EITC), even the portion not associated with the EITC. This provision was enacted to give the IRS more time to detect and prevent fraud.

For special procedures for individuals not otherwise required to file federal income tax returns for the 2021 tax year, see Rev. Proc. 2022-12, which provides several special procedures and simplified return options for taxpayers seeking to claim the §32 EITC for the 2021 tax year.

2. Eligible Individuals

a. In General

An eligible individual includes any individual who has a qualifying child for the tax year,[1733] and any other individual who satisfies three conditions.[1734]

First, the individual's principal place of abode must be in the United States for more than one-half of that tax year.[1735]

Second, the individual must have attained age 25 but not attained age 65 before the close of the tax year, but if the individual is married,[1736] then either the individual or his/her spouse must meet this condition.[1737]

With respect to this second condition, for tax years beginning in 2021 only, the individual must have attained the "applicable minimum age" before the close of that tax year, but if the individual is married,[1738] then either the individual or his/her spouse must meet this condition.[1739] The "applicable minimum age" is 24 for a "specified student"[1740] (other than a qualified former foster youth or a qualified homeless youth), 18 for

[1725] §529A(c)(3)(A).

[1726] §26(b)(2)(Y).

[1727] §877A(e)(2).

[1728] §877A(g)(6) (reference to §529A(c)(3).

[1729] Reg. §1.6033-5(a). *See* §4965(c)(8).

[1730] §32(a).

[1731] *See* IRS Pub. 596, *Earned Income Credit (EIC)*; Notice 1015 (Dec. 2024), *Have You Told Your Employees About the Earned Income Credit (EIC)?*

[1732] In *Myers v. Army & Air Force Exch. Serv. (In re Myers)*, the bankruptcy court clarified that §6402(m) only dictates when a refund resulting from §24 or §32 will be issued, and has no bearing on when the claim to refund (or right to payment) arises. *Myers v. Army & Air Force Exch. Serv. (In re Myers)*, 608 B.R. 464, 2019 BL 367641 (Bankr. E.D.N.C. 2019).

[1733] §32(c)(1)(A)(i). *See Scott v. Commissioner*, T.C. Memo 2009-211; *Willoughby v. Commissioner*, 97 T.C.M. 1302 (2009); *Horsley v. Commissioner*, 97 T.C.M. 1198 (2009); *Pavia v. Commissioner*, 96 T.C.M. 398 (2008). *See also Fiegel v. Commissioner*, 79 T.C.M. 1944 (2000) (no earned income tax credit for taxpayer with no qualifying child and no dependents); *Guerrier v. Commissioner*, 79 T.C.M. 1940 (2000); *Briggsdaniels v. Commissioner*, T.C. Memo 2000-105, *aff'd*, 248 F.3d 1169, 2 Fed. Appx. 848 (9th Cir. 2001) (same).

[1734] §32(c)(1)(A)(ii). *See Wooten v. Commissioner*, 79 T.C.M. 1526 (2000).

[1735] §32(c)(1)(A)(ii)(I).

[1736] For tax years beginning in 2020 and earlier, marital status is determined under §7703. Pre-2021 §32(c)(1)(A) (flush language), repealed by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9623(b)(1). For tax years beginning in 2021 and later, except as provided in the special rule for a separated spouse that resides with his/her qualifying child for more than one-half of the tax year, marital status is determined under §7703. *See* §32(d)(2), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9621(a).

[1737] §32(c)(1)(A)(ii)(II))

[1738] Except as provided in the special rule for a separated spouse that resides with his/her qualifying child for more than one-half of the tax year, marital status is determined under §7703. *See* §32(d)(2), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9621(a).

[1739] §32(n)(1)(A) (reference to §32(c)(1)(A)(ii)(II)) and §32(n)(2), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9621(a).

[1740] "Specified student" means an individual who is an eligible student (as defined in §25A(b)(3)) during at least five calendar months during the tax year. §32(n)(1)(C).

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a "qualified former foster youth"[1741] or a "qualified homeless youth"[1742] and 19 for other individuals.[1743]

Third, the individual must not be someone for whom a dependency exemption deduction is allowable[1744] to another taxpayer for a tax year beginning in the same calendar year as the individual's tax year.[1745] A taxpayer is not an eligible individual by virtue of claiming someone as a qualified relative for purposes of the dependency exemption deduction.[1746]

The IRS has stated that an otherwise qualifying homeless individual can claim an earned income tax credit (EITC). As noted above, to be eligible for the EITC, the individual must live in the United States (any of the 50 states or Washington, DC) for more than half of the year. Therefore, homeless individuals, including those who reside at one or more homeless shelters, can meet that requirement. Through the Free File system, anyone who qualifies for the EITC also qualifies to use brand-name software to prepare and electronically file their return for free. The IRS urges anyone experiencing homelessness who has a smartphone or access to a computer to take advantage of this service.[1747] According to the IRS, many financial institutions will help an individual without an account to open a low-cost or no-cost bank account into which a tax refund may be direct deposited.[1748]

Proposed regulations issued in 2017, which taxpayers may apply to any open tax years pending the issuance of revised final regulations, reflect a change in the IRS's position on the interaction between eligibility to claim the earned income tax credit under §32 and the tiebreaker rules of §152(c)(4). Specifically, under the proposed regulations, if an individual lives with two low-income taxpayers, and the individual meets the definition of qualifying child with respect to both of them, and after applying the tiebreaker rules the individual is not a qualifying child of the second taxpayer, the second taxpayer would still qualify for the earned income tax credit for a taxpayer without a qualifying child under §32(c)(1)(A)(ii), the so-called childless earned income tax credit.[1749]

> *Example:* B and C live together, and each of them is a low-income taxpayer. Neither has a child, and each may claim the childless earned income tax credit under §32(c)(1)(A)(ii). Later, B has a child, and B's child meets the definition of a qualifying child under §152(c)(1) for both B and C. The child is treated as the qualifying child of B (not C) under the tiebreaker rules of §152(c)(4), so B may claim the earned income tax credit as an eligible individual with a qualifying child under §32(c)(1)(A)(i). Under the proposed regulations, C may still claim the childless earned income tax credit under §32(c)(1)(A)(ii).[1750]

However, an individual who elects the §911 foreign earned income and housing cost amount exclusion for the tax year is not an eligible individual for that tax year.[1751] Likewise, an individual who is a nonresident alien for any portion of a tax year is not an eligible individual for that tax year unless the individual is treated as a resident for the tax year by reason of having made the election under §6110(g) or §6110(h).[1752]

An individual who is the qualifying child of a taxpayer for a tax year of that taxpayer is not an eligible individual for any tax year of the individual that begins in the calendar year in which the taxpayer's tax year begins.[1753]

> *Example:* P's tax year begins on November 1. C is P's child. C's tax year begins on July 1. For P's tax year November 1, Year 1, through October 31, Year 2, C is P's qualifying child. C has a child, G, who is a qualifying child with respect to C for C's tax year July 1, Year 1, through June 30, Year 2. However, because C is P's qualifying child for P's tax year beginning in Year 1, C is not an eligible individual for C's tax year July 1, Year 1, through June 30, Year 2, because that tax year begins in Year 1, as does P's tax year for which C is P's qualifying child.

No credit for a tax year is allowable to an eligible individual if that individual fails to satisfy the identification number requirement for that tax year. Under the identification number requirement, the individual must include the individual's taxpayer identification number (TIN) on the tax return for the tax year and, if the individual is married, the individual must include the TIN of the individual's spouse on that tax return.[1754] For purposes of the identification requirement, a TIN will generally be a social security number issued to the child by the Social Security Administration (SSA). The social security number must be issued on or before the due date for filing the return for the tax year in question.[1755]

[1741] "Qualified former foster youth" means an individual who (i) on or after the date that such individual attained age 14, was in foster care provided under the supervision or administration of an entity administering (or eligible to administer) a plan under part B or part E of title IV of the Social Security Act (without regard to whether federal assistance was provided with respect to such child under such part E), and (ii) provides (in such manner as the Treasury Secretary may provide) consent for entities which administer a plan under part B or part E of title IV of the Social Security Act to disclose to the Treasury Secretary information related to the status of such individual as a qualified former foster youth. §32(n)(1)(D).

[1742] "Qualified homeless youth" means an individual who certifies, in a manner as provided by the Treasury Secretary, that such individual is either an unaccompanied youth who is a homeless child or youth, or is unaccompanied, at risk of homelessness, and self-supporting. §32(n)(1)(E).

[1743] §32(n)(1)(B), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9621(a).

[1744] As discussed in III.B., above, beginning after 2017, the dependency exemption is zero. However, §151(d)(5)(B) specifically states that for purposes of any other Code provision, the reduction of the exemption amount to zero is not taken into account in determining whether a deduction is "allowed or allowable," or whether a taxpayer is entitled to a deduction. So, even though the dependency exemption amount is zero, the exemption is still "allowed" and, therefore, the taxpayer can claim the earned income credit if all other applicable requirements are met.

[1745] §32(c)(1)(A)(ii)(III).

[1746] CCA 200812024.

[1747] *See* IRS News Release IR-2021-87 (Apr. 15, 2021).

[1748] IRS News Release IR-2021-87 (Apr. 15, 2021).

[1749] Prop. Reg. §1.32-2(c)(3)(ii), REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017).

[1750] *See* Prop. Reg. §1.32-2(c)(3)(iii) *Ex. 1*, *Ex. 2*. In the example provided in the Preamble to REG-137604-07, B and C are the individual's mother and aunt, whereas in the examples in the proposed regulations, B and C are the individual's parent and grandparent. 82 Fed. Reg. at 6,377.

[1751] §32(c)(1)(C).

[1752] §32(c)(1)(D).

[1753] §32(c)(1)(B).

[1754] §32(c)(1)(E).

[1755] §32(m).

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Note: The omission of a correct TIN is considered a mathematical or clerical error allowing any additional tax due to be summarily assessed.[1756] The IRS is also authorized to use the mathematical and clerical error procedure to deny eligibility for the earned income tax credit even though a correct TIN is supplied if the IRS determines that the applicable statutory age restrictions for eligibility is not satisfied.[1757] A taxpayer is considered to have omitted a correct TIN for purposes of the mathematical error procedures if the information provided by the taxpayer on the return with respect to the individual whose TIN is required differs from the information the IRS obtains from the person issuing the TIN (i.e., the Social Security Administration).[1758] Such information includes the name, age, date of birth and social security number.[1759]

For tax years beginning in 2021 and later, taxpayers who previously could not claim the so-called "childless EITC" (the earned income tax credit for eligible individuals with no qualifying children) because all of their qualifying children lack social security numbers, are eligible to claim the childless EITC.[1760]

For tax years beginning in 2020 and earlier, no credit for a tax year was allowable to an eligible individual if that individual had one or more qualifying children but none of the children were taken into account in computing the credit because the taxpayer had no qualifying children that met the identification requirement (i.e., had a TIN that was included on the taxpayer's tax return).[1761]

b. *Qualifying Child*

A qualifying child is an individual who is a qualifying child of the taxpayer for purposes of the dependency exemption deduction.[1762] In making this determination, three modifications apply.[1763] First, the requirement that the individual not provide over one-half of the individual's own support is disregarded.[1764] Second, the special rules for individuals whose parents are divorced or separated are ignored.[1765] Third, the requirement that the individual have the same principal place of abode as does the taxpayer for more than one-half of the tax year cannot be satisfied unless the abode is in the United States.[1766]

A qualifying child does not include a married individual unless the taxpayer is entitled to a dependency exemption deduction with respect to the individual or would be entitled but for the special rules for individuals whose parents are divorced or separated.[1767] The definition of qualifying child for purposes of the dependency exemption deduction is discussed in III.B.3.c.

A person who is otherwise a qualifying child is not taken into account for purposes of computing the earned income tax credit for a tax year unless the taxpayer includes the name, age, and taxpayer identification number (TIN) of the qualifying child on the tax return for that tax year.[1768] For purposes of the identification requirement, a TIN generally is a social security number (SSN) issued to the child by the Social Security Administration.[1769]

As stated above, for tax years beginning in 2021 and later, taxpayers who previously could not claim the childless EITC, because all of their qualifying children lack SSNs, are eligible to claim the childless EITC.[1770]

> *Example (1):* In a given tax year, Taxpayer is an eligible individual with 2 children, both of whom have TINs that the Taxpayer includes on the Taxpayer's return. Assuming all other requirements are met, both children are considered qualifying children.

> *Example (2):* In a given tax year, Taxpayer is an eligible individual with 2 children, only one of whom has a TIN that the Taxpayer includes on the Taxpayer's return. Only the child with a TIN is considered a "qualifying child."

> *Example (3):* In a given tax year, Taxpayer is an eligible individual with 2 children, neither of which has a TIN that the Taxpayer includes on the Taxpayer's return. Neither child is a qualifying child. In a tax year beginning after December 31, 2020, Taxpayer can nevertheless claim the childless EITC. In a tax year beginning before January 1, 2021, Taxpayer was not able to claim the EITC because Taxpayer would not have met the requirement in former §32(c)(1)(F).

Prospective adoptive parents may apply for an Adoption Taxpayer Identification Number (ATIN) for a prospective adoptive child as a temporary measure to satisfy the identification requirement.[1771] When the adoption becomes final, the adoptive parent must apply for a social security number for the child.[1772]

c. *Principal Place of Abode*

Note: There is no definition of "principal place of abode" in the earned income tax credit provisions. However, the legislative history indicates that an individual's principal place of abode should be determined under rules similar to those applicable in determining whether the abode requirement for head of household filing status has been met.[1773] Thus, for example, the

[1756] §6213(g)(2)(F).
[1757] §6213(g)(2)(L).
[1758] §6213(g)(2) (flush language). For tax years beginning in 2026, a correct Social Security number (as defined in §24(h)(7)) or employer identification number (EIN) will be required in place of a TIN. §6213(g)(2)(J), amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70606(b).
[1759] §6213(g)(2) (flush language), §32(c)(3)(D)(i).
[1760] *See* Pub. L. No. 117-2, §9622 (amending §32(c)(1)).
[1761] Former §32(c)(1)(F), repealed by Pub. L. No. 117-2, §9622.
[1762] §32(c)(3)(A) (reference to §152(c)).
[1763] §32(c)(3)(A), §32(c)(3)(C).
[1764] §32(c)(3)(A) (reference to §152(c)(1)(D)).
[1765] §32(c)(3)(A) (reference to §152(e)).
[1766] §32(c)(3)(C).
[1767] §32(c)(3)(B).
[1768] §32(c)(3)(D)(i).
[1769] §32(m). The SSN must be issued on or before the due date for filing the return for the tax year in question. *Id.*
[1770] *See* Pub. L. No. 117-2, §9622.
[1771] *See* Prop. Reg. §301.6109-3(c)(2), REG-137604-07, 82 Fed. Reg. 6,370 (Jan. 19, 2017). Taxpayers may apply the proposed regulations in open tax years pending the issuance of revised final regulations.
[1772] Reg. §301.6109-3(a)(1), Prop. Reg. §301.6109-3(a)(1).
[1773] H.R. Rep. No. 101-964, at 1037 (1990) (Conf. Rep.).

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fact that an individual is born or dies during the tax year does not prevent a household from being his or her principal place of abode for that year. Likewise, an individual is not considered to have terminated a household merely because the individual is temporarily absent due to illness, education, business, vacation, military service, or a custody agreement. Along the same lines, the Tax Court has held that a temporary absence due to jail confinement after arrest but before conviction did not disqualify taxpayer from EIC eligibility.[1774]

A household maintained in Puerto Rico is not an abode in the United States.[1775] The principal place of abode of a member of the Armed Forces is treated as being in the United States for any period during which the member is stationed outside the United States while serving on extended active duty.[1776] Extended active duty is any period of active duty pursuant to a call or order to such duty for a period of more than 90 days or for an indefinite period.[1777] The IRS Chief Counsel has advised that a member of the Armed Forces residing in Puerto Rico has a principal place of abode within the United States, and that a member of the Armed Forces residing in a state or the District of Columbia whose home of record is Puerto Rico also has a principal place of abode within the United States.[1778]

3. Computation of Credit

a. In General

The earned income tax credit amount for a tax year equals the credit percentage multiplied by so much of the eligible individual's earned income as does not exceed the earned income limitation amount.[1779] The earned income tax credit is subject to a phase-out based on an income limitation.[1780] If the taxpayer has no earned income, the earned income tax credit amount is zero.[1781]

Note: The statute literally limits the earned income tax credit to "so much of the taxpayer's earned income for the tax year as does not exceed the earned income amount." The term "earned income limitation amount" is used in this Portfolio in lieu of "earned income amount" because the statutory term is at best ambiguous, and in many respects confusing, given that the term "amount of earned income," which is intended to refer to the taxpayer's actual earned income, is not very different from "earned income amount."

The IRS is required to provide, and has provided, tables for the computation of the earned income tax credit.[1782] The tables reflect the computation principles described in V.C.3.b. and V.C.3.c., below, and reflect income brackets no greater than $50 each.[1783] The brackets reflect earned income between $0 and the amount of earned income above which the credit equals zero because of the phase-out described in V.C.3.e., below.[1784] The brackets also reflect adjusted gross income between the dollar amount at which the phase-out begins and the amount of adjusted gross income above which the credit equals zero because of the phase-out described in V.C.3.e., below.[1785]

The IRS can compute the taxpayer's earned income tax credit. For instructions on how to have the IRS compute the taxpayer's earned income tax credit, see the relevant tax year instructions for Form 1040.

