

Individual Tax Update, Part 2

IN THE JANUARY COLUMN, WE LOOKED AT two individual tax provisions contained in the Job Creation and Worker Assistance Act of 2002 (JCWAA) (P.L. 107-147): exclusion of foster care payments and deductibility of teacher classroom expenses. This month, we discuss new IRC §151(c)(6), which pertains to the claiming of a taxpayer's principal residence for a missing child.

Principal Residence for a Missing Child

Prior to December 22, 2000, there was no tax legislation concerning the treatment of a missing child by the parents when the child is presumed kidnapped. The IRS, however, did publish guidance by issuing Technical Advice Memorandum TAM 200034029. In this TAM, the IRS held that the parents should be presumed to meet the support test of §152(a) if, before the kidnapping, the parents provided over half of the support for the child, and should not be presumed to meet the support test of §151(a) after the kidnapping because the parents do not provide over half of the support for the child in accordance with *Otmishi v. Commissioner*, Tax Court Memo TCM 1980-472.

The court held in *Otmishi* that the taxpayer did not provide any support for his child during the year even though the father expended amounts to locate his child, who had been taken by the child's mother. This case, however, is not truly on point because it pertains to a kidnapping by a family member. Apparently the IRS recognized this fact and issued TAM 200038059 a few weeks later, which reversed its advice in TAM 200034029. The IRS held in this later ruling that no other individual, other than the parents, has legal custody of the child, and

in these unusual circumstances it should ordinarily be presumed that the parents have incurred sufficient expenses for the support of the child.

Section 151(c)(6) was added by Act §306(a) of JCWAA. This new section provides that the dependency exemption is available to the parents of a kidnapped child and became effective beginning on December 22, 2000. Hence, eligible taxpayers are able to take advantage of this provision for tax years 2000 and thereafter by filing amended tax returns. This newly enacted tax provision is far reaching because it allows a taxpayer to continue treating his or her missing child as a dependent for purposes of the dependency exemption, child credit, surviving spouse filing status, and head of household filing status. A similar rule also applies under the tax provisions for claiming the earned income credit.

In general, a missing child is defined in §151(c)(6) as a child of the taxpayer who is presumed by law enforcement authorities to have been kidnapped by someone who is not a member of the child or taxpayer's family. Furthermore, the child was (without regard to §151(c)(6)) the dependent of the taxpayer for the portion of the taxable year before the date of the kidnapping. Once §151(c)(6) is satisfied by the taxpayer, the missing child shall be treated as a dependent of the taxpayer for all taxable years during the period that the child is kidnapped and shall cease to apply in the first taxable year after the calendar year in which the child would have attained age 18 or there is a determination that the child is deceased.

Act §412(b) clarifies that, if a taxpayer met the household maintenance requirement of the surviving spouse filing status or the head of household filing status in regard to the dependent child immediately before the

kidnapping, it is deemed that the taxpayer continues to meet that requirement during the kidnapping period, too.

There are a few important issues that should be considered at this point. First, it is a taxpayer-friendly provision because a taxpayer eligible to file under the surviving spouse filing status during the year of kidnapping is eligible to continue filing under this status throughout the qualified kidnapping period. Under normal circumstances, this filing status generally is available to a taxpayer for only two years following the death of the taxpayer's spouse. Second, this provision is effective retroactively to year 2000. As a result, a taxpayer may be eligible to file an amended tax return for years

2000 and 2001 and, if eligible, should take advantage of this provision. Unfortunately, tax returns prior to 2000 can't be amended. Third, the law enforcement authorities must establish that someone other than a member of the kidnapped child or taxpayer's family has kidnapped the child. This condition would not be satisfied in those cases where the authorities believe that the child is a runaway or has been taken by a former spouse after a divorce. It seems reasonable, therefore, that the taxpayer will need some type of documentation from the authorities to satisfy this condition. Finally, what happens if it is learned at a later time that the child did run away from home and therefore was not kidnapped? What

corrective actions (e.g., filing of amended tax returns), if any, does the taxpayer need to follow? There does not appear to be an answer to this issue at present. The documentation from authorities noted above could be beneficial in this situation, but it is reasonably safe to assume that documentation isn't likely to be on the minds of parents in this situation.

On a similar matter, what happens in the case of a missing or kidnapped spouse? Obviously, §151(c)(6) doesn't apply. The taxpayer instead must look to §2(c), which provides relief in the case of an abandoned spouse (possibly a missing spouse). In this situation, the taxpayer is treated as not married if §7703(b) (married individuals living apart) is satisfied, is able to file as head of household or single (but not as married joint or head of household), and can't claim the kidnapped spouse as a dependent. Although this situation isn't as common as a kidnapped child, there doesn't seem to be any provisions for these taxpayers.

In next month's tax column, we will complete our discussion of tax provisions in JCWAA pertaining to individual taxpayers by looking at the clarifications made to adoption expenses. ■

The material for this article came, in part, from the MicroMash CPE course "Tax Legislation & Treasury Interpretations in 2002" by Tony Curatola.

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