

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also Part I, §§ 105, 106, 132, 152, 213, 220, 223; 1.106-1, 1.152-4.)

Rev. Proc. 2008-48

SECTION 1. PURPOSE

This revenue procedure describes the circumstances under which the Internal Revenue Service will treat a child of parents who are divorced, separated, or living apart as the dependent of both parents for purposes of §§ 105(b), 106(a), 132(h)(2)(B), 213(d)(5), 220(d)(2) and 223(d)(2) of the Internal Revenue Code when the custodial parent has not released the claim to the exemption for the child under § 152(e)(2).

SECTION 2. BACKGROUND

.01 Section 105(b) provides an exclusion from gross income to employees for certain employer-provided medical expense reimbursements, including expenses incurred by the employee for the medical care (as defined in § 213(d)) of the employee, the employee's spouse, or the employee's dependent (as defined

under § 152 determined without regard to subsections (b)(1), (b)(2) and (d)(1)(B)).

.02 Section 106(a) provides that the gross income of an employee does not include employer-provided coverage under an accident or health plan. Section 1.106-1 of the Income Tax Regulations provides that the exclusion from gross income extends to contributions that the employer makes to an accident or health plan on behalf of the employee and the employee's spouse or dependents, as defined in § 152. Notice 2004-79, 2004-2 C.B. 898, states that the Service intends to revise § 1.106-1 to provide that the term "dependent" for purposes of § 106 has the same meaning as in § 105(b), and that taxpayers may rely on the notice pending the publication of the regulations.

.03 Section 132(a)(1) and (2) provides an exclusion from gross income for certain fringe benefits that qualify as no-additional-cost services or qualified employee discounts. Section 132(h)(2)(A) provides that use of the fringe benefit by the employee's spouse or dependent is treated as use by the employee. For this purpose, dependent child means any child (as defined in § 152(f)(l)) of the employee (i) who is a dependent of the employee, or (ii) both of whose parents are deceased and who has not attained age 25.

.04 Section 213(a) allows a deduction for medical expenses of the taxpayer, the taxpayer's spouse, or the taxpayer's dependent (as defined under § 152 determined without regard to subsections (b)(1), (b)(2) and (d)(1)(B)).

.05 Sections 220(f)(1) and 223(f)(1) allow an exclusion from gross income for distributions from Archer Medical Savings Accounts (MSAs) and Health Savings

Accounts (HSAs), respectively, if the distributions are used to pay qualified medical expenses (as defined in § 213(d)) of the account beneficiary, the account beneficiary's spouse, or the account beneficiary's dependent (as defined under § 152 determined without regard to subsections (b)(1), (b)(2) and (d)(1)(B)).

.06 For purposes of §§ 105(b), 132(a)(1) and (2), and 213(a), any child to whom § 152(e) applies is treated as a dependent of both parents. Sections 220(d)(2) and 223(d)(2) do not include a similar rule. However, §§ 220(d)(2)(A) and 223(d)(2)(A) define medical care by reference to § 213(d), and under § 213(d)(5), a child to whom § 152(e) applies is treated as the dependent of both parents.

.07 Under prior § 152(e), children of divorced or separated parents were treated as dependents of both parents under §§ 105(b), 132(h)(2)(B), and 213(d)(5) whether or not a parent released the claim to the exemption. The Working Families Tax Relief Act of 2004, Pub. L. 108-311, 118 Stat. 1166, and the Gulf Opportunity Zone Act of 2005, Pub. L. 109-135, 119 Stat. 2577, amended § 152(e) for taxable years beginning after December 31, 2004. Section 152(e) now provides that, in the absence of a qualified pre-1985 instrument (see § 152(e)(3)), a child may be treated as the dependent of the noncustodial parent only if the custodial parent releases the claim to the exemption. Section 152(e)(2). If the custodial parent does not release the claim, the right to the exemption is determined under the general rules of § 152(c) or (d).

Consequently, the preamble to § 1.152-4(f), 73 FR 37797 (July 2, 2008), explains

that, if a custodial parent does not release the claim to the exemption, only the taxpayer who is entitled to claim the child as a dependent under § 152(c) or (d) may treat the child as a dependent for purposes of §§ 105(b), 132(h)(2)(B), and 213(d)(5). This guidance provides a limited exception to that conclusion.

SECTION 3. SCOPE

This revenue procedure applies to taxpayers who:

.01 Are divorced, legally separated under a decree of divorce or separate maintenance, legally separated under a written separation agreement, or live apart at all times for the last 6 months of the calendar year; and

.02 Are the parents of a child who:

(1) Receives over one-half of the child's support during the calendar year from the child's parents;

(2) Is in the custody of one or both parents for more than one-half of the calendar year; and

(3) Qualifies under § 152(c) or 152(d) as a qualifying child or qualifying relative of one of the child's parents.

SECTION 4. APPLICATION

The Service will treat a child described in the scope section of this revenue procedure of taxpayers within the scope of this revenue procedure as the dependent of both parents under §§ 105(b), 106(a), 132(h)(2)(B), 213(d)(5), 220(d)(2), and 223(d)(2), whether or not the custodial parent releases the claim to the exemption under § 152(e)(2).

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective August 18, 2008. However, taxpayers may apply this revenue procedure in any taxable year beginning after December 31, 2004, for which the period of limitation on credit or refund under § 6511 has not expired as of August 18, 2008.

SECTION 6. ADDITIONAL INFORMATION

The principal author of this revenue procedure is Mireille Khoury of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other individuals participated in its development. For further information regarding this revenue procedure as it relates to §§ 105, 106, 220 and 223, contact Mireille Khoury at (202) 622-6080 (not a toll free call). For further information regarding this revenue procedure as it relates to § 132, contact Neil Shepherd at (202) 622-6040 (not a toll-free call). For further information regarding this revenue procedure as it relates to §§ 152 and 213, contact Victoria Driscoll at (202) 622-4920 (not a toll-free call).