Note: Though taxpayers are not required, or permitted, to compute the earned income tax credit following the statutory pattern because the tables incorporate those computational steps, the discussion and examples in V.C.3.b. and V.C.3.c., below, do follow that statutory pattern. This provides a description and understanding of the concepts underlying the computational steps incorporated into the tables.

b. Credit Percentage

The credit percentage is 34% for eligible individuals who have one qualifying child, 40% for eligible individuals who have two qualifying children, and 45% for eligible individuals with three or more qualifying children.[1786] It is 7.65% for eligible individuals with no qualifying children,[1787] except for tax years beginning in 2021, when the credit percentage for childless eligible individuals is 15.3%.[1788]

> *Example (1):* T is an eligible individual with two qualifying children. T's earned income is $5,000, and T's AGI is $10,000. T's credit percentage is 40%. T's earned income tax credit is $2,000 ($5,000 × .40).

> *Example (2):* T is an eligible individual with one qualifying child. T's earned income is $5,000, and T's AGI is $10,000. T's credit percentage is 34%. T's earned income tax credit is $1,700 ($5,000 × .34).

> *Example (3):* T is an eligible individual with four qualifying children. T's earned income is $5,000, and T's AGI is $10,000. T's credit percentage is 45%. T's earned income tax credit is $2,250 ($5,000 × .45).

> *Example (4):* In 2020, T is an eligible individual with no qualifying children. T's 2020 earned income is $5,000, and T's 2020 AGI is $10,000. T's credit percentage is 7.65%. T's earned income tax credit is $382.50 ($5,000 × .0765).

> *Example (5):* In 2021, T is an eligible individual with no qualifying children. T's 2021 earned income is $5,000, and T's 2021 AGI is $10,000. T's credit percentage is 15.3%. T's earned income tax credit is $765 ($5,000 × .153).

[1774] *Rowe v. Commissioner*, 128 T.C. 13 (2007).
[1775] Rev. Rul. 78-400.
[1776] §32(c)(4).
[1777] §32(c)(4).
[1778] CCA 200025055.
[1779] §32(a)(1).
[1780] §32(a)(2).
[1781] *Brooks v. Commissioner*, 78-2 USTC ¶9714 (D.S.C. 1978) (referring to former §43, which is the predecessor to §32).
[1782] §32(f)(1).
[1783] §32(f)(2).
[1784] §32(f)(2)(A).
[1785] §32(f)(2)(B).
[1786] §32(b)(1).
[1787] §32(b)(1).
[1788] §32(n)(3), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9621(a).

ISBN 978-1-55871-737-4

c. Earned Income Limitation Amount

The earned income limitation amount depends on the number of qualifying children that the eligible individual has[1789] and the calendar year in which the taxpayer's tax year begins.[1790] For tax years beginning in 2021 only, the earned income limitation amount for eligible individuals with one qualifying child is, subject to adjustment for inflation, $6,330, with two or more qualifying children is $8,890, and with no qualifying children is $9,820.[1791] For all other tax years, the earned income limitation amount for eligible individuals with one qualifying child is $6,330, with two or more qualifying children $8,890, and with no qualifying children $4,220.[1792]

With the exception of the earned income limitation amount for eligible individuals without qualifying children in tax year 2021, the earned income limitation amount is adjusted annually for inflation.[1793]

The earned income limitation amounts for recent years are provided in *Tables, Charts & Lists, Income Tax and Accounting, Earned Income Credit (EIC) Table.*

> *Example (1):* Assume the earned income limitation amount for Year 1 is $10,000 for eligible individuals who have one qualifying child, $14,040 for eligible individuals who have two or more qualifying children, or $6,670 for eligible individuals who have no qualifying children.
>
> T is an eligible individual with two qualifying children. For Year 1, assume T's earned income is $7,000, and T's AGI is $9,500. T's credit percentage is 40%. T's Year 1 earned income tax credit is $2,800 ($7,000 × .40).

> *Example (2):* Assume the earned income limitation amount for Year 1 is $10,000 for eligible individuals who have one qualifying child, $14,040 for eligible individuals who have two or more qualifying children, or $6,670 for eligible individuals who have no qualifying children.
>
> T is an eligible individual with three qualifying children. For Year 1, assume that T's earned income is $15,500 and T's AGI is $15,500. No more than $14,040 of that earned income may be taken into account. T's credit percentage is 45%. T's Year 1 earned income tax credit is $6,318 ($14,040 × .45).

d. Maximum Amount of Credit

The maximum earned income tax credit amount is determined by multiplying the earned income amount by the credit percentage.[1794] With the exception of the maximum earned income tax credit amount for eligible individuals without qualifying children (the maximum "childless EITC") in tax year 2021, the maximum earned income tax credit amount is adjusted annually for inflation.[1795]

Note: The American Rescue Plan Act of 2021 increased the maximum EITC amount for childless individuals from $543 to $1,502 for 2021 only.[1796]

e. Credit Phase-Out

(1) In General

The earned income tax credit for a tax year is limited in the form of a phase-out.[1797] The credit for any tax year is limited to any excess of the credit that would otherwise be allowed[1798] over the phase-out reduction amount.[1799] The phase-out reduction amount equals the phase-out percentage multiplied by any excess of the greater of the taxpayer's earned income or adjusted gross income over the phase-out amount, but it does not exceed the amount of the credit that would be allowable absent the phase-out reduction.[1800] There is no authority for excluding gambling winnings from adjusted gross income for this purpose.[1801]

As an eligible individual's earned income or adjusted gross income, if greater, increases above the beginning of the phase-out range, the maximum credit amount decreases until it reaches zero. Once an individual's earned income or adjusted gross income, if greater, exceeds the end of the phase-out range (completed phaseout amount), no credit is allowed.[1802] For example, in 2025 no credit is allowed for married taxpayers filing jointly without qualifying children whose earned income is more than the completed phaseout amount of $26,214.[1803]

The phase-out percentage is 15.98% for eligible individuals who have one qualifying child.[1804] It is 21.06% for eligible individuals with two or more qualifying children.[1805] For eligible individuals with no qualifying children it is 7.65%.[1806] For tax years beginning in 2021, it was 15.3% for eligible individuals with no qualifying children.[1807]

(2) Phase-Out Amount

The phase-out amount (threshold phase-out amount) depends on the number of qualifying children that the eligible individual has,[1808] the individual's marital status,[1809] and the calendar year in which the taxpayer's tax year begins. With the exception of the statutory phase-out amount for eligible individuals without qualifying children in tax year 2021, the statutory phase-out amount is adjusted annually for inflation.[1810] The

[1789] §32(b)(2)(A).
[1790] *See, e.g.*, §32(j), §32(n)(4).
[1791] §32(n)(4)(A), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9621(a).
[1792] §32(b)(2)(A).
[1793] §32(j), §32(n)(4)(B).
[1794] §32(b)(2)(A), §32(b)(1).
[1795] §32(j), §32(n)(4)(B). The maximum earned income tax credit amounts for recent years are provided in *Tables, Charts & Lists, Income Tax and Accounting, Earned Income Credit (EIC) Table.*
[1796] *See* Rev. Proc. 2019-44 and Rev. Proc. 2021-23.
[1797] §32(a)(2).
[1798] §32(a)(2)(A).
[1799] §32(a)(2)(B). *See, e.g., Briggsdaniels v. Commissioner*, T.C. Memo 2000-105, *aff'd*, 248 F.3d 1169, 2 Fed. Appx. 848 (9th Cir. 2001).
[1800] §32(a)(2)(B).
[1801] *Petty v. Commissioner*, 87 T.C.M. 1419 (2004).
[1802] *See, e.g., Irions v. Commissioner*, 97 T.C.M. 1502 (2009).
[1803] *See* Tables, Charts & Lists, *Earned Income Credit (EIC) Table.*
[1804] §32(b)(1) (chart row 1).
[1805] §32(b)(1) (chart row 2).
[1806] §32(b)(1) (chart row 3).
[1807] §32(b)(1) (chart row 3), as modified for tax year 2021 by §32(n)(3).
[1808] §32(b)(2)(A).
[1809] §32(b)(2)(B).
[1810] §32(j), §32(n)(4)(B).

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threshold phase-out amount for recent years are available in *Tables, Charts & Lists, Income Tax and Accounting, Earned Income Credit (EIC) Table*.

Note: Unlike the earned income limitation amount, the threshold phase-out amount is not different for eligible individuals with one qualifying child and those with two or more qualifying children.

If the eligible individual is married and files a joint return, the threshold phase-out amount is increased by $5,000.[1811] The $5,000 amount is adjusted annually for inflation.[1812]

The threshold phase-out amount and the completed phase-out amount for recent years are provided in *Tables, Charts & Lists, Income Tax and Accounting, Earned Income Credit (EIC) Table*.

> *Example (1):* Assume, for Year 1, the threshold phase-out amount for a taxpayer *not* filing a joint return and having one or more qualifying children is $21,560.
>
> T, an eligible unmarried individual with one qualifying child, has earned income and AGI in the amount of $27,530 for Year X. Before phase-out, T's earned income tax credit is $3,995 ($27,530, limited to the earned income limitation amount of $11,750, multiplied by .34). T's earned income or AGI exceeds $21,560 (the Year 1 threshold phase-out amount for an unmarried individual with one qualifying child) by $5,970. T's phase-out reduction amount is $954 ($5,970 × .1598). T's earned income tax credit after the phase-out is $3,041 ($3,995 minus $954).

> *Example (2):* Refer to Example (1). Assume T's earned income and AGI is $47,530. T's earned income tax credit, before phase-out, is $3,955 ($47,530, limited to the earned income limitation amount of $11,750, multiplied by .34). T's earned income or AGI exceeds $21,560 (Year 1 threshold phase-out amount for an unmarried individual with one qualifying child) by $25,970. T's phase-out reduction amount would be $4,150 ($25,970 × .1598), but it is limited to $3,995. T's earned income tax credit after the phase-out is zero ($3,995 minus $3,995).

> *Example (3):* Refer to Example (1) and ignore Example (2). Assume T's earned income is $27,530 and that T's AGI is $47,530. T's earned income tax credit, before phase-out, is $3,995 ($27,530, limited to the earned income limitation amount of $11,750, multiplied by .34). T's Year 1 threshold phase-out amount is $21,560. T's AGI (the larger of earned income or AGI) exceeds $21,560 by $25,970. T's phase-out reduction amount would be $4,150 ($25,970 × .1598), but it is limited to $3,995. T's earned income tax credit after the phase-out is zero ($3,995 minus $3,995).

[1811] §32(b)(2)(B).
[1812] §32(j).

f. Earned Income

(1) General Definition

Earned income includes wages, salaries, tips, and other employee compensation, but only if these amounts are includible in gross income.[1813] In the case of a joint return, the earned income of the taxpayer is the sum of the earned incomes of each spouse.[1814] Special rules apply to U.S. possessions.[1815] Also, special elections related to the computation of earned income may be available to qualified individuals affected by certain disasters.

Neither a military service member's Basic Allowance for Housing and Basic Allowance for Subsistence[1816] nor amounts excluded from gross income under §933 by bona fide Puerto Rican residents[1817] is included in earned income. A taxpayer may elect to treat as earned income any amount excluded from gross income under §112.[1818] Earned income does not include interest, dividends, or gain recognized on the sale of investment property.[1819]

Earned income also includes net earnings from self-employment for purposes of self-employment social security taxes,[1820] such as commissions earned by a full-time self-employed life insurance sales agent.[1821] Net earnings from self-employment must be computed with regard to the §164(f) deduction for self-employment taxes.[1822] Net earnings from self-employment include any net earnings that the taxpayer is deemed to have for self-employment purposes because of the §1402(a) election to treat the taxpayer's net earnings from self-employment as at least $1,600, even though the taxpayer has no actual net earnings.[1823] Compensation excluded from net earnings from self-employment, such as amounts paid to public officials,[1824] are not earned income. Similarly, income that is exempt from self-employment social security taxes because of elections available to ministers and members of religious orders[1825] is not earned income unless it is wages, salaries, tips, or other employee compensation.[1826] Earned income is reduced by any net loss from self-employment.[1827]

Earned income includes strike benefits paid by a labor union to members who perform services in connection with a strike and payments by the union to members who do not perform such services to the extent they are included in gross income.[1828] Earned income does not include nontaxable disability payments attributable to employee contributions,[1829] nor does it

[1813] §32(c)(2)(A)(i).
[1814] American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9626(b).
[1815] *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9626(b).
[1816] Notice 2003-21, Q&A-37.
[1817] *See* PMTA 2007-00057.
[1818] §32(c)(2)(B)(vi).
[1819] *Schomberg v. United States*, 81-2 USTC ¶9609 (E.D. Cal. 1981).
[1820] §32(c)(2)(A)(ii).
[1821] Rev. Rul. 80-194.
[1822] §32(c)(2)(A)(ii).
[1823] Rev. Rul. 78-313.
[1824] Rev. Rul. 61-113.
[1825] *See* §1402(e), §1402(g).
[1826] Rev. Rul. 79-78.
[1827] Reg. §1.32-2(c)(2).
[1828] Rev. Rul. 78-191.
[1829] CCA 199916041.

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include social security disability payments received by an unemployed individual.[1830]

Earned income does not include jury fees, no matter how they are described under state law.[1831] Earned income does not include amounts received as a pension or an annuity,[1832] as unemployment compensation,[1833] or as workers' compensation,[1834] nor does it include income of a nonresident alien individual that is not effectively connected with the conduct of a trade or business within the United States.[1835] The Tax Court has held that military retirement pay received as a pension does not constitute earned income for purposes of the earned income tax credit, relying on a Supreme Court decision[1836] holding that military retirement benefits are to be considered deferred pay for past services and rejecting an argument that the taxpayer's status as subject to recall by the military during retirement made the payments reduced compensation for current services rather than a pension.[1837]

Earned income does not include welfare or social security disability payments.[1838] Earned income does not include foster care payments excluded from gross income under §131, but foster parents who are in the trade or business of providing child care and who include their earnings from the foster care payments in their gross income may treat those payments as earned income.[1839] Earned income includes Medicaid waiver payments.[1840]

Earned income is computed without regard to any community property laws which may otherwise apply.[1841] Earned income does not include amounts received by an individual for services performed while the individual is an inmate at a penal institution,[1842] even if the inmate is an employee,[1843] is serving the sentence at a treatment facility for sex offenders,[1844] or receives payment for services performed in a work release program or while at a halfway house.[1845] Earned income does not include amounts received by an inmate by "begging" from friends and family who have no expectation of repayment.[1846]

Earned income does not include workfare payments, but only to the extent they are subsidized under a state program.[1847] Workfare payments are amounts received for services performed in work activities as defined in §407(d) of the Social Security Act to which the taxpayer is assigned under any state program under part A of Title IV of the Social Security Act.[1848] Earned income cannot be manufactured from the deemed monthly income provision applicable to spouses who are students or incapable of self-care for purposes of the household and dependent care credit.[1849]

If the taxpayer does not keep proper books and records to substantiate net self-employment income, the IRS may disregard the amount of self-employment income reported by the taxpayer and may calculate the taxpayer's earned income tax credit without regard to unsubstantiated income.[1850] If the taxpayer reports net earnings from self-employment without claiming the applicable business expenses, the net earnings from self-employment must be adjusted by those business expenses, and if the taxpayer reports net earnings from self-employment but cannot show that the business exists, the taxpayer cannot claim the earned income tax credit based on those net earnings.[1851] If the taxpayer claims that the income was paid by another person, but fails to produce witnesses, does not establish the existence or location of payor corporations, and otherwise provides inconsistent testimony, the IRS will be upheld in its disregarding of the taxpayer's claim that the income exists.[1852]

Observation: Usually, the substantiation requirements are applied to the taxpayer's disadvantage with respect to deductions. Because the earned income tax credit is refundable and because it is designed in a manner that at certain income levels the increase in the credit generated by additional gross income exceeds the income in tax liability before credits, there is an incentive for taxpayers with certain amounts of income to report nonexistent income for the sole purpose of increasing the refundable credit. The principles described in the preceding paragraph, though initially appearing to be counter-intuitive, make sense in light of these earned income tax credit characteristics.

(2) Special Rules Applicable to Certain Tax Years

For purposes of computing the earned income tax credit (EITC) on a taxpayer's 2020 federal income tax return, the taxpayer could elect to determine the earned income tax credit by substituting 2019 earned income for 2020 earned income if a

[1830] *Powers v. Commissioner*, 79 T.C.M. 1287 (2000), *aff'd*, 234 F.3d 1269 (6th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001).

[1831] SCA 200028035.

[1832] §32(c)(2)(B)(ii); Reg. §1.32-2(c)(2).

[1833] Reg. §1.32-2(c)(2).

[1834] Reg. §1.32-2(c)(2).

[1835] §32(c)(2)(B)(iii); Reg. §1.32-2(c)(2).

[1836] *Barker v. Kansas*, 503 U.S. 594 (1992), *rev'g Barker v. State*, 249 Kan. 186 (1991).

[1837] *Smith v. Commissioner*, 70 T.C.M. 30, 31 (1995) (citing *Barker v. Kansas*, 503 U.S. 594, 605 (1992)).

[1838] *Powers v. Commissioner*, 79 T.C.M. 1287 (2000), *aff'd*, 234 F.3d 1269 (6th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001).

[1839] CCA 199934018.

[1840] *Feigh v. Commissioner*, 152 T.C. 267 (May 15, 2019) (IRS could not reclassify income to be excluded from earned income even though payments were excluded from gross income pursuant to Notice 2014-7, which resulted in double benefit to taxpayers); *see* AOD 2020-2 (recommending acquiescence to *Feigh v. Commissioner*). *Note:* Beginning for 2019, changes were made to how Medicaid waiver payments are treated for purposes of the earned income tax credit. See the instructions for Form 1040.

[1841] §32(c)(2)(B)(i); Reg. §1.32-2(c)(2).

[1842] §32(c)(2)(B)(iv); *Rogers v. Commissioner*, T.C. Memo 2004-245; *Wilson v. Commissioner*, T.C. Memo 2001-139; *Skaggs v. Commissioner*, 148 T.C. 367 (2017) (inmate transferred to a state security hospital for mental health treatment was still incarcerated in a penal institution and wages earned at the hospital were not earned income for purposes of the EITC).

[1843] *Taylor v. Commissioner*, 76 T.C.M. 808 (1998) (telemarketing job).

[1844] CCA 200014035.

[1845] SCA 1998-049. *See Tramble-Bey v. Commissioner*, T.C. Summ. Op. 2001-23.

[1846] *Lucas v. Commissioner*, T.C. Memo 1999-321; *Wolf v. Commissioner*, 78 T.C.M. 488 (1999); *Dominguez v. Commissioner*, 78 T.C.M. 487 (1999); *Daniel v. Commissioner*, 78 T.C.M. 486 (1999); *Bauta v. Commissioner*, 78 T.C.M. 485 (1999).

[1847] §32(c)(2)(B)(v).

[1848] §32(c)(2)(B)(v).

[1849] *Powers v. Commissioner*, 79 T.C.M. 1287 (2000), *aff'd*, 234 F.3d 1269 (6th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001).

[1850] *See* SCA 1998-052 (reference to Reg. §1.6001-1(a)).

[1851] *See* CCA 200022051. *See also Akhter v. Commissioner*, T.C. Summ. Op. 2001-20 (no evidence of income from a self-employment activity).

[1852] *See Blore v. Commissioner*, 80 T.C.M. 559 (2000).

ISBN 978-1-55871-737-4

taxpayer's 2020 earned income was less than the taxpayer's 2019 earned income.[1853]

Likewise, the taxpayer could elect to determine the earned income tax credit for its first tax year beginning in 2021 by substituting 2019 earned income for 2021 earned income if the taxpayer's 2021 earned income was less than the taxpayer's 2019 earned income.[1854]

As stated above, special elections related to the computation of earned income may be available to qualified individuals affected by certain disasters. As an example, a taxpayer was able to elect to use his or her 2018 earned income to figure the taxpayer's 2019 earned income tax credit if: (a) the taxpayer's 2018 earned income was more than his or her 2019 earned income; and (b) the taxpayer's main home was located in one of the federally declared disaster areas eligible for this relief at any time during the incident period.[1855] See also 597 T.M., Tax Incentives for Economically Distressed Areas, for a detailed discussion of those rules.

4. Limitations on Availability of Credit

a. Failure to File Joint Return

Except as provided in the special rule for separated spouses described below, an individual who is married at the close of a tax year is not allowed to claim the earned income tax credit for that tax year unless the individual and his/her spouse file a joint return.[1856]

For tax years beginning in 2021 and later, except as provided in the special rule for separated spouses described below: (1) the determination of marriage is made as of the close of the tax year, except that if either spouse dies during the tax year the determination is made as of the date of death, and (2) an individual legally separated from his spouse under a decree of divorce or of separate maintenance is not treated as married.[1857] Under a special rule, a separated spouse who meets certain requirements is eligible for the earned income tax credit despite being legally married but not filing jointly. To qualify for this special rule, the separated spouse must: (1) be married and not file a joint return for the tax year, (2) live with a qualifying child for more than half of the tax year, and (3) either (i) not live with other spouse during the last six months of the tax year, or (ii) have a decree, instrument, or agreement (other than a divorce decree) described in §121(d)(3)(C) with respect to the other spouse, and not live with the other spouse by the end of the tax year.[1858] For tax years beginning in 2020 and earlier, a married individual could claim the earned income tax credit only if they file a joint return with their spouse (no exceptions), and for the purpose of this rule, an individual who was legally separated under a decree of divorce or separate maintenance was not considered to be married.[1859]

b. Short Tax Years

The earned income tax credit is not allowable for a tax year of fewer than 12 months.[1860] This limitation does not apply if the reason for the short tax year is the death of the taxpayer.[1861]

c. Disqualified Investment Income

The earned income tax credit is not allowable for a tax year if the taxpayer's aggregate disqualified income for that year exceeds the limitation amount.[1862] For tax years beginning in 2021 and later, the disqualified income limitation amount is $10,000,[1863] adjusted annually for inflation.[1864] For tax years beginning in 2020 and earlier, the disqualified income limitation amount was $2,200,[1865] adjusted annually for inflation.[1866] The disqualified investment income limitation amounts for recent years are provided in *Tables, Charts & Lists, Income Tax and Accounting, **Earned Income Credit (EIC) Table**.*

Disqualified income consists of five types of income:[1867]

- Interest and dividends includible in gross income for the tax year.[1868]
- Tax-exempt interest received or accrued in the tax year.[1869]
- The excess, if any, of gross income from rents or royalties not derived in the ordinary course of business over the sum of interest deductions properly allocable to that gross income plus other deductions clearly and directly allocable to that gross income.[1870]
- Capital gain net income.[1871]

[1853] Taxpayer Certainty and Disaster Tax Relief Act, Pub. L. No. 116-260, Div. EE, Title II, §211(a). An incorrect use on a tax return of earned income pursuant to this special rule will be treated as a mathematical or clerical error for which the IRS may assess additional tax immediately, outside of the normal deficiency procedures, pursuant to §6213(b)(1). Taxpayer Certainty and Disaster Tax Relief Act, Pub. L. No. 116-260, Div. EE, Title II, §211(c)(1).

[1854] American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9626(a).

[1855] For further guidance, see IRS Pub. 596, *Earned Income Credit (EIC)*, for use in preparing 2019 returns and applicable Form 1040 instructions.

[1856] §32(d)(1), pre-2021 §32(d); Reg. §1.32-2(b)(2); *Anderson v. Commissioner*, 95 T.C.M. 1148 (2008); *Shinault v. Commissioner*, 91 T.C.M. 1306 (2006); *Toney v. Commissioner*, 88 T.C.M. 24 (2004); *Diaz v. Commissioner*, 87 T.C.M. 1420 (2004); *Chappell v. Commissioner*, 81 T.C.M. 1781 (2001); *Cotton v. Commissioner*, 80 T.C.M. 594 (2000); *Chiosie v. Commissioner*, 79 T.C.M. 1812 (2000); *Newsom v. Commissioner*, 78 T.C.M. 415 (1999); *Harkless v. Commissioner*, 77 T.C.M. 1467 (1999); *Madrigal v. Commissioner*, 76 T.C.M. 537 (1998); *Mischel v. Commissioner*, 74 T.C.M. 253 (1997); *Presley v. Commissioner*, 72 T.C.M. 1530 (1996); *Fordjour v. Commissioner*, 2002-2 USTC ¶50,717 (D. Ariz. 2002); *Brooks v. Commissioner*, 78-2 USTC ¶9714 (D.S.C. 1978) (referring to former §43, which is the predecessor to §32). *See also* AOD 2017-05 (IRS does not acquiesce in *Tsehay v. Commissioner*, T.C. Memo 2016-200, which held that taxpayer's filing status was married filing separately and also allowed earned income tax credit, apparently overlooking the pre-2021 §32(d) prohibition on married taxpayer filing separately claiming credit).

[1857] §32(d)(2)(A) (reference to §7703(a)(1)). *See* §7703(b).

[1858] §32(d)(2)(B) (special rules for separated spouse), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9623(a).

[1859] Pre-2021 §32(d) and reference to §7703(a)(2); Reg. §1.32-2(b)(2).

[1860] §32(e); Reg. §1.32-2(b)(3).

[1861] §32(e); Reg. §1.32-2(b)(3).

[1862] §32(i)(1).

[1863] §32(i)(1), as amended by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9624(a).

[1864] §32(j), as amended by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9624(b).

[1865] Pre-2021 §32(i)(1).

[1866] §32(j).

[1867] §32(i)(2).

[1868] §32(i)(2)(A).

[1869] §32(i)(2)(B). *See* §6012(d).

[1870] §32(i)(2)(C).

[1871] §32(i)(2)(D).

ISBN 978-1-55871-737-4

• The excess, if any, of aggregate income from all passive activities for the year, aside from earned income or income in one of the preceding categories, over the aggregate losses from all passive activities for the year.[1872]

The IRS has ruled that gain from the sale of business assets reported on Form 4797 is not treated as capital gain net income, even though it is so characterized under §1231(a)(1), because it is not gain from the sale of investment property.[1873] The IRS Chief Counsel has advised that a parent who elects under §1(g)(7) to report a child's income on the parent's return must treat the child's disqualified income as the parent's disqualified income.[1874] The IRS Chief Counsel has also advised that rental income is disqualified income whether or not the rental is a trade or business, because if it is not a trade or business the income is disqualified as rental, and if it is a trade or business, the income is disqualified because it is passive.[1875] The same advice was given with respect to rental income from the lease of the taxpayer's property to the taxpayer's wholly owned corporation.[1876]

d. Fraudulent and Improper Claims

(1) Prior Acts of Recklessness or Fraud

The earned income tax credit is not allowed for any tax year that is within either ten or two tax years after the tax year for which the final determination that the taxpayer's claim of credit was due to reckless or intentional disregard of the rules and regulations, or fraud, respectively.[1877] The first disallowance period is a period of 10 tax years that begins after the most recent tax year for which there was a final determination that the taxpayer's claim of the earned income tax credit was due to fraud.[1878] The second disallowance period is a period of two tax years that begins after the most recent tax year for which there was a final determination that the taxpayer's claim of the earned income tax credit was due to reckless or intentional disregard of rules and regulations other than through fraud.[1879]

Comment: It is possible for a disallowance period to begin while another disallowance period is underway. In this situation, the disallowance period with a termination date that extends farthest into the future is controlling. Under some circumstances, a chain of disallowance periods could preclude the taxpayer from claiming the credit for a very long period.

The disallowance period applies even if only part of the taxpayer's claim for credit is found to be reckless or intentionally disregards the rules. For instance, if one of several claimed children is not entitled to be claimed and the taxpayer continues to claim that child in consecutive years, and assuming this was found to be reckless or intentional in a final determination, the ban is not pro-rated based upon the number of children improperly and properly claimed, but is the full two years. This is so even if the taxpayer would have been entitled to an EIC claim for the other children.[1880]

The determination of fraud or of reckless or intentional disregard of rules or regulations must be made in a deficiency proceeding that provides for judicial review.[1881] These sanctions are in addition to any other penalty imposed under the law for the taxpayer's conduct.[1882] It is not necessary for the IRS to assert a fraud or accuracy-related penalty as a prerequisite to a determination of fraud or of reckless or intentional disregard of rules or regulations with respect to the claiming of the earned income tax credit, though it is not unusual for those other penalties to be asserted.[1883] IRS Chief Counsel has advised that the taxpayer's failure to respond, or failure to respond adequately, to an IRS request for substantiation and verification of an earned income tax credit claim is not in itself reckless disregard of rules that trigger the two-year disallowance.[1884]

The IRS may use math error procedures to make an assessment if a taxpayer claimed the earned income tax credit during the period in which a taxpayer is not permitted to claim the credit because of a prior fraudulent or reckless claim[1885] Further, the Chief Counsel's office concluded that the IRS may use math error authority to recover erroneous refunds related to certain earned income tax credits that were identified as being paid to certain taxpayers prior to taxpayers being issued their TINs.[1886]

(2) Taxpayers Making Improper Claims

The earned income tax credit is not allowed to any taxpayer who has been denied the credit for any previous tax year as a result of the chapter 63, subchapter B deficiency procedures unless the taxpayer provides evidence of eligibility for the credit.[1887] A denial of the credit as a result of a deficiency procedure occurs when a tax on account of the credit is assessed as a deficiency, other than on account of a mathematical or clerical error.[1888] Ineligibility for the earned income tax credit under this provision is subject to judicial review.[1889]

To demonstrate eligibility, the taxpayer must complete Form 8862, *Information To Claim Certain Credits After Disallowance*, and attach it to the first income tax return on which the taxpayer claims the credit after the credit has been denied as a result of the deficiency procedures.[1890] If any item on the form is inconsistent or incorrect, the taxpayer is treated as hav-

[1872] §32(i)(2)(E). *See* §469 (definition of passive activity).
[1873] Rev. Rul. 98-56.
[1874] CCA 199951034.
[1875] SCA 200120037.
[1876] FSA 200120036.
[1877] §32(k)(1)(A).
[1878] §32(k)(1)(B)(i).
[1879] §32(k)(1)(B)(ii).

[1880] CCA 201931008.
[1881] *See* H.R. Rep. No. 105-220, at 597 (1997) (Conf. Rep.).
[1882] *See* H.R. Rep. No. 105-220, at 597 (1997) (Conf. Rep.).
[1883] SCA 200113028.
[1884] SCA 200245051.
[1885] §6213(g)(2)(K).
[1886] The Inspector General of Tax Administration identified these erroneous refunds during review of 2014 tax year returns. The Chief Counsel's office determined that the IRS may use math error authority to disallow these credits and the erroneous refunds under §6213(g)(2)(F), §6213(g)(2)(I), and former §6213(g)(2)(J). PMTA 2018-17. For tax years beginning in 2026, a correct Social Security number (as defined in §24(h)(7)) or employer identification number (EIN) will be required in place of a TIN. §6213(g)(2)(J), amended by the One Big Beautiful Bill Act (OBBBA), Pub. L. No. 119-21, §70606(b).
[1887] §32(k)(2); Reg. §1.32-3(a).
[1888] Reg. §1.32-3(b) (reference to §6213(b)(1)).
[1889] *See* H.R. Rep. No. 105-220, at 597 (1997) (Conf. Rep.).
[1890] Reg. §1.32-3(c).

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ing failed to demonstrate eligibility.[1891] The failure to provide this information is treated as a mathematical error, thus permitting the IRS to deny any earned income tax credit subsequently claimed by the taxpayer.[1892] If two individuals marry after one has been made ineligible for the earned income tax credit under the deficiency procedure provision, the eligibility demonstration requirements apply to both spouses if they file a joint return and claim the earned income tax credit, unless the one who had been made ineligible subsequently demonstrates eligibility.[1893]

If the taxpayer properly demonstrates eligibility for the earned income tax credit, the taxpayer is not required to submit Form 8862 in the future unless the IRS again denies the earned income tax credit as a result of the deficiency procedures.[1894] If a taxpayer's claim for the earned income tax credit is denied under §6213(g)(2)(K), the taxpayer must attach Form 8862 to the next return for which the earned income tax credit is claimed. A taxpayer fails to demonstrate eligibility if, for example, the form is incomplete or any item of information on the form is incorrect or inconsistent with any item on the return.[1895]

e. Delinquent Child Support Payments

The claiming of the earned income tax credit by a delinquent child support payor is treated as a mathematical error.[1896] A delinquent child support payor is a person who files a return with an entry claiming the earned income tax credit with respect to a child and who is, according to the Federal Case Registry of Child Support Orders established under §453(h) of the Social Security Act, a noncustodial parent of the child.[1897]

5. Application of Earned Income Tax Credit in U.S. Possessions

For calendar years 2021 and later, the American Rescue Plan Act of 2021 provides the U.S. Treasury with authority to make payments to Puerto Rico, American Samoa, and mirror code possessions for amounts they pay to provide the earned income tax credit (EITC) to their residents.[1898] For Puerto Rico, the payment amount is the "specified matching amount" (as defined in §7530(a)(3)) for the year, plus, for calendar years 2021 through 2025, the lesser of (i) the expenditures made by Puerto Rico during such calendar year for education efforts with respect to individual taxpayers and tax return preparers relating to the earned income tax credit, or (ii) $1,000,000.[1899] For Puerto Rico, the payments are contingent on Puerto Rico increasing the amount of its EITC.[1900] For American Samoa, the payment amount is the lesser of (i) the cost to American Samoa of the earned income tax credit for tax years beginning in or with 2021, or (ii) $16,000,000, plus, for calendar years 2021 through 2025, the lesser of (i) the expenditures made by American Samoa during such calendar year for education efforts with respect to individual taxpayers and tax return preparers relating to such earned income tax credit, or (ii) $50,000.[1901] For American Samoa, the payments are contingent on American Samoa enacting and maintaining an EITC.[1902] For the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands — which have mirror code tax systems — the U.S. Treasury will make payments equal to the U.S. possession's costs of providing the EITC to its residents, plus, for calendar years 2021 through 2025, the lesser of (i) the expenditures made by such possession during such calendar year for education efforts with respect to individual taxpayers and tax return preparers relating to such earned income tax credit, or (ii) $50,000.[1903]

6. Treatment of EITC for Other Purposes

In computing eligibility for, and the amount of, benefits under many government programs, any refund that an individual (or the individual's spouse) receives from the earned income tax credit is not treated as income by those programs and is not taken into account in determining resources for the month in which the earned income tax credit refund is received or the following month.[1904] Federal programs that exclude earned income tax credit refunds from benefits or eligibility determinations include:

- the Section 8 Housing Choice Vouchers program;[1905]
- housing and other financial assistance programs for farmers, farm workers, and certain other persons in rural areas;[1906]
- rent supplement programs for qualifying individuals who rent from private nonprofits, limited-dividend entities, or cooperative housing corporations;[1907]
- mortgage assistance for moderate-income families, displaced families, and the elderly;[1908]
- food assistance programs;[1909]
- the commodity supplemental food program;[1910]

[1891] Reg. §1.32-3(c).
[1892] *See* Reg. §1.32-3(d) (reference to §6213(g)(2)(K)).
[1893] Reg. §1.32-3(e).
[1894] Reg. §1.32-3(a).
[1895] Reg. §1.32-3(c).
[1896] §6213(g)(2)(M).
[1897] §6213(g)(2)(M).
[1898] §7530, added by Pub. L. No. 117-2, §9625.
[1899] §7530(a)(1), added by Pub. L. No. 117-2, §9625.
[1900] §7530(a)(2), added by Pub. L. No. 117-2, §9625.
[1901] §7530(c)(1), added by Pub. L. No. 117-2, §9625.
[1902] §7530(c)(2), added by Pub. L. No. 117-2, §9625.
[1903] §7530(b), added by Pub. L. No. 117-2, §9625.
[1904] §32(l) (coordination with certain means-tested programs). *See* Housing and Urban Development Notice, Federally Mandated Exclusions from Income, 77 Fed. Reg. 43,347 (July 24, 2012).
[1905] §32(l)(1). *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383; *see also* 24 C.F.R. §5.500(a)(4), 24 C.F.R. §5.609(c)(17).
[1906] §32(l)(2). *See* 42 U.S.C. §1441 and 42 U.S.C. §1471(b)(4) (income thresholds based on levels established in the Housing Act of 1937); *see also* 24 C.F.R. §5.609(c)(17).
[1907] §32(l)(3). *See* §101 of the Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 12 U.S.C. §1701s; *see also* 24 C.F.R. §5.500(a)(3), 24 C.F.R. §5.609(c)(17).
[1908] §32(l)(4). *See* §221(d)(3), §235, and §236 of the National Housing Act, Pub. L. No. 73-479 (1934), 12 U.S.C. §1715l(d)(3), 12 U.S.C. §1715z, and 12 U.S.C. §1715z-1; *see also* 24 C.F.R. §5.500(a)(4)(i), 24 C.F.R. §5.500(a)(1)–(2), 24 C.F.R. §5.609(c)(17).
[1909] §32(l)(5). *See* 7 U.S.C. §2014(d)(13) and 7 U.S.C. §2014(e)(2)(A)(i), replaced in 1996 by the Temporary Assistance to Needy Families (TANF) program, Pub. L. No. 104-193. In 2008, the Food Stamp program was renamed the Supplemental Nutrition Assistance Program (SNAP). Pub. L. No. 110-234; *see also* C.F.R. §273.9(c)(10)(vii).

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- child care and development fund programs, including head start and early start;[1911]
- the low-income home energy assistance program;[1912]
- the federal work-study program;[1913]
- the veterans' benefits program;[1914]
- the Medicaid and the Children's Health Insurance programs;[1915] and
- supplemental security income.[1916]

In contrast, for Chapter 13 bankruptcy purposes, an earned income tax credit refund is considered income that must be taken into account in determining a bankruptcy debtor's disposable income.[1917]

L. 2020 Recovery Rebates

1. In General

To help alleviate economic strain on taxpayers in the wake of the Coronavirus (COVID-19) pandemic, Congress initially enacted §6428,[1918] which provided eligible individuals a refundable credit in their first tax year beginning in 2020, in the amount of $1,200 ($2,400 for eligible individuals filing jointly) plus an additional $500 for each qualifying child (as defined by §24(c)). As discussed further below, Congress authorized such credits to be paid in advance to taxpayers in the form of "Economic Impact Payments" (EIPs) — also known as "stimulus checks" or "stimulus payments" — via check, direct deposit, or debit card.[1919] Late in 2020, Congress provided further assistance to taxpayers in the form of an additional refundable credit in the taxpayer's first tax year beginning in 2020, in the amount of $600 ($1,200 for eligible individuals filing a joint return) plus an additional $600 for each qualifying child.[1920]

For purposes of the recovery rebates under §6428 and §6428A, an "eligible individual" is any individual *other than* a nonresident alien, an individual that can be claimed as a dependent on another tax return, or an estate or trust.[1921]

The ability for an eligible individual to claim the recovery rebates on the 2020 tax return depended on how much or whether such individual received any EIPs. Generally, an eligible taxpayer that received the full EIPs would not claim any credit on the tax return, but an eligible taxpayer that received less than the full amount of the EIPs or no EIPs could claim the credit on the return.

In addition to IRS Notice 1444 and/or Notice 1444-B, which were required to be issued by the IRS under §6428(f)(7) and §6428(f)(6), respectively, the IRS has made information available to taxpayers regarding EIPs and credits on its website, including links to FAQs, news releases and additional detailed information. Section 6428(h) and §6428A(h) provides that the Secretary shall prescribe such regulations "or other guidance as may be necessary to carry out the purposes of this section," including any such measures as are deemed appropriate to avoid allowing multiple credits or rebates to a taxpayer. Although regulations were not issued, the IRS has stated that the FAQs were issued to provide general information to taxpayers and tax professionals "as expeditiously as possible." Because the FAQs were not published in the Internal Revenue Bulletin, the IRS has stated that the FAQs will not be relied on or used by the IRS to resolve a case. Nonetheless, the IRS has stated in its Fact Sheets that a taxpayer who reasonably and in good faith relies on the FAQs will not be subject to a penalty that provides a reasonable cause standard for relief, including a negligence penalty or other accuracy-related penalty, to the extent that reliance results in an underpayment of tax. Given the absence of regulatory or other formal guidance from the IRS, this Portfolio refers to FAQs and other information issued by the IRS via its website in this Section L (2020 Recovery Rebates) and Section M (2021 Recovery Rebates). See links to the Economic Impact Payments page and the Economic Impact Payment Information Center on the IRS website.[1922] Detailed information regarding how to claim recovery rebates on 2020 tax returns were included in the Instructions for the 2020 Form 1040.[1923]

Most eligible individuals received the first and second 2020 EIPs automatically and did not need to claim the credits on their 2020 tax return. Eligible individuals who did not receive a first or second EIP, or received less than the full amounts, would have been eligible to claim the 2020 recovery

[1910] *See* Agriculture and Consumer Protection Act of 1973 (1973 U.S. Farm Bill), Pub. L. No. 93-86, §4(a), as amended by Pub. L. No. 110-246; *see also* 7 C.F.R. §247.9(e)(3), 7 C.F.R. §246.7(d)(2)(iv)(D).

[1911] *See* Child Care and Development Block Grant Act of 1990, Pub. L. No. 97-35, title VI, subtitle A, ch. 8, subch. C (codified as amended at 42 U.S.C. §9857–§9858r), added by the Omnibus Budget Reconciliation Act of 1990 (1990 OBRA), Pub. L. No. 101-508, §5082; Head Start Act, Pub. L. No. 97-35, title VI, subtitle A, ch. 8, subch. B, (codified as amended at 42 U.S.C. §9831–§9852), reauthorized by the Improving Head Start for School Readiness Act of 2007, Pub. L. No. 110-134; *see also* 7 C.F.R. §247.9(e)(3), 7 C.F.R. §246.7(d)(2)(iv)(D).

[1912] *See* Low-Income Home Energy Assistance Act, Pub. L. No. 97-35, title XXVI, codified as amended at 42 U.S.C. 42 U.S.C. §8621–42 U.S.C. §8630; *see also* 7 C.F.R. §247.9(e)(3), 7 C.F.R. §246.7(d)(2)(iv)(D).

[1913] *See* Higher Education Act of 1965, Pub. L. No. 89-329, §480, 42 U.S.C. §1087vv, as amended by Pub. L. No. 111-312.

[1914] *See* An Act to Consolidate into One Act All of the Laws Administered by the Veterans Administration and for Other Purposes, Pub. L. No. 85-857 (1958). *See also* 38 C.F.R. §3.271(a)(2)–(3).

[1915] *See* the Social Security Act of 1935, Pub. L. No. 74-271, as amended by the Social Security Amendments of 1965, Pub. L. No. 89-97, §121(a), codified as amended at 42 U.S.C. §1936a(r)(2) (providing states flexibility to disregard federal income tax refunds from eligibility requirements).

[1916] *See* the Social Security Amendments of 1972, Pub. L. No. 92-603. *See also* 20 C.F.R. §416.1112(c)(1).

[1917] *Marshall v. Blake*, 885 F.3d 1065 (7th Cir. 2018).

[1918] §6428, added by the CARES Act, Pub. L. No. 116-136, §2201, effective March 27, 2020.

[1919] §6428(a).

[1920] §6428A(a), added by the COVID-related Tax Relief Act of 2020, Pub. L. No. 116-260, Div. N, Title II, §272, effective December 27, 2020.

[1921] §6428(d), §6428A(d). If a taxpayer claimed an individual as a dependent for 2019, the dependent will not qualify for an EIP (which is discussed further below). If the individual no longer qualifies as another taxpayer's dependent for 2020, to claim the credit, the individual must file a return for 2020. IRS Info. Letter 2020-0015.

[1922] *See* Fact Sheet 2022-27 (April 13, 2022).

[1923] IRS Notice 1444, *Your Economic Impact Payment* (first EIP payment), and IRS Notice 1444-B, *Your Economic Impact Payment* (second EIP payment), showed how much a taxpayer received. The Instructions for 2020 Form 1040, *U.S. Individual Income Tax Return*, are detailed and, among other things, stated that taxpayers should have Notice 1444 or Notice 1444-B available when completing the Recovery Rebate Credit Worksheet in connection with preparing Form 1040. For further information about claiming recovery rebates on 2020 tax returns, see the Instructions for Form 1040.

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rebate credit under §6428(a) by filing a 2020 tax return. When processing the 2020 return, the IRS determined the eligibility and amount of the taxpayer's credit based on the 2020 tax return information and the amounts of any EIP previously issued. If a taxpayer is eligible, it will be reduced by the amount of any EIPs already issued to them. If there's a mistake with the credit amount on Form 1040 or Form 1040-SR, the IRS will calculate the correct amount, make the correction, and continue processing the return. In the event of a correction, the IRS sent the taxpayer a letter or notice explaining any change.[1924]

The IRS website has a special section — *2020 Recovery Rebate Credit — Topic G: Correcting issues after the 2020 tax return is filed* — that provides additional information to explain what errors may have occurred. Individuals who disagree with the IRS calculation should review their letter as well as the questions and answers for what information they should have available when contacting the IRS. The IRS has urged individuals who have not yet filed their 2020 tax return to properly determine their eligibility for the 2020 recovery rebate credit before they file their 2020 tax returns. To calculate any credit due, taxpayers must start with the amount of any EIPs received and use the Recovery Rebate Credit Worksheet or tax preparation software. Individuals who did not save or did not receive an IRS letter or notice can securely access their tax information with an IRS online account. See also *2020 Recovery Rebate Credit — Topic E: Receiving the Credit on a 2020 tax return,* which provides the procedures for requesting an IRS payment trace to track a missing EIP if a taxpayer received notice that an EIP was issued to him or her and the taxpayer did not receive it.

> *Example 1:* In April 2020, taxpayer (T), a single individual, is eligible for and receives a direct deposit of $1,200 as an advance refund of the §6428 recovery rebate credit based on data from her 2019 tax return filed in January 2020. On January 10, 2021, the IRS issues an additional direct deposit to T of $600 pursuant to §6428A based on her 2019 tax data. The total credit to which T was entitled under §6428 and §6428A based on her filing status is $1,800 and T did not need to take any further action on her 2020 return.

> *Example 2:* Taxpayer (T), a recent college graduate, was claimed by her parents as a dependent on their 2019 return. T gets a full-time job in 2020 and will file her own 2020 tax return. Because T did not file a 2019 return, she does not receive a $1,200 EIP under §6428 or a $600 EIP under §6428A. If otherwise eligible, T can claim both the $1,200 and the $600 credit on her 2020 tax return.

In addition to setting forth information on its website, the IRS has provided special procedures under Rev. Proc. 2021-24 for individuals not otherwise required to file federal income tax returns for tax year 2020 to claim the 2020 recovery rebate credit under §6428 and the additional 2020 recovery rebate credit under §6428A.[1925]

> If the IRS did not issue the first or second EIP based on a taxpayer's filed superseding return changing a joint filing status, but instead based the EIP on the prior joint return, the taxpayer may still claim a recovery rebate credit (RRC) on their 2020 income tax return. However, taxpayers should expect that their refund will be delayed because the IRS will manually review the claim if its records are inconsistent with the RRC. The IRS will likely issue a math error notice explaining that it is reducing or eliminating the claimed RRC because the EIP was previously paid. [T]axpayers will have the opportunity to explain their situation by responding to the math error notice and must respond within 60 days that the joint election was invalid or was superseded and they did not receive the EIP to which they were entitled.
>
> Taxpayers who did not receive their first or second EIP after they filed a superseding return changing their election from filing jointly may still be eligible for the RRC on their 2020 income tax return. Taxpayers could still file a superseding return electing to file married filing separately or head of household for the 2020 return until May 17, 2021, which may trigger a separate EIP after processing the superseded return. That superseded return would be the basis for the third EIP.

Note: Any credit or refund allowed or made to any individual under §6428 (first EIP) or §6428A (second EIP) was not: (1) subject to reduction or offset pursuant to 31 USC §3716 or §3720A, (2) subject to reduction or offset pursuant to §6402(d), §6402(e) or §6402(f), or (3) reduced or offset by other assessed Federal taxes that would otherwise be subject to levy or collection.[1926] Additionally, with exceptions, the right of any person to any second EIP was not transferable or assignable, at law or in equity, and no such payment is subject to, execution, levy, attachment, garnishment, or other legal process, or the operation of any bankruptcy or insolvency law.[1927] However, a court has held that first EIPs were not property exempt from the federal tax levy under §6334(a), and thus, were subject to garnishment.[1928]

2. *Credit Phase-Outs Based on AGI*

Both of the 2020 recovery rebate credits under §6428 and §6428A were subject to limitations based on adjusted gross income (AGI). Thus, the total amount of the credits allowed by §6428(a) and §6428A(a) were reduced (but not below zero) by 5% of the excess of the taxpayer's adjusted gross income

[1924] *2020 Recovery Rebate Credit Frequently Asked Questions.*

[1925] Rev. Proc. 2021-24. These procedures could also be used by individuals who were not otherwise required to file federal income tax returns for tax year 2020 to receive advance child tax credit payments under §7527A and third-round economic impact payments under §6428B. *See* CCA 202248010 (Chief Counsel's Office advised that for EIP purposes, a $1 simplified return filed through the non-filer portal is a Federal income tax return). For further discussion of Rev. Proc. 2021-24 and §7527A, see III.C., above, and for further discussion of §6428B, see III.M., below.

[1926] Pub. L. No. 116-136, §2201(d), effective March 27, 2020; Pub. L. No. 116-260, §272(d)(1), effective December 27, 2020.

[1927] Pub. L. No. 116-260, §272(d)(2).

[1928] *United States v. Ruiz*, No. EP-19-CR-03035(1)-DCG, 2021 BL 432646 (W.D. Tex. Nov. 10, 2021). For further discussion of property exempt from levy, see 637 T.M., *Federal Tax Collection Procedure — Liens, Levies, Suits, and Third-Party Liability.*

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over $150,000 in the case of joint return or a surviving spouse, $112,500 for a head of household, or $75,000 for any other taxpayer.[1929] The combined credits completely phased out for joint filers and surviving spouses with adjusted gross income exceeding $198,000 and for single filers with adjusted gross income exceeding $99,000.

Note: If a taxpayer did not qualify for the 2020 recovery rebate credit based on the AGI reported on his or her 2020 tax return, however, because of the unemployment compensation exclusion[1930] that taxpayer's 2020 AGI is reduced making him or her eligible for such credit, the IRS will calculate the credit and send the taxpayer any refund owed. This process also applies when the unemployment exclusion makes a taxpayer eligible for a larger 2020 credit than the one claimed on his or her 2020 tax return.[1931]

3. *Advance Payment of Credits (EIPs)*

a. *Advance Payment of §6428 Credits (First EIPs)*

To accelerate financial relief to individuals, Congress made the §6428 recovery rebate tax credit available in the form of an advance refund of the credit referred to as an "Economic Impact Payment" (EIP), commonly known as a stimulus payment or stimulus check. To help identify eligible individuals, §6428(f) provided that each individual who was an eligible individual for tax year 2019 was treated as having made a payment against his/her income tax for tax year 2019 in an amount equal to the EIP amount. The EIP amount was the amount that would have been allowed as a credit under §6428 for tax year 2019 if §6428 had applied to tax year 2019.[1932] The §6428 EIPs were only available until December 31, 2020.

Certain individuals with zero adjusted gross income or no filing obligations such as Social Security recipients, railroad retirees, those receiving Veterans Affairs benefits, homeless individuals and others who did not file tax returns also were eligible to receive a §6428 EIP.[1933]

Note: Eligible individuals who did not receive an EIP check or direct deposit and who were not otherwise required to file a tax year 2019 return were still able to receive an EIP using one of two methods:

• Use of the IRS's "Non-Filers: Enter Payment Info Here" portal (which is now closed) to register and submit the required information no later than midnight (Eastern Time) November 21, 2020.[1934]

• Filing a 2019 return electronically or on paper following the procedures set forth in Rev. Proc. 2020-28 no later than October 15, 2020.[1935]

The credit would be claimed on the 2020 tax return. However, a taxpayer who received an advance payment of the credit had to reduce the amount of the credit claimed on the return (but not below zero) by the amount of any EIP received.[1936]

A failure to reduce the recovery rebate credit claimed on the federal income tax return by the amount of the EIP was treated as a mathematical or clerical error for which the IRS could assess additional tax immediately, outside of the normal deficiency procedures, pursuant to §6213(b)(1).[1937]

Note: There is no provision in §6428 that required individuals who received an EIP based on their 2018 or 2019 tax returns to pay back all or part of the payment if, based on the information reported on the 2020 tax return, they no longer qualified for that amount or would qualify for a lesser amount. For example, if an individual received $500 for a child who, based on the 2018 or 2019 tax return, met the qualifying child requirements, but the child turned age 17 in 2020 and no longer met the qualifying child requirements, the individual was not required to pay back the $500. Similarly, if an individual received $500 based on claiming their child on their 2018 or 2019 return but did not claim the child on their 2020 return because the child's other parent claimed the child, the individual did not have to pay back the $500, even if the child's other parent claimed $500 for the same child on his or her 2020 tax return.[1938]

EIPs made to individuals who were deceased or a nonresident alien in 2020 must be returned to the IRS.[1939]

An IRS policy stated in an EIP FAQ initially barred incarcerated individuals from receiving EIPs. In *Scholl v. Mnuchin*, several incarcerated individuals brought a class-action lawsuit challenging this policy.[1940] The district court held that the failure to provide incarcerated individuals with an EIP solely on the basis of their incarceration violated §6428 because the statutory

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[1929] *See* §6428(c), §6428A(c).

[1930] §85(c)(1), added by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9042.

[1931] *2020 Recovery Rebate Credit Frequently Asked Questions — Topic E: Receiving the Credit on a 2020 tax return,* Q E8; IRS Fact Sheet FS-2022-26 (Apr. 13, 2022).

[1932] See §6428(f). Pursuant to §6428(f)(7), Notice 1444, *Your Economic Impact Payment*, was mailed to recipients to provide information about the payment and instructions to address discrepancies. Pub. 5412-W, *Get An Economic Impact Payment From The IRS*. For a discussion of Taxpayer Advocate Service assistance, see 623 T.M., *IRS Procedures: Examinations and Appeals.*

[1933] Section 6428(f)(5)(A) allowed the IRS to provide EIPs to eligible individuals who had not filed a tax return for tax year 2019. The IRS used information reported on the eligible individual's tax return filed for 2018. If no 2018 return was filed, §6428(f)(5)(B) provided that the IRS could use information with respect to that eligible individual for calendar-year 2019 provided on (1) Form SSA-1099, *Social Security Benefit Statement*, or (2) Form RRB-1099, *Social Security Equivalent Benefit Statement.*

[1934] *See also* IR-2020-229 (Oct. 6, 2020) (extending registration and submission deadline to November 21, 2020); IR-2020-253 (Nov. 9, 2020). Eligible individuals who did not receive $500 per child when they received their EIP, could also use the Non-filers tool to get a catch-up payment for a qualifying child but, they had to do so by November 21, 2020, or claim the payment as a credit on their 2020 return. IRS Pub. 5412-X.

[1935] Section 3 of Rev. Proc. 2020-28 provided a simplified procedure for filing a paper or electronic tax return if the eligible individual was not required to file a tax return for 2019. Section 4 of Rev. Proc. 2020-28 provided a special procedure for filing a return electronically if the eligible individual had no tax year 2019 adjusted gross income.

[1936] §6428(e)(1), §6428(f). *See* IRS Pub. 5412-S, *Keep the Economic Impact Payment Notice For Your Tax Records*, reminding individuals who receive an EIP in 2020 to keep their copy of Notice 1444, *Your Economic Impact Payment*, with their tax records.

Further guidance for correcting recovery credit-related issues after the 2020 return has been filed is provided on the IRS website. *See 2020 Recovery Rebate Credit — Topic G: Correcting issues after the 2020 tax return is filed.*

[1937] *See* §6428(e)(1).

[1938] *See First Economic Impact Payment Questions and Answers — Topic J: Reconciling on Your 2020 Tax Return*, Q J3.

[1939] See eligibility requirements in §6428(d) and §6428A(d). More information and instructions for returning payments have been available on the IRS website at Economic Impact Payment Information Center.

[1940] *Scholl v. Mnuchin*, 494 F. Supp. 3d 661 (N.D. Cal. 2020).

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language did not expressly exclude such individuals from receiving EIPs.[1941] The court also issued a permanent injunction enjoining the IRS from withholding EIPs from plaintiffs or any class member on the sole basis of their incarcerated status and further directing the IRS to take corrective measures to ensure EIPs are mailed to incarcerated individuals.[1942]

b. Advance Payment of §6428A Credits (Second EIPs)

Much like the initial round of EIPs, the IRS issued additional 2020 recovery rebates (the second round of EIPs — commonly referred to as stimulus payments or stimulus checks) to eligible individuals by direct deposit, paper checks, and debit cards early in 2021. The amount of the payment was determined based on 2020 tax year information. Payments were automatic for eligible individuals who filed a 2019 tax return, those who received Social Security retirement, survivor, or disability benefits (SSDI), Railroad Retirement benefits as well as Supplemental Security Income (SSI) and Veterans Affairs beneficiaries who didn't file a tax return. Payments were also automatic for anyone who successfully registered for the first EIP online at IRS.gov using the Non-Filers tool by November 21, 2020 or who submitted a simplified tax return that had been processed by the IRS. As noted above, U.S. citizens and resident aliens who were not eligible to be claimed as a dependent on someone else's income tax return were generally eligible for this second payment. Eligible individuals were to automatically receive an EIP of up to $600 for individuals or $1,200 for married couples and up to $600 for each qualifying child.[1943]

Unlike the initial EIP, if an eligible individual did not receive a payment or it was less than expected by the time they filed their 2020 return, the credit (or remaining balance thereof) had to be claimed on the 2020 tax return, i.e., there were no online tools or other methods for a taxpayer to request a payment.[1944]

A failure to reduce the recovery rebate credit claimed on the federal income tax return by the amount of the EIP was treated as a mathematical or clerical error for which the IRS could assess additional tax immediately, outside of the normal deficiency procedures, pursuant to §6213(b)(1).[1945]

More information about the second round of stimulus payments (second EIPs) was made available in IR-2020-280 (Dec. 29, 2020).

4. Special Rules

a. Identification Number Requirement

To claim the §6428 credit on the 2020 tax return, eligible individuals had to include their social security numbers (SSN) on their tax return. In the case of a return other than a joint return, the $1,200 amount was treated as zero unless the taxpayer included their SSN. In the case of a joint return, the $2,400 amount was treated as $1,200 if the SSN of only one spouse was included, and the $2,400 amount was treated as zero if neither spouse's SSN was included.[1946] To claim the §6428A credit on the 2020 tax return, eligible individuals had to include their SSNs on their tax return. In the case of a return other than a joint return, the $600 amount was treated as zero unless the taxpayer included their SSN. In the case of a joint return, the $1,200 amount was treated as $600 if the SSN of only one spouse was included, and the $2,400 amount was treated as zero if neither spouse's SSN was included.[1947]

As discussed above, an additional $500 for each qualifying child was available in addition to the $1,200/$2,400 credit. To receive the additional $500 per child, the taxpayer had to include each child's SSN.[1948] In the case of a qualifying child that was adopted, or placed for adoption, taxpayers should have used an adoption taxpayer identification number (ATIN) on their return.[1949]

Note: Because §6428(g) required a recipient of the 2020 recovery rebate to have an SSN, undocumented immigrants without a work authorization who filed taxes using an Individual Taxpayer Identification Number (ITIN), were unable to claim the credit or receive an advance payment, even if they had qualifying U.S. citizen children. This precise issue did not take long to work its way into litigation. In *R.V. v. Mnuchin*, the taxpayers alleged that the benefits of emergency cash assistance distributed under the CARES Act intentionally and discriminatively denied those benefits to U.S. citizen children solely because one or both of a child's parents were undocumented immigrants.[1950] The district court recognized that Congress has extensive authority over legislation involving noncitizens and accepted that the SSN requirement under §6428(g) serves legitimate government interests (administrative efficiency and resource preservation purposes). Thus, the court held that the statute is not in violation of the U.S. citizen children's

[1941] *Scholl*, 494 F. Supp. 3d 661 (N.D. Cal. 2020).

[1942] *Scholl*, 494 F. Supp. 3d 661 (N.D. Cal. 2020). The IRS appealed the decision to the Ninth Circuit. *See* No. 20-116915 (9th Cir. Oct. 8, 2020). The IRS updated its FAQs to reflect the holding in *Scholl*, directing incarcerated individuals to provide information to the IRS by using the Non-Filers: Enter Payment Info here online tool by November 21, 2020, or by mailing a 2019 simplified paper tax return following the procedures described in Rev. Proc. 2020-28 by a court-ordered deadline of October 30, 2020.

For other litigation involving incarcerated individuals, see *Scholl v. Mnuchin*, No. 20-cv-05309-PJH, 2021 BL 8621 (N.D. Cal. 2021) (motion to intervene by incarcerated individuals in U.S. Virgin Islands denied as plaintiffs failed to satisfy timeliness requirement and their issue was not protected in the original litigation as original case did not include references to agreement between United States and possession territories regarding nonpayment of EIPs to incarcerated individuals), and *Stevens v. IRS*, No. 21-cv-00573-PJH, 2021 BL 77909 (N.D. Cal. 2021) (incarcerated plaintiff could not maintain action for separate individual relief because he was already a member of the *Scholl* class; individual suit for injunctive and equitable relief may be dismissed when it duplicates an existing class action's allegations and prayer for relief; plaintiff also could not obtain relief sought because CARES Act-imposed deadline of December 31, 2020 for issuing EIP had passed); *Wilson v. Dep't of Treasury*, No. 21-cv-01191-PJH, 2021 BL 81449 (N.D. Cal. 2021) (same).

[1943] The eligibility rules are set forth in §6428A(d) (eligible individuals), §6428A(c) (limitations based on adjusted gross income), and §6428A(g) (identification number requirement).

[1944] See §6428A(f); IR-2020-280 (Dec. 29, 2020); IR-2021-01 (Jan. 4, 2021). Individuals were able to check the status of both their first and second EIPs by using the *Get My Payment* tool on the IRS website, which is no longer available.

[1945] *See* §6428A(e)(1).

[1946] §6428(g)(1)(A), §6428(g)(1)(B), §6428(g)(3)(A).

[1947] §6428A(g)(1), §6428A(g)(2), §6428A(g)(4).

[1948] §6428(g)(1)(C).

[1949] §6428(g)(3)(B).

[1950] Complaint at 3, *R.V. v. Mnuchin*, No. 8:20-cv-01148 (D. Md. 2020). *See R.V. v. Mnuchin*, No. 20-cv-1148, 2020 BL 227570 (D. Md. 2020) (finding that taxpayer established Article III and statutory standing, and that court has subject matter jurisdiction over claims).

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implied right to equal protection under the Fifth Amendment.[1951]

In a factually similar proceeding, in *Amador v. Mnuchin*,[1952] several plaintiffs alleged that §6428(g) was constitutionally infirm for several reasons, including that it intentionally and substantially infringed upon their right to marriage and family self-definition in violation of the Due Process Clause of the Fifth Amendment, infringed on their First Amendment rights to freedom of speech and freedom of association, and violated the equal protection component of the Fifth Amendment.

In *Doe v. Trump*, the plaintiff sued because she was excluded from access to the credit and EIP because she filed a tax return jointly with her spouse, an immigrant who paid taxes and filed tax returns with an ITIN. The plaintiff asserted that, except for her spouse's lack of an SSN, she would otherwise be eligible for and receive an advance credit from the IRS, both for herself and each of her dependent US. citizen children. The plaintiff argued that the government denied her an immediate benefit that other similarly situated tax filers have received, a denial that was unconstitutional because it infringed on their fundamental right to marry and their right to equal protection under the law. The district court granted the government's summary judgment motion after concluding that the exclusion provision of §6428(g) survived a rational basis review and that the plaintiffs failed to state a claim on which relief could be granted. The court found that Congress could have rationally included the exclusion provision to promote administrative efficiency and minimize delays in the distribution of checks. The court concluded that the plaintiffs failed to negate that rational basis and, accordingly, found that the exclusion provision survived a rational basis review.[1953]

b. Special Rule for Armed Forces Members

Individuals who were members of the U.S. armed forces during the tax year were eligible to receive the §6428 and §6428A credits as long as at least one spouse had an SSN.[1954]

M. 2021 Recovery Rebate

1. Amount

The American Rescue Plan Act of 2021 provided for a refundable credit (the "2021 recovery rebate credit") of up to $1,400 for each eligible individual ($2,800 for joint return filers) and up to $1,400 for each dependent (as defined in §152; includes adult dependents).[1955] As with the 2020 recovery rebate credits, the IRS sent out advance payments of the 2021 recovery rebate credit as a third round of economic impact payments (EIPs), also known as "recovery rebates" or "stimulus payments" or "stimulus checks" or "advance refunds".

Section 6428B(h) provides that the Secretary shall prescribe such regulations "or other guidance as may be necessary to carry out the purposes of this section," including (1) regulations or other guidance providing taxpayers the opportunity to provide the Secretary information sufficient to allow the Secretary to make advance payments to such taxpayers under subsection (g) (including the determination of the amount of such payment) and (2) regulations or other guidance to ensure to the maximum extent administratively practicable that, in determining the amount of any credit under subsection (a) and any credit or refund under subsection (g), an individual is not taken into account more than once, including by different taxpayers and including by reason of a change in joint return status or dependent status between the taxable year for which an advance refund amount is determined and the taxable year for which a credit under subsection (a) is determined.[1956] Section 6428B(i) further provides that the Secretary shall carry out a robust and comprehensive outreach program to ensure that all taxpayers learn of their eligibility for the advance refunds and credits under subsection (g); are advised of the opportunity to receive such advance refunds and credits; and are provided assistance in applying for such advance refunds and credits.

As noted above in Section L (2020 Recovery Rebates), although regulations were not issued, FAQs were issued by the IRS to provide general information to taxpayers and tax professionals "as expeditiously as possible." However, because the FAQs were not published in the Internal Revenue Bulletin, they will not be relied on or used by the IRS to resolve a case. Nonetheless, a taxpayer who reasonably and in good faith relies on these FAQs will not be subject to a penalty that provides a reasonable cause standard for relief, including a negligence penalty or other accuracy-related penalty, to the extent that reliance results in an underpayment of tax.[1957] This Portfolio refers to such information, including other forms of "guidance" issued by the IRS and made available on its website, in this Section M (2021 Recovery Rebates) and Section L (2020 Recovery Rebates) above. Information on the 2021 recovery rebate credit was made available on the IRS website at 2021 Recovery Rebate Credit Questions and Answers.

The third EIP amount began to phase out ratably for single filers with adjusted gross income (AGI) of $75,000, head of household filers with AGI of $112,500, or joint return filers and surviving spouses with AGI of $150,000. Taxpayers with AGI of more than $80,000 for single filers, more than $120,000 for head of household filers, or more than $160,000 for joint return filers and surviving spouses, did not receive any payment, regardless of the number of dependents claimed on the taxpayer's return.[1958]

The IRS began issuing the third round of EIPs to eligible individuals by direct deposit, paper checks, and debit cards in March 2021.

For purposes of the third round of EIPs, the IRS used the most recent adjusted gross income in its system (2020 if the

[1951] *R.V. v. Mnuchin*, No. 8:20-cv-1148-PWG, 2021 BL 425314 (D. Md. 2021) (although taxpayers' U.S. citizen children had standing to constitutionally challenge §6428(g), statute passes equal protection muster under rational basis review).

[1952] 476 F. Supp. 3d 125 (D. Md. 2020) (denying government's motion to dismiss).

[1953] *See Doe v. Trump*, No. 8:20-cv-00858-SVW-JEM, 2020 BL 350812 (C.D. Cal. 2020). As a result of changes to §6428(g) made by the COVID-related Tax Relief Act of 2020, Pub. L. No. 116-260, Div. N, §273(a)(3), a taxpayer who was married to an individual who did not have an SSN could have been entitled to a $1,200 credit.

[1954] §6428(g)(4), §6428A(g)(5).

[1955] §6428B(a) (allowance of credit), §6428B(b) (credit amount), §6428B(e)(3) (credit is refundable). Section 6428B was added to the Code by the American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9601.

[1956] §6428B(h)(1), §6428B(h)(2).

[1957] *See* IRS Fact Sheet FS 2022-27 (April 13, 2022).

[1958] §6428B(d).

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taxpayer filed a 2020 return, or 2019 otherwise).[1959] If an individual had not filed a tax return for 2019 or 2020, the IRS determined the payment amount based on information available to it.[1960]

If an eligible individual who received the third EIP determined based on a 2019 tax return was entitled to a larger payment based on the 2020 tax return, the eligible individual would receive an additional payment making up the difference if the eligible individual's 2020 tax return was processed[1961] before August 15, 2021.[1962]

Also, the IRS issued "plus-up payments" to eligible individuals who received a third EIP based on a 2019 tax return or information received from SSA, RRB or VA, and were eligible for a larger amount based on their 2020 tax return. The IRS sent plus-up payments to eligible taxpayers every week until the legislative deadline of December 31, 2021.[1963]

Note: Through March 2022, the IRS will send Letter 6475, *Your 2021 Economic Impact Payment(s)*, to confirm the total amount of the third EIP and any plus-up payments taxpayers received for tax year 2021.[1964] The IRS stated in News Release IR-2021-255 (Dec. 22, 2021) that Letter 6475 (applicable only to the third EIP) was intended to help EIP recipients determine if they were entitled to and should have claimed the Recovery Rebate Credit on their tax year 2021 tax returns that they filed in 2022.

If an eligible individual did not receive the full amount of the third EIP, including the plus-up payments, the individual could claim the 2021 recovery rebate credit but had to file a 2021 tax return — even if the individual did not usually file taxes — to claim it. The 2021 tax return had to be filed by April 18, 2025 to claim the credit.[1965] That 2021 recovery rebate credit reduced any tax owed for 2021 or was included in a tax refund.[1966] To help eligible individuals calculate their 2021 Recovery Rebate Credit, they ould find the amount of their third EIP by checking their IRS Online Account, Notice 1444-C letter, Letter 6475, or 2021 account transcript.[1967]

A taxpayer whose 2021 adjusted gross income decreased (compared to that taxpayer's adjusted gross income on the tax return that the IRS used to compute the economic impact payment amount), and who thereby became eligible for the stimulus payment for the first time, could claim it as a recovery rebate credit on the taxpayer's 2021 federal income tax return filed in 2022. Similarly, a taxpayer who received an EIP based on 2019 or 2020 adjusted gross income in an amount less than the amount for which the taxpayer was eligible based on the taxpayer's 2021 adjusted gross income could claim the difference as a recovery rebate credit on the 2021 tax return filed in 2022.[1968] Individuals filing a 2021 joint return with a spouse that died in 2021 must see the 2021 Recovery Rebate Credit Worksheet provided in the 2021 Form 1040 and Form 1040-SR instructions to calculate their recovery rebate credit amount.[1969]

A taxpayer who received an advance payment of the credit (i.e., an EIP) was required to reduce the amount of the credit claimed on the taxpayer's 2021 tax return filed in 2022 by the amount of the EIP received, but if a taxpayer received a larger EIP in 2021 than they were eligible for on their 2021 income tax return, the taxpayer did not have to pay back the difference.[1970] Failure to reduce the amount of the credit claimed on the 2021 return was treated as arising out of a mathematical or clerical error and summarily assessed pursuant to §6213(b)(1).[1971]

Individuals who made a mistake calculating the recovery rebate credit and claimed an amount on Form 1040 for the 2021 recovery rebate credit should not file an amended return. The IRS will correct the amount of that 2021 credit and send a notice identifying the changes made. If a correction is needed, there can be a delay in processing the return. If the taxpayer agrees with the changes made by the IRS, no response or action is required. If the taxpayer disagrees, he or she can contact the IRS.[1972]

For eligible individuals who did not claim a recovery rebate credit on their 2021 tax return and IRS records do not show the issuance of an EIP, they will need to amend their return by filing a Form 1040X to claim the remaining amount of stimulus money for which they are eligible.[1973] This includes individuals who may not have received the full amount of their third EIP because their circumstances in 2021 were different than they were in 2020. Taxpayers who need to file an amended return to claim the 2021 recovery rebate credit — even if they don't usually file taxes — should use the worksheet in the 2021 instructions for Form 1040 and 1040-SR to determine the amount of the credit. Enter the amount on the Refundable Credits section of the Form 1040Xand include "Recovery Rebate Credit" in the Explanation of Changes section.[1974]

If an individual did not receive a third-round payment — and his or her *IRS Online Account* shows a payment amount greater than $0, or he or she received Notice 1444-C, *Your*

[1959] *See* §6428B(g)(1), §6428B(g)(5)(A).

[1960] *See* §6428B(g)(6). *See also 2021 Recovery Rebate Credit — Topic B: Claiming the Recovery Rebate Credit if you aren't required to file a 2021 tax return.*

[1961] For purposes of §6428B(g), a tax return is not treated as filed until it has been processed by the Internal Revenue Service. §6428B(g)(7).

[1962] §6428B(g)(5)(B)(i). The statute defines the "additional payment determination date" as the earlier of (i) 90 days after the 2020 filing deadline or (ii) September 1, 2021. §6428B(g)(5)(B)(ii). The determination date is the earlier of (i) August 15, 2021 (i.e., 90 days after May 17, 2021, which is the 2020 filing deadline), or (ii) September 1, 2021. Therefore, the determination date is August 15, 2021.

[1963] *2021 Recovery Rebate Credit — Topic A: General Information*, Q A2.

[1964] *2021 Recovery Rebate Credit — Topic A: General Information*, Q A3.

[1965] IRS Pub. 5486-A, *It's Not Too Late to Claim the 2020 & 2021 Recovery Rebate Credit When You Don't Normally File a Tax Return.*

[1966] *2021 Recovery Rebate Credit — Topic D: Claiming the 2021 Recovery Rebate Credit*, Q D1 and D2.

[1967] *2021 Recovery Rebate Credit — Topic D: Claiming the 2021 Recovery Rebate Credit*, Q D6; *2021 Recovery Rebate Credit — Topic G: Finding the Third Economic Impact Payment Amount to Calculate the 2021 Recovery Rebate Credit*, Q G2.

[1968] *See Questions and Answers about the Third Economic Impact Payment — Topic C: Plus-Up Payments.*

[1969] *2021 Recovery Rebate Credit — Topic E: Calculating the 2021 Recovery Rebate Credit*, Q E7.

[1970] *See* §6428B(f)(1). In the case of an EIP with respect to a joint return, half of the payment was treated as having been made or allowed to each individual filing the joint return. §6428B(f)(2).

[1971] §6428B(e)(1).

[1972] IRS News Release IR-2022-72 (Mar. 30, 2022).

[1973] Individuals can use the IRS online tool, Interactive Tax Assistant, *Should I File an Amended Return?*, to help determine if they should amend their original tax return. IRS News Release IR-2022-72 (Mar. 30, 2022).

[1974] IRS News Release IR-2022-72 (Mar. 30, 2022).

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2021 Economic Impact Payment, or Letter 6475, *Economic Impact Payment (EIP) 3 End of Year*, indicating that a payment was issued to that individual[1975] — they should contact the IRS to request a payment trace to determine if that payment was cashed.[1976]

2. Eligibility

For purposes of the 2021 recovery rebate, an "eligible individual" is any individual *other than* a nonresident alien, an individual that can be claimed as a dependent on another tax return, or an estate or trust.[1977] A dependent means a dependent (child or nonchild) as defined in §152.[1978] However, a taxpayer was not eligible for the third EIP with respect to a dependent unless the valid identification number of that dependent was included on the taxpayer's tax return.[1979]

An individual did not need a permanent address or a bank account to qualify for an EIP. A homeless individual could list the address of a friend, relative, or trusted service provider, such as a shelter, drop-in day center, or transitional housing program, on the return filed with the IRS. If the individual was unable to choose direct deposit, a check or debit card for the tax refund and the EIP could then be mailed to that address.[1980] If the IRS has an individual's bank account information, however, the information was invalid or the account had been closed, the bank would return the EIP to the IRS. The EIP would be mailed by check at the address the IRS had on file if it could be issued before December 31, 2021. If the EIP could not be issued before that date, the individual could have been eligible to claim the recovery rebate credit when the individual filed his or her 2021 return.[1981]

Deceased individuals who died before January 1, 2021 were not "eligible individuals" for the third EIP.[1982] Thus, for purposes of determining the advance refund amount, for each individual who died before January 1, 2021, the payment amount was reduced from $1,400 to $0. The social security number of only one spouse (rather than both spouses) was treated as included on the tax return for purposes of determining the amount of the 2021 recovery rebate credit[1983] if (1) a joint return was filed, (2) only one spouse died before January 1, 2021, (3) the deceased spouse was a member of the U.S. Armed Forces at any time during the tax year, and (4) the social security number of the deceased spouse was included on the tax return for the tax year.[1984] If a taxpayer not filing a joint return, or both spouses filing a joint return, died before January 1, 2021, then the credit amount is $0 with respect to any dependent of the taxpayer.[1985]

The IRS used available information to determine eligibility and issue the third EIP to eligible individuals who: (1) filed a 2020 tax return; (2) filed a 2019 tax return if the 2020 return had not been submitted or processed yet; (3) did not file a 2020 or 2019 tax return but registered for the first EIP using the special nonfilers portal in 2020; or (4) were federal benefit recipients as of December 31, 2020, who do not usually file a tax return and received Social Security and Railroad Retirement Board benefits, Supplemental Security Income (SSI) and Veteran benefit recipients in 2020.[1986] Additionally, the IRS provided special procedures, as well as an online sign-up tool, for individuals to receive the third EIP under §6428B if the individuals were not otherwise required to file federal income tax returns for tax year 2020.[1987]

The IRS has also provided several special procedures for individuals who were not otherwise required to file federal income tax returns for the 2021 tax year to claim the recovery rebate credit under §6428B, the child tax credit under §24, and the earned income credit under §32.[1988] One special procedure applied to "zero adjusted gross income filers" and required that they file either Form 1040, *U.S. Individual Income Tax Return*, Form 1040-SR, *U.S. Tax Return for Seniors*, or Form 1040-NR, *U.S. Nonresident Alien Income Tax Return*, electronically for taxable year 2021.[1989] Special procedures for zero adjusted gross income filers applied to tax returns filed on or after January 24, 2022.[1990]

Rev. Proc. 2022-12 also provided simplified return procedures for filers who wished to claim the §24 child tax credit or the §6428B recovery rebate credit for the 2021 tax year.[1991] These simplified return procedures applied to federal income tax returns filed after April 18, 2022.[1992] Another set of simplified return procedures applied to filers who wished to claim the recovery rebate credit under §6428B, the child tax credit under §24, or the earned income credit under §32 for the 2021 tax

[1975] The *IRS Online Account* shows the most current EIP information, so if a payment was issued and returned to the IRS, the amount shown in the *IRS Online Account* can be less than what is shown in the individual's Letter 6475. IRS News Release IR-2022-72 (Mar. 30, 2022).

[1976] For requesting a payment trace for a missing EIP, see *2021 Recovery Rebate Credit — Topic F: Receiving the Credit on a 2021 Tax Return*, Q F9 and Q F8.

[1977] §6428B(c).

[1978] §6428B(e)(1).

[1979] §6428B(e)(2)(C). If the dependent was adopted or placed for adoption, the term "valid identification number" had to include the dependent's adoption taxpayer identification number. §6428B(e)(2)(D)(ii).

[1980] To make an address update for purposes of receiving the 2021 recovery rebate credit, see *2021 Recovery Rebate Credit — Topic A: General Information*, Q A6.

[1981] *See Get My Payment Frequently Asked Questions.*

[1982] *See* §6428B(g)(2)(B)(i).

[1983] Married individuals filing a joint return were eligible for a $1,400 credit (i.e., half of the $2,800 credit amount) if one spouse included a social security number but the other spouse did not. §6428B(e)(2)(B).

[1984] *See* §6428B(g)(2)(B)(ii).

[1985] *See* §6428B(g)(2)(B)(iii).

[1986] *See* §6428B(g); *See also Updated details about the third round of Economic Impact Payments* (Mar. 2021). Payment recipients received an IRS notice, or letter, after they received a payment, telling them the amount of the payment. This notice should have been retained as part of the recipient's tax records. For information about payment status, see *Get My Payment Frequently Asked Questions.*

[1987] Rev. Proc. 2021-24; *Child Tax Credit Non-filer Sign-up Tool.* These procedures and the online tool could also be used by individuals who were not otherwise required to file federal income tax returns to receive advance child tax credit payments under §7527A and to claim the 2020 recovery rebate credit under §6428 and the additional 2020 recovery rebate credit under §6428A. *See* CCA 202248010 (Chief Counsel's Office advised that for EIP purposes, a $1 simplified return filed through the non-filer portal is a Federal income tax return). For further discussion of Rev. Proc. 2021-24, the Non-filer tool, and §7527A, see III.C., above, and for further discussion of the credits under §6428 and §6428A, see III.L., above.

[1988] Rev. Proc. 2022-12.

[1989] Rev. Proc. 2022-12, §4.

[1990] Rev. Proc. 2022-12, §7.01.

[1991] Rev. Proc. 2022-12, §5. Filers filing under Rev. Proc. 2022-12, §5 could file their returns electronically or on paper. Rev. Proc. 2022-12, §5.05.

[1992] Rev. Proc. 2022-12, §7.02.

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year.[1993] These simplified return procedures also applied to federal income tax returns filed after April 18, 2022.[1994]

3. *Identification Number Requirement*

a. *In General*

To be eligible for the third round EIP, or to claim the 2021 recovery rebate credit on a tax return, eligible individuals had to include their social security numbers (SSNs) on the return.[1995] The maximum payment amount ($1,400) was reduced to $0 for each otherwise eligible individual *or* qualifying dependent who did not have a SSN (i.e., who has an individual taxpayer identification number (ITIN) instead).

For a return other than a joint return, the $1,400 amount was treated as $0 unless the taxpayer includes his/her SSN.[1996] Married individuals filing a joint return are eligible for a $1,400 credit (i.e., half of the $2,800 credit amount) if one spouse included a SSN but the other spouse did not, in addition to $1,400 per dependent whose SSN or adoption taxpayer identification number (ATIN) was included on the tax return.[1997] A taxpayer was not eligible for the EIP or the 2021 recovery rebate credit with respect to a dependent unless the valid identification number of that dependent was included on the taxpayer's tax return.[1998] If the dependent was adopted or placed for adoption, the term "valid identification number" had to include the dependent's ATIN.[1999] An omission of a correct valid identification number would be treated as a mathematical or clerical error for purposes of applying §6213(g)(2) to the omission.[2000]

b. *Special Rule for Armed Forces Members*

Individuals who are members of the U.S. armed forces during the tax year were eligible to receive the refundable 2021 recovery rebate credit if at least one spouse's SSN is provided.[2001]

4. *Offsets*

The advance payment of the 2021 recovery rebate credit (i.e., the EIP) was generally exempt from offset (reduction) for past-due debts owed by the recipient (including past-due child support and federal tax obligations).[2002] However, the amount the taxpayer claimed as a credit on the 2021 tax return generally was subject to offset. Furthermore, the EIP was not protected from garnishment or levy (debt collection actions that occur after the EIP is received).[2003]

5. *Application to U.S. Possessions*

The American Rescue Plan Act of 2021 provided that the U.S. Treasury make payments to the U.S. possessions (both U.S. possessions with mirror code tax systems and U.S. possessions without mirror code tax systems)[2004] equal to the aggregate amount issued to their residents as a result of the 2021 recovery rebate credit.[2005] Many residents of U.S. possessions would have received this benefit under a version of the provision administered by the territorial government, rather than by the IRS. These payments were nontaxable. In addition, like other tax credits, the payments did not count as income or resources for a 12-month period in determining eligibility for, or the amount of assistance provided by, any federally funded public benefit program.

[1993] Rev. Proc. 2022-12, §6. Filers could file electronically or on paper.

[1994] Rev. Proc. 2022-12, §7.02.

[1995] §6428B(e)(2).

[1996] §6428B(e)(2)(A), §6428B(e)(2)(D)(i).

[1997] §6428B(e)(2)(B), §6428B(e)(2)(D)(i).

[1998] §6428B(e)(2)(C).

[1999] §6428B(e)(2)(D)(ii).

[2000] §6428B(e)(2)(G).

[2001] §6428B(e)(2)(E).

[2002] American Rescue Plan Act of 2021, Pub. L. No. 117-2, §9601(c)(2) (exception from reduction or offset).

[2003] *See, e.g.*, *United States v. Ruiz*, No. EP-19-CR-03035(1)-DCG, 2021 BL 432646 (W.D. Tex. Nov. 10, 2021) (§6428 EIP payments are not unemployment benefits and therefore not exempt from levy). For further discussion of property exempt from levy, see 637 T.M., *Federal Tax Collection Procedure — Liens, Levies, Suits, and Third-Party Liability*.

[2004] "Mirror code tax system" means, with respect to any U.S. possession, the income tax system of the possession if the income tax liability of its residents under the possession's tax system is determined by reference to U.S. income tax laws as if the possession were the United States. Pub. L. No. 117-2, §9601(b)(5).

[2005] *See* Pub. L. No. 117-2, §9601(b).

ISBN 978-1-55871-737-4

IV. Exceptions Relating to Household Expenses

A. *Reimbursements for Certain Excess Living Expenses*

1. *In General*

Under §123(a), gross income does not include any reimbursement for excess living expenses received from an insurance company by an individual who suffers a qualified loss of use or occupancy of the principal residence, to the extent the reimbursement is within the exclusion limitation. Gross income includes any reimbursement not within the exclusion.[2006] Thus, the IRS has advised that gross income does not include reimbursements from an insurer for additional living expenses incurred because of a fire, but does include reimbursement of normal living expenses.[2007] The reimbursement must be pursuant to the terms of an insurance contract providing indemnification for temporary increases in living expenses resulting from the qualified loss of use or occupancy.[2008]

Note: If the reimbursement is not received pursuant to the terms of an insurance contract, it may be excludible for other reasons, such as the exclusion for amounts received under "general welfare" provisions. Thus, the IRS has advised that payments for living expenses made by FEMA to uninsured or underinsured disaster victims are excluded from gross income.[2009] The tax treatment of disaster relief payments is discussed in IV.E., below.

The principal residence is determined by analyzing all of the facts and circumstances of the individual's living arrangements.[2010] A principal residence, for purposes of the §123 exclusion, can be a dwelling or apartment leased to the individual or a dwelling or apartment owned by the individual.[2011]

The exclusion does not apply to insurance reimbursements for loss of rental income.[2012] It also does not apply to reimbursements to compensate the taxpayer for loss of, or damage to, real or personal property.[2013] The exclusion does not apply to reimbursements for living expenses incurred because of governmental condemnation of, or similar action with respect to, the principal residence that is not related to a qualified loss of use or occupancy.[2014]

2. *Amounts Included as Reimbursements*

Reimbursements for excess living expenses are amounts received to compensate or reimburse the individual for increases in household living expenses incurred because of the qualified loss of use or occupancy.[2015] Household living expenses are living expenses incurred for the individual and members of the individual's household.[2016]

[2006] Reg. §1.123-1(a)(5).
[2007] CCA 200114045.
[2008] Reg. §1.123-1(a)(1).
[2009] CCA 200114045.
[2010] Reg. §1.123-1(c).
[2011] Reg. §1.123-1(c).
[2012] Reg. §1.123-1(a)(3).
[2013] Reg. §1.123-1(c).
[2014] Reg. §1.123-1(c).
[2015] §123(a).
[2016] §123(a).

Note: The exclusion is intended to apply to the reasonable and necessary increases in household living expenses incurred to maintain the household's customary standard of living during the period of qualified loss of use or occupancy.[2017]

In the case of a principal residence a portion of which is used for other than residential purposes, reimbursements for excess living expenses reimbursements do not include the portion of the insurance reimbursements attributable to the increased expenses incurred because of the loss of use of the nonresidential portion.[2018]

The exclusion applies only to those amounts specifically identified by the insurance company as being paid exclusively for excess living expenses.[2019] If the individual receives an unallocated lump sum from the insurance company, the amount treated as reimbursement for excess living expenses equals the lump sum multiplied by a fraction, the numerator of which is the amount claimed for excess living expenses and the denominator of which is the total amount claimed.[2020] If the individual receives a lump sum in settlement of contested claims, the individual must establish the amount reasonably allocated to increased living expenses, consistent with the terms of the insurance contract and the other facts of the case.[2021]

The amount allocated to excess living expenses, however, cannot exceed the insurance policy limitations for increased living expenses coverage.[2022] If the policy limitation on increased living expenses also applies to other coverage, such as loss of rental income, the limitation on increased living expenses equals the total limitation multiplied by a fraction, the numerator of which is the amount of the increased living expenses and the denominator of which is the sum of the increased living expenses and the other losses within the scope of the total limitation.[2023]

3. *Qualified Loss of Use or Occupancy*

A qualified loss of use or occupancy is one that occurs because of either damage or destruction by fire, storm, or other casualty or denial of access by governmental authorities because of the occurrence or threat of occurrence of such a casualty.[2024] Other casualties are those for which a casualty loss deduction is allowed under §165(c)(3).[2025] The casualty loss deduction is discussed in 527 T.M., *Loss Deductions.*

The period of qualified loss of use or occupancy is the period during which the principal residence cannot be used because of the casualty and the requisite repair or replacement, or the period during which access is denied by governmental authority.[2026]

[2017] Reg. §1.123-1(a)(2).
[2018] Reg. §1.123-1(a)(3).
[2019] Reg. §1.123-1(a)(4)(i).
[2020] Reg. §1.123-1(a)(4)(ii).
[2021] Reg. §1.123-1(a)(4)(iii).
[2022] Reg. §1.123-1(a)(4)(ii), §1.123-1(a)(4)(iv).
[2023] Reg. §1.123-1(a)(4)(iv).
[2024] §123(a); Reg. §1.123-1(a)(1).
[2025] Reg. §1.123-1(a)(1).
[2026] *See* Reg. §1.123-1(b)(1).

ISBN 978-1-55871-737-4

4. Exclusion Limitation

The §123 exclusion applies to reimbursements for excess living expenses received for household expenses incurred during any period only to the extent the reimbursements do not exceed excess household living expenses.[2027] Excess household living expenses are the excess of the actual household living expenses incurred during the period resulting from the qualified loss of use or occupancy over the normal household living expenses that would have been incurred during that period.[2028] Thus, the excess of insurance proceeds over the increased living expenses resulting from a casualty loss of a residence are included in gross income, for the later of the tax year in which the loss period ends or the tax year in which the excess portion of the insurance proceeds is received.[2029]

Living expenses generally include the cost of renting suitable housing and extraordinary expenses for transportation, food, utilities, and miscellaneous services during the period of qualified loss of use or occupancy.[2030] Actual living expenses are the reasonable and necessary living expenses incurred as a result of the qualified loss of use or occupancy and in order to maintain the household's customary standard of living.[2031] They must be of such a nature as to qualify for reimbursement under the terms of the applicable insurance contract without regard to monetary limitations on coverage.[2032]

Generally, actual living expenses include the costs during the period of qualified loss of use or occupancy of temporary housing, utilities furnished at the place of temporary housing, meals procured at restaurants that customarily would have been prepared in the residence, transportation, and other miscellaneous services.[2033] To the extent that the qualified loss of use or occupancy causes merely an increase in the amount expended for items of living expenses normally incurred, only the increase is treated as an actual living expense.[2034]

Normal living expenses consist of the same categories of expenses comprising actual living expenses that would have been incurred but are not incurred as a result of the casualty or threat thereof.[2035] If the qualified loss of use or occupancy causes a decrease in the amount normally expended for an item of living expense during the period of qualified loss, the item of normal living expense is considered not to have been incurred to the extent of the decrease.[2036]

Example: O's residence is extensively damaged by fire on April 1 of the current year. O and O's family use the residence solely as a principal residence. During April of the current year O and O's family could not reside in the residence because it was being repaired, so they stayed at a motel and ate at restaurants. The motel cost $2,500, the restaurant meals cost $1,600, and laundry that would have been done in the residence cost $50 to do at a laundromat. O continues to make mortgage payments on the damaged residence; these are not actual living expenses caused by the casualty. O's commuting expenses decrease by $200 because the motel is closer to O's place of business than is the residence. O does not incur $850 of groceries expenses, $250 of residence utilities, and $15 for laundry supplies that would have been incurred had there been no fire and the family had remained in the residence. Actual living expenses are $4,150 ($2,500 motel, plus $1,600 meals, plus $50 laundry). Normal living expenses not incurred are $1,315 ($200 decrease in commuting, $850 groceries, $250 utilities, $15 laundry). The exclusion limitation is $2,835 ($4,150 minus $1,315).[2037]

B. *Qualified Foster Care Payments*

1. In General

Under §131, gross income does not include amounts received by a foster care provider as qualified foster care payments.[2038] The exclusion does not apply to operators of boarding homes who provide room and board to adults who have not been placed in their care through the actions of a governmental agency responsible for adult foster care.[2039]

Note: Expenses allocable to amounts excluded from gross income are not deductible.[2040]

2. Qualified Foster Care Payment

A qualified foster care payment is an amount that satisfies two conditions.[2041] First, it must be paid by a state, a political subdivision thereof, or a qualified foster care placement agency.[2042] Second, it must either be paid to the foster care provider for caring for a qualified foster individual in the foster care provider's home[2043] or be a difficulty of care payment.[2044] Payments from a for-profit corporation do not qualify.[2045]

The IRS has ruled that payments made to third-party respite care providers, who are persons giving relief to foster care providers, are not qualified foster care payments because

[2027] §123(b); Reg. §1.123-1(b)(1).
[2028] §123(b); Reg. §1.123-1(b)(1).
[2029] Rev. Rul. 93-43.
[2030] Reg. §1.123-1(b)(1).
[2031] Reg. §1.123-1(b)(2).
[2032] Reg. §1.123-1(b)(2).
[2033] Reg. §1.123-1(b)(2).
[2034] Reg. §1.123-1(b)(2).
[2035] Reg. §1.123-1(b)(3).
[2036] Reg. §1.123-1(b)(3).
[2037] *See* Reg. §1.123-1(b)(4).
[2038] §131(a). *See, e.g.*, TAM 200039006 (payments to foster care provider excludible as qualified foster care payments).
[2039] H.R. No. 841, 99th Cong., 2d Sess. II-838–II-839 (1986) (Conf. Rep.). *See also Ray v. United States*, 993 F. Supp. 2d 760 (S.D. Ohio 2014) (state law imposed legal duty on parent/guardian to provide care for adult child and payments received by state cannot be characterized as foster care payments excludible from income).
[2040] *See* TAM 9434005.
[2041] §131(b)(1).
[2042] §131(b)(1)(A).
[2043] §131(b)(1)(B)(i). *See, e.g., Stromme v. Commissioner*, 138 T.C. 213 (2012) (foster care must be provided in taxpayer's principal residence, meaning house where taxpayer regularly performs routines of private life; Tax Court determined taxpayers did not live in house in which they provided foster care, which was licensed by county for operation as group home, because, among other reasons, taxpayers owned another house, which was not licensed by county for operation as group home, where they did everyday chores, hosted parties, etc.), *citing Dobra v. Commissioner*, 111 T.C. 339 (1998) (person's "home" is where he resides, i.e., where he lives).
[2044] §131(b)(1)(B)(ii).
[2045] *In re Booker*, 92 AFTR2d 2003-6155 (Bankr. Ct. Ohio 2003).

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the payments are for services and not for the cost of providing foster care.[2046] The IRS has also ruled that a county agency's payments to a group home that were directly related to the specific needs of, and based on the number of, children under care are qualified foster care payments.[2047]

Although the statute contemplates that the foster care provider is an individual providing care in his or her home, the IRS has ruled that payments made to an S corporation are qualified foster care payments, where the S corporation was a conduit for the payments from the state to the taxpayer.[2048] The S corporation was wholly owned by the taxpayer, and the taxpayer personally provided the foster care services in the taxpayer's home. The state made payments to the S corporation, which paid certain expenses of the individuals in foster care, and then transferred the remainder of the payments to the taxpayer. The S corporation did not retain any of the foster care payments. As a result, the IRS concluded that the S corporation was a conduit for the payments from the state to the taxpayer.

3. *Qualified Foster Individual*

A qualified foster individual is any person living in a foster family home in which the individual was placed either by the state, a political subdivision thereof, or by a qualified foster care placement agency.[2049]

The Tax Court has held that payments received from the state for care of foster individuals who did not reside in the taxpayer's principal residence are not excluded from gross income because the person under care is not a qualified foster individual.[2050] Similarly, the IRS has determined that full-time equivalent staff subsidies paid by a county agency to a group home were not qualified foster care payments because they were not directly related to caring for qualified foster individuals, but made to assist in hiring employees.[2051] The IRS Office of Chief Counsel concluded that a biological parent who receives payment for the care of a disabled biological child may not qualify as a foster care provider under §131, reasoning that the ordinary meaning of the term "foster care" excludes care by a biological parent.[2052]

4. *Qualified Foster Care Placement Agency*

A qualified foster care placement agency is any placement agency licensed or certified by a state, a political subdivision thereof, or an entity designated by a state or political subdivision thereof, for the foster care program of the state or political subdivision to make foster care payments to providers of foster care.[2053]

5. *Difficulty of Care Payments*

Difficulty of care payments are payments that satisfy three conditions.[2054] First, they must not be paid for caring for a qualified foster individual in the foster care provider's home.[2055] Second, they must be compensation for providing the additional care of a qualified foster individual, but only if two tests are met.[2056] The first test is met if the care is required by reason of a physical, mental, or emotional handicap of the individual with respect to which the state has determined that there is a need for additional compensation.[2057] The second test is met if the care is provided in the foster care provider's home.[2058] Third, the payor must designate the payments as compensation meeting the two tests of the second condition.[2059]

Section 131 does not explicitly address whether payments under Medicaid waiver programs are qualified foster care payments. However, the IRS recognizes that waiver programs and state foster care programs have similar oversight and purposes. Notice 2014-7 provides that qualified Medicaid waiver payments made on or after January 3, 2014, are treated as difficulty of care payments. For purposes of the notice, qualified Medicaid waiver payments are payments made under a Medicaid waiver program by a state or local government, or an entity that is a certified Medicaid provider to an individual care provider for nonmedical support services provided under a plan of care to an eligible individual living in the care provider's home. The care recipient may be related or unrelated to the provider.[2060]

Note: The Tax Court has stated that little, if any, deference should be given to Notice 2014-7.[2061] In *Feigh v. Commissioner*,[2062] the court determined that Medicaid waiver payments do not fit the statutory definition of a qualified foster care payment under §131, and the exclusion of the payments does not represent how the IRS has historically treated such payments. Therefore, the court concluded that the notice lacks the thoroughness and persuasiveness required for a greater level of deference.[2063] In AOD 2020-2, the Chief Counsel's Office recommended acquiescence to *Feigh v. Commissioner*.[2064] As such, the IRS will not argue that Medicaid waiver payments are not earned income for the purposes of the earned income tax credit and additional child tax credit merely because they are excludable under §131 pursuant to Notice 2014-7.[2065]

The IRS maintains a Q&A expanding on the guidance in Notice 2014-7. Of particular note, whether the IRS will treat payments under a state program other than a state Medicaid

[2046] CCA 200347004. *See* IRS Info. Letters 2003-0061, 2003-0060, and 2003-0059 (same).
[2047] TAM 9545002.
[2048] PLR 201131007.
[2049] *See* §131(b)(2).
[2050] *Dobra v. Commissioner*, 111 T.C. 339 (1998). *See also* TAM 9429004.
[2051] TAM 9545002.
[2052] PMTA 2010-007.
[2053] §131(b)(3).
[2054] §131(c)(1).
[2055] §131(c)(1).
[2056] §131(c)(1)(A).
[2057] §131(c)(1)(A)(i).
[2058] §131(c)(1)(A)(ii).
[2059] §131(c)(1)(B).
[2060] Notice 2014-7 (accordingly, as of Jan. 3, 2014, the IRS will no longer assert the position in PMTA 2010-007), or apply *Alexander v. Commissioner*, T.C. Summ. Op. 2011-48, *Harper v. Commissioner*, T.C. Summ. Op. 2011-56, or *Bannon v. Commissioner*, 99 T.C. 59 (1992).
[2061] *Feigh v. Commissioner*, 152 T.C. 267 (May 15, 2019) (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).
[2062] *Feigh*, 152 T.C. 267 at 5. Whether the Medicaid waiver payments should have been included in the taxpayers' gross income was not the issue in the case. However, the court analyzed Notice 2014-7 because the IRS attempted to rely on the notice to argue that because the Medicaid waiver payments were excluded from gross income under the notice then they should not count as earned income for the purposes of the earned income tax credit and additional child tax credit. *Feigh*, 152 T.C. 267 at 6–7.
[2063] *Feigh*, 152 T.C. 267 at 5–6.
[2064] 152 T.C. 267 (May 15, 2019).
[2065] AOD 2020-2.

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Home and Community-Based Services waiver program as difficulty of care payments depends on the nature of the payments and the purpose and design of the program.[2066]

6. Limitations

For each foster home in which there is a qualified foster care individual who has attained age 19, foster care payments, other than difficulty of care payments, for any period to which they relate are not excluded from gross income to the extent that the payments are made for more than five qualified foster care individuals who have attained the age of 19.[2067]

For each foster home, difficulty of care payments for any period to which they relate are not excluded from gross income to the extent the payments are made for more than[2068] 10 qualified foster care individuals who have not attained age 19[2069] and five qualified foster care individuals who have attained age 19.[2070]

Note: For this purpose, the IRS has ruled that a child attains a given age on the child's birthday.[2071]

C. Housing and Related Assistance

1. Mortgage and Interest Payment Assistance

Mortgage assistance payments under §235 of the National Housing Act are welfare benefits and are excluded from gross income.[2072] The same conclusion has been reached with respect to rental subsidy payments made by governments to owners of manufactured homes under §557 of the Quality Housing and Work Responsibility Act of 1998[2073] because they were in the nature of general welfare.[2074] Similarly, Pay-for-Performance Success Payments made under the U.S. government's Home Affordable Modification Program are excluded from gross income as welfare benefits if they benefit the homeowner.[2075] Though the IRS was unable to reach any conclusion with respect to payments under a specific Native American Housing Assistance and Self-Determination Act program because insufficient facts had been presented, it nonetheless noted that analogous housing assistance payments have been held to be excludible payments in the nature of general welfare,[2076] and thereafter ruled that housing assistance payments made by an Indian tribal government to its members are excluded from gross income because they are in the nature of general welfare.[2077] However, interest payments made under §236 of the National Housing Act to mortgagees on behalf of limited-profit corporations formed to acquire and lease apartments in lower income housing projects are included in gross income.[2078] Similarly, payments made by mortgage loan servicers to mortgage holders, effectively reducing the interest rate on mortgage loans owed by members of the armed services, are income to the service member.[2079]

Note: The IRS has ruled that gross income does not include payments made to homeowners under a state program to manage an unspecified crisis that was "causing extreme hardship" to homeowners and that was "substantially and adversely affecting the public health, safety, and general welfare of" that state's homeowners.[2080] Without additional information, the meaningfulness of this ruling to other taxpayers is extremely limited if not completely lacking.

2. Energy Conservation Assistance

Under §136, gross income does not include the value of any direct or indirect subsidy provided by a public utility to a customer for the purchase or installation of any energy conservation measure.[2081] This exclusion does not apply to any payment to or from a qualified cogeneration facility or qualifying small power production facility under §210 of the Public Utility Regulatory Policy Act of 1978.[2082]

An energy conservation measure is any installation or modification primarily designed to reduce consumption of electricity or natural gas or to improve the management of energy demand with respect to a dwelling unit.[2083] A dwelling unit includes a house, apartment, condominium, mobile home, boat, or similar property and all structures and other property appurtenant to the dwelling unit.[2084] A dwelling unit does not include the portion of a unit that is used exclusively as a hotel, motel, inn or similar establishment.[2085]

A public utility is a person engaged in the sale of electricity or natural gas to residential, commercial, or industrial customers for their use.[2086] For this purpose, a person includes the Federal government, a state or local government, a subdivision of a state or local government, or any instrumentality of any such government or subdivision.[2087]

Aside from §136, the IRS has ruled that the following payments are excluded from gross income:

- financial assistance under the Solar Energy and Energy Conservation Bank Act;[2088]

[2066] https://www.irs.gov/Individuals/Certain-Medicaid-Waiver-Payments-May-Be-Excludable-From-Income. *See* PLR 201623003 (State administered in-home supportive care program payments to care providers met the purpose and design of the Medicaid waiver program of §1915(c) of the Social Security Act (SSA) and will be treated as difficulty of care payments, and thus excludible from gross income to the providers under §131(c)).

[2067] §131(b)(4).

[2068] §131(c)(2).

[2069] §131(c)(2)(A).

[2070] §131(c)(2)(B).

[2071] Rev. Rul. 2003-72.

[2072] Rev. Rul. 75-271.

[2073] Pub. L. No. 105-276.

[2074] CCA 199948040.

[2075] Rev. Rul. 2009-19. *See also* IRS Info. Letter 2012-0010, referring to FAQs regarding the Principal Reduction Alternative under HAMP.

[2076] CCA 200138007.

[2077] PLR 200632005.

[2078] Rev. Rul. 76-75.

[2079] PLR 201134003 (citing Rev. Rul. 76-75). Note that the subsidy amount is considered a payment of interest made by the service member to the owner of the mortgage loan.

[2080] PLR 200808012.

[2081] §136(a).

[2082] §136(d).

[2083] §136(c)(1).

[2084] §136(c)(2)(A) (reference to §280A(f)(1)(A)).

[2085] §136(c)(2)(A) (reference to §280A(f)(1)(B)).

[2086] §136(c)(2)(B).

[2087] *Id.*

[2088] Pub. L. No. 96-294 §509.

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• subsidies under the National Energy Conservation Act of 1980 from a utility to a residential customer for energy conservation purposes;[2089] and

• payments made under state law to qualified individuals to reduce their cost of winter energy consumption.[2090]

Gross income also does not include grants received under a state energy conservation program for installation of an approved energy conservation system.[2091] Nor does it include a one-time state payment of up to $500 made to lower- and middle-income taxpayers for the purchase and installation of energy efficient furnaces or boilers meeting or exceeding federal energy efficiency standards because the payments are in the nature of general welfare, are not state tax refunds, and do not generate state income tax deductions or credits.[2092] In contrast, grants from a Department of Housing and Urban Development program under the Solar Heating and Cooling Demonstration Act of 1974[2093] are included in gross income because the enabling legislation does not provide for exclusion from federal income taxation.[2094]

3. Rehabilitation Assistance

Gross income does not include home rehabilitation grants received by low-income homeowners residing in areas targeted by a local government's community development program because they are in the nature of general welfare.[2095] The IRS has ruled that payments to individuals under a city housing assistance program that did not use federal funds were not includible in gross income because they, too, are in the nature of general welfare.[2096] Gross income also does not include the fair market value of a new building facade constructed by an urban renewal agency on the taxpayer's building under a facade grant program, because the taxpayer had no control over the construction, was not a party to the construction contract, was required to grant an easement for the facade, was not involved in the contract negotiations or payments, and was not permitted to alter the facade.[2097] However, the IRS has ruled that gross income includes payments received from a local government to assist taxpayers who own buildings that were originally single-family residences or duplexes and that had been converted into apartments to reconvert the buildings to their original condition, because there were no income limitations imposed on those who were eligible to receive the payments, because the program under which the payments were made did not have safety as its primary goal, and because for the owners the properties were chiefly investment properties rather than family residences.[2098]

4. Relocation Assistance Payments

Gross income does not include relocation assistance payments, including moving expenses and certain additional payments for the cost of replacement housing, made under title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970,[2099] to persons who are displaced by federal or federally assisted programs.[2100] Similarly, replacement housing and relocation payments under the Housing and Urban Development Act of 1968,[2101] are excluded from gross income,[2102] as are relocation payments under the Housing and Community Development Act of 1974.[2103] The IRS has advised that discounts provided by Texas, Mississippi, and Alabama to assist mostly low and moderate income taxpayers displaced by one or more of Hurricanes Katrina, Rita, or Wilma purchase a principal residence for the first time are not included in gross income because they are in the nature of general welfare.[2104]

Residents affected by a gas leak discovered by SoCal Gas on October 23, 2015 did have to include in gross income payments or reimbursements made by SoCal Gas, pursuant to a county directive or subsequent court orders, for relocation and cleaning expenses specified in Announcement 2016-25 and incurred generally for the period beginning November 19, 2015 through May 31, 2016.[2105] However, family and friends who received payments under the relocation plan for housing affected area residents had to include these payments in gross income, unless these amounts were properly excludible from gross income under §280A (relating to the exclusion for rental income from a taxpayer's residence for less than 15 days during the tax year).[2106]

Payments to assist individuals in purchasing comparable housing outside a flood plain, made pursuant to a state flood relief program, also are excluded from gross income.[2107] However, tenants must include in gross income relocation assistance payments received from landlords that are required by municipal ordinances to make the payments.[2108] Condemnation proceeds are included in gross income, to the extent they exceed the taxpayer's adjusted basis in the property, unless the taxpayer qualifies for nonrecognition treatment, because the proceeds are not relocation assistance payments.[2109] The treatment of condemnation proceeds is discussed in 568 T.M., *Involuntary Conversions.*

[2089] *Id.* at §545.

[2090] Rev. Rul. 78-170.

[2091] Rev. Rul. 79-356 (HUD grants under 1974 Solar Heating and Cooling Demonstration Act); IRS Info. Letter 2010-0109, (state incentives for alternative energy systems); IRS Info. Letter 2010-0133, (geothermal heat pump installation grants from Maryland Energy Administration).

[2092] CCA 200908025.

[2093] 42 U.S.C. §5501–§5517.

[2094] Rev. Rul. 79-356.

[2095] Rev. Rul. 76-395.

[2096] PLR 9829049.

[2097] *Bailey v. Commissioner*, 88 T.C. 1293 (1987), *acq.*, 1989-2 C.B. 1. *See* PLR 200722005 (50% reimbursement of rehabilitation costs excludible because property owners lack dominion and control over construction; 100% reimbursements also excludible because payments based on age and financial need); IRS Info. Letter 2013-0027 (federal income tax treatment of taxpayer's grant program ascertained through PLR request).

[2098] PLR 200625006.

[2099] Pub. L. No. 91-646.

[2100] Rev. Rul. 74-205.

[2101] Pub. L. No. 90-448.

[2102] *See*, *e.g.*, Rev. Rul. 60-279; Rev. Rul. 76-373.

[2103] Rev. Rul. 74-205.

[2104] CCA 200910029.

[2105] Announcement 2016-25.

[2106] Announcement 2016-25.

[2107] CCA 200017040.

[2108] Rev. Rul. 82-106.

[2109] *Nielsen v. Commissioner*, 114 T.C. 159 (2000).

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D. *Disaster Relief and Crime Victim Programs*

1. *Disaster Relief*

a. *Qualified Disaster Relief Payments*

Under §139, gross income does not include any amount received by an individual as a qualified disaster relief payment[2110] nor any amount received as a qualified disaster mitigation payment.[2111] The exclusion does not apply to any individual identified by the Attorney General as having been a participant or conspirator in a terroristic action or a representative of such individual.[2112]

Note: No deduction or credit is allowable to the person for whose benefit a qualified disaster relief payment or qualified disaster mitigation payment is made for or because of any expenditure to the extent of the amount excluded from gross income with respect to that expenditure.[2113] The taxpayer is prohibited from increasing basis or adjusted basis on account of any amount excluded from gross income as a qualified disaster mitigation payment.[2114]

A qualified disaster relief payment is any one of four types of payments made to, or for the benefit of, an individual, but only to the extent any expense compensated by the payment is not otherwise compensated for by insurance or some other reimbursement.[2115] The first type of payment is any amount paid to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster.[2116] The second type of payment is any amount to reimburse or pay reasonable and necessary expenses incurred for the repair or rehabilitation of a personal residence or repair or replacement of its contents to the extent that the need for such repair, rehabilitation, or replacement is attributable to a qualified disaster.[2117] The third type of payment is any amount paid by a person engaged in the furnishing or sale of transportation as a common carrier by reason of the death or personal physical injuries incurred as a result of a qualified disaster.[2118] The fourth type of payment is any amount paid by a federal, state, or local government, or agency or instrumentality of such a government, in connection with a qualified disaster in order to promote the general welfare.[2119] The residence can be owned or rented by the taxpayer.[2120] The exclusion does not apply to payments in the nature of income replacement, such as payments for lost wages, unemployment compensation, or business income replacement.[2121]

A qualified disaster mitigation payment is any payment under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as in effect on April 15, 2005, or under the National Flood Insurance Act, as in effect on that date, to or for the benefit of any property owner for hazard mitigation with respect to that property.[2122] Qualified disaster mitigation payments do not include amounts received from the sale or other disposition of property.[2123]

b. *Qualified Disasters*

There are four types of qualified disasters.[2124] The first type is any disaster caused by a terroristic or military action.[2125] The second type is any federally declared disaster.[2126] The third type is any disaster caused by an accident involving a common carrier, or by any other event determined by the IRS to be of a catastrophic nature.[2127] The fourth type of qualified disaster, applicable only to the fourth type of disaster relief payment, is any disaster determined by an applicable federal, state, or local authority, as determined by the IRS, to warrant assistance from the federal, state, or local government or agency or instrumentality of such a government.[2128] For purposes of the first type, a terroristic or military action is any terroristic activity which a preponderance of the evidence indicates was directed against the United States or any of its allies,[2129] or any military action involving the Armed Forces of the United States and resulting from violence or aggression, or a threat of violence or aggression, against the United States or any of its allies.[2130]

c. *Form of Payment and Expense Accounting*

The IRS takes the position that the disaster relief payment can be in the form of an annuity.[2131] Taxpayers are not required to account for actual expenses, provided that the amount of the payments can reasonably be expected to be commensurate with the expenses that are incurred.[2132] It is not necessary that all of the amounts received by a taxpayer with respect to a disaster fit within the same type of payment because the categories are not intended to be mutually exclusive.[2133]

[2110] §139(a).
[2111] §139(g)(1).
[2112] §139(e).
[2113] §139(h).
[2114] §139(g)(3).
[2115] §139(b).
[2116] §139(b)(1).
[2117] §139(b)(2).
[2118] §139(b)(3).
[2119] §139(b)(4).
[2120] J. Comm. on Tax'n, *Technical Explanation of the Victims of Terrorism Relief Act of 2001*, JCX-93-01 (Dec. 21, 2001).
[2121] J. Comm. on Tax'n, *Technical Explanation of the Victims of Terrorism Relief Act of 2001*, JCX-93-01 (Dec. 21, 2001).
[2122] §139(g)(2).
[2123] §139(g)(2).
[2124] §139(c).
[2125] §139(c)(1).
[2126] §139(c)(2) (reference to §165(i)(5)). *See also* www.fema.gov/disasters (lists of declared disasters by state and year).
[2127] §139(c)(3). *See also* Rev. Rul. 131, *modified by* Rev. Rul. 2003-12 (assistance payments received by flood victims from state agencies, charitable organizations, and employers excludible from income under §139(c)(2)). *But see* CCA 200431012 (payments to property owners under Federal Emergency Management Agency's (FEMA) flood mitigation programs (Flood Mitigation Assistance Program (FMA), Pre-Disaster Mitigation program (PDM), and Hazard Mitigation Grant Program (HMGP)) to build foundation elevations do *not* meet requirements for exclusion under 139(b)). The IRS has also indicated that annuity payments made to disaster victims by §501(c)(3) charitable organizations may qualify as "qualified disaster relief payments." *See* IRS Info. Letter 2002-0167.
[2128] §139(c)(4).
[2129] §139(c)(1) (reference to §692(c)(2)(A)). *See* Rev. Proc. 2004-26.
[2130] §139(c)(1) (reference to §692(c)(2)(A)).
[2131] *See* IRS Info. Letter 2002-0167.
[2132] J. Comm. on Taxation, *Technical Explanation of the Victims of Terrorism Relief Act of 2001*, JCX-93-01 (Dec. 21, 2001).
[2133] J. Comm. on Taxation, *Technical Explanation of the Victims of Terrorism Relief Act of 2001*, JCX-93-01 (Dec. 21, 2001).

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d. Floods

The IRS has advised that grants under a state disaster relief program to help homeowners pay for repair of their flood-damaged homes were not includible in gross income except to the extent that the homeowner already claimed a deduction for the loss to which the grant related.[2134] In contrast, the IRS also advised that grants under a state flood mitigation program to assist property owners to build foundation elevations were includible in gross income because they were paid to offset potential future disaster, and not on account of a damage from a disaster that had already occurred.[2135]

The IRS has ruled that payments under a state program to pay or reimburse reasonable and necessary medical, temporary housing, or transportation expenses incurred as a result of a flood were excluded from gross income under §139 because they are in the nature of general welfare.[2136] The IRS also ruled that similar payments under an employer's program also were excluded under §139 but were not in the nature of general welfare.[2137] The IRS further ruled that similar payments under a charitable organization's program are excluded from gross income under §102.[2138]

The IRS has advised that FEMA reimbursements for flood insurance premiums and claim preparation expenses are not includible in the recipients' gross incomes.[2139] Similarly, the IRS has determined that payments received by individuals on account of the Indian Ocean tsunamis occurring on December 26, 2004, are excluded from gross income.[2140]

e. September 11, 2001, Attacks

The IRS has ruled that periodic payments to claimants from the September 11 Victim Compensation Fund are excluded from their gross income, and that amounts transferred to the assignment company which makes those periodic payments are excluded from the company's gross income to extent they do not exceed the aggregate cost of any qualified funding asset purchased by the company to fund its payment obligation.[2141] However, the IRS has concluded that grant payments made by the Empire State Development Corporation to businesses recovering from the September 11 attacks are generally includible in gross income.[2142]

The IRS has concluded that various minimum amount grants made by the Lower Manhattan Development Corporation (a public benefit corporation of New York State, under its residential grant program established in response to the September 11, 2001, attacks) are excluded from gross income under §139 and because they were in the nature of general welfare.[2143] However, the IRS also concluded that payments exceeding the minimum amounts are included in gross income, and do not qualify under the §139 exclusion or as payments in the nature of general welfare, because they are not intended as compensation for the reasonable extra expenses of living in the attack area and are made regardless of needs.[2144]

f. Other Disasters

The IRS has ruled that payments under §408 of the Disaster Relief Act of 1974 and under §105(a)(11) of the Housing and Community Development Act of 1974 are excluded from gross income because they are in the nature of general welfare.[2145] Similarly, it has advised that payments for living expenses made by FEMA to uninsured or underinsured victims of federally declared disasters are excluded from gross income because they are in the nature of general welfare.[2146]

The IRS has also ruled that gross income does not include amounts contributed by an employer to assist the rehabilitation of employees and their families in the wake of a natural disaster.[2147] The IRS has advised that payments in the nature of general welfare made from a state government disaster relief fund are excluded from the recipients' gross incomes,[2148] and that relief payments are excluded if they are needs-based.[2149]

Additionally, the IRS has explained that because the COVID-19 pandemic is a federally declared disaster, certain government payments made to individuals in connection with the COVID-19 pandemic may be qualified disaster relief payments that are excluded from the recipient's gross income under §139. For example, the Coronavirus State and Local Fiscal Recovery Funds (SLFR Funds) payments intended to assist families with childcare costs resulting from the COVID-19 pandemic are excluded from gross income.[2150]

In contrast, the IRS has advised that businesses must include in gross income interest subsidy payments made on their behalf under a city disaster relief program,[2151] and state reimbursement of interest cost incurred by business recipients of Small Business Administration loans.[2152] Similarly, relief payments from a government to compensate for lost business profits are includible in gross income,[2153] as are relief payments

[2134] TAM 200022050, CCA 200016019.
[2135] CCA 200431012.
[2136] Rev. Rul. 2003-12.
[2137] Rev. Rul. 2003-12.
[2138] Rev. Rul. 2003-12.
[2139] CCA 200114046.
[2140] Notice 2005-23.
[2141] Rev. Rul. 2003-115.
[2142] Notice 2003-18, Q&A-1, -2, -4; *see CF Headquarters Corp. v. Commissioner*, 164 T.C. No. 5 (Mar. 04, 2025) (grant proceeds received by taxpayer are not excluded from gross income under §118, as then in effect, because taxpayer did not show that the proceeds became part of the working capital).

[2143] Notice 2002-76.
[2144] Notice 2002-76.
[2145] Rev. Rul. 98-19; Rev. Rul. 76-144.
[2146] CCA 200114045 and CCA 200114044.
[2147] Rev. Rul. 53-131. *See also* Notice 2006-10 (federal agency payments to reimburse employees for evacuation and safe haven expenses due to Hurricane Katrina are excludible from gross income and wages under §139).
[2148] *See, e.g.*, CCA 199918053.
[2149] CCA 200245052.
[2150] See Q7 of the IRS's *Frequently asked questions for states and local governments on taxability and reporting of payments from Coronavirus State and Local Fiscal Recovery Funds*, FS-2021-16 (Nov. 2021). See also Q8 of the IRS's *Frequently asked questions for states and local governments on taxability and reporting of payments from Coronavirus State and Local Fiscal Recovery Funds*, FS-2021-16 (Nov. 2021), explaining that because SLFR Funds payments for childcare costs issued by the state/local government are not income to the recipients, no Form 1099-MISC or other information return is required to be filed with the IRS or furnished to the recipients. For further discussion of COVID-19-related government payments excluded from gross income, see 501 T.M., *Gross Income: Overview and Conceptual Aspects.*
[2151] CCA 199919007.
[2152] CCA 200034025.
[2153] CCA 200245052.

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from a state to replace profits lost because of a hurricane.[2154] State grants that compensate taxpayers for loss, repair, or replacement of business property damaged or destroyed as a result of a natural disaster are includible in gross income, except to the extent a nonrecognition provision applies.[2155] Payments under the federal fishery disaster relief fund representing compensation for lost wages or lost profits are includible in gross income.[2156]

2. *Air Transport Disaster Payments*

Gross income does not include payments under §406 of the Air Transportation Safety and System Stabilization Act[2157] received by the taxpayer.[2158] The exclusion does not apply to any individual identified by the Attorney General as having been a participant or conspirator in a terroristic action or to representative of such individual.[2159]

3. *Crime Compensation*

Awards made by a state crime victims compensation board to crime victims or their surviving spouses and beneficiaries are excluded from gross income.[2160] To the extent the award is for medical expenses deducted in a previous tax year, however, the award is included in gross income under the tax benefit doctrine.[2161] The tax benefit doctrine is discussed in 502 T.M., *Gross Income: Tax Benefit, Claim of Right and Assignment of Income.*

[2154] CCA 200013030.
[2155] Rev. Rul. 2005-46; CCA 200032041.
[2156] *See* IRS Info. Letter 2002-0208.
[2157] 49 U.S.C. §40101.
[2158] §139(f).
[2159] §139(e).
[2160] Rev. Rul. 74-74.
[2161] Rev. Rul. 74-74.

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