

### *Symposium: Lingering Tax Issues for the Twenty-First Century*

## The Tax Concepts of "Dependent" And "Support": Their Impact On "Tax Indigents"

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# THE TAX CONCEPTS OF "DEPENDENT" AND "SUPPORT": THEIR IMPACT ON "TAX INDIGENTS"

Marcus Schoenfeld\*

## I. WHO IS A "TAX INDIGENT?"

This article will not address the current profound debates of tax policy, such as whether the Internal Revenue Code (Code) should be repealed and replaced by a flat tax, a consumption tax, a value added tax, or otherwise. Rather, this article will look at the present Code and its enforcement by the Internal Revenue Service (Service), especially with respect to "tax indigents"—those individuals who cannot afford professional assistance or representation in disputes with the Service or before the United States Tax Court (Tax Court).<sup>1</sup> Indeed, even if the present Code were repealed, similar problems would probably exist under any tax system.

One need not be in abject poverty in order to qualify as a "tax indigent." In a very real sense, most taxpayers are "tax indigents," because few taxpayers can afford competent professional help to contest their liability with the Service. The taxpayer may be well into the middle class, yet he or she could properly be called a "tax indigent," because a taxpayer with an average, or even a somewhat above average, income would rarely be able to spend thousands of dollars on a lawyer or

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<sup>1</sup> One of the three pioneer tax clinics, held at Hofstra Law School, limited its representation to "tax indigents," which were taxpayers with an income below the median for Nassau County, New York, where the school is located. Analogous to this meaning, in dealing with federal funding for law school and business school tax clinics, I.R.C. §7526(b)(1) (added in 1998) states that in order to qualify as a "low income taxpayer clinic," at least 90 percent of the clinic's clients must have incomes no greater than 250 percent of the poverty level. This definition of "low income taxpayer" will probably be about the same as a median dollar figure. "Tax indigent" will be used herein to include "lower income taxpayers" as defined by Congress in I.R.C. §7526. In addition, this article will include as a "tax indigent" virtually any middle class taxpayer who, in economic terms, simply cannot afford professional help in dealing with the Internal Revenue Service, or an attorney to go before the United States Tax Court on his or her behalf.

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accountant (or both) to challenge the IRS effectively,<sup>2</sup> even if he could manage to raise the needed funds.

Compounding this economic problem, some tax indigents may be functionally illiterate or English may not be their native tongue. Even if they are not English illiterate, they may not comprehend "regulationese"—forms and letters written in technical terms. These types of tax indigents especially need help, because they may not timely fill out required forms or respond to time deadlines, which strongly prejudices their rights.

The most obvious situation in which it is uneconomic to hire a tax professional occurs when the asserted tax deficiency is less than the minimum fee of the professional. But even if the professional's fee is less than the tax deficiency asserted, it may be that a taxpayer, making a cost benefit analysis, would feel it is not worth the time and cost of contesting the asserted deficiency with the Service, even without professional help. In theory, if the taxpayer cannot settle within the Service, he can petition the Tax Court. But in court the *pro se* taxpayer is at a great disadvantage,<sup>3</sup> although the judge is often somewhat lenient with *pro se* taxpayers in Small Tax Cases.<sup>4</sup>

Because the Service prevails on most litigated issues, this factor will also affect the cost benefit determination. In sum, for most taxpayers, it usually is impractical in terms of time or money or both to contest the Service's determinations. In addition, of course, if the taxpayer hires professional help, the professional's fee must be paid whether the taxpayer wins or loses.

Because the Service is adversarial to a taxpayer and their employees know the law and especially the procedures while the taxpayer does not, an unrepresented taxpayer is at a great disadvantage. Because civil tax

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<sup>2</sup> Assuming a professional's hourly fee at a very conservative \$150 an hour and assuming a very conservative 15 billable hours of work, the minimum fee would be \$2,250. Many matters would take much longer, while hourly fees keep running.

<sup>3</sup> Many taxpayers represent themselves *pro se* in the Tax Court. One reason is that only attorneys can practice before the Tax Court. Accountants or other professionals who can practice before the Service cannot practice before the Tax Court. Therefore, the taxpayer's cost of representation would mount rapidly.

<sup>4</sup> "Small tax cases" may be elected by a taxpayer when the tax in controversy is less than \$50,000 for each year before the court. I.R.C. §7463(a) (Law Co-op 1998) (for cases begun after July 22, 1998). Until P.L. 105-206 was passed in 1998, the limit was \$10,000 per year. No appeal is possible from the decision of the Tax Court in these cases. I.R.C. §7463(b) (Law Co-op 1998).

matters are not criminal,<sup>5</sup> the taxpayer is not entitled to a free court appointed lawyer. Neither is there any institution similar to Legal Aid for tax problems.<sup>6</sup> Except for a very few *pro bono* attorneys, most tax indigents handle tax matters themselves.<sup>7</sup>

While all taxpayers may have problems with the tax law because it is virtually incomprehensible, it seems that very low income tax indigents may suffer more because, among other things, the Service targets taxpayers for audit based in part on areas where errors on returns are common. Tax indigents may not have their returns prepared professionally and may have errors when they prepare their own returns.

Three issues affecting tax indigents are related: the dependent exemption deduction (exemption),<sup>8</sup> the head of household status,<sup>9</sup> and the complexities of the earned income credit (EIC).<sup>10</sup> These issues, and others,<sup>11</sup> impact heavily on the lower income taxpayers,<sup>12</sup> because the EIC is specifically targeted at low income taxpayers and the dependent exemption and head of household affect low income tax indigents disproportionately. Further, in monetary terms, while each exemption of \$2,700<sup>13</sup> per dependent will lower any taxpayer's taxable income by that amount, it would usually save a higher tax bracket taxpayer more in

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<sup>5</sup> There are tax crimes, defined in I.R.C. §§7201-17, which are beyond the scope of this paper.

<sup>6</sup> Legal Aid in Philadelphia refers its tax cases to the Villanova Tax Clinic.

<sup>7</sup> Some areas have a law school or a business school tax clinic to help tax indigents, but relatively few taxpayers can avail themselves of their services because there are too few to help more than a small number of tax indigents. I.R.C. §7526, *see supra* note 1, provides seed money for such clinics, and this will help the tax indigent problem. But there probably will still be not nearly enough representatives for the number of potential clients.

<sup>8</sup> I.R.C. §151 (Law Co-op 1998). Subsections (a) and (b) create a "personal exemption" for the taxpayer and spouse. This topic is not discussed herein. Subsection (c) creates a "dependent exemption" deduction. Reference to the "exemption" herein is only to the dependent exemption.

<sup>9</sup> I.R.C. §2(b) (Law Co-op 1998). *See infra* note 114 and accompanying text.

<sup>10</sup> I.R.C. §32 (Law Co-op 1998). *See infra* note 123 and accompanying text.

<sup>11</sup> *See infra* note 15 and accompanying text.

<sup>12</sup> For example, of the 30 client inquiries to the Villanova Law School Tax Clinic for the February 22, 1999 Tax Court calendar in Philadelphia, 24 involved these issues. Most of these cases would have been settled in Appeals if the clients had had effective representation before the Service.

<sup>13</sup> The statute says this "exemption amount" of a dependent exemption deduction is \$2,000. I.R.C. §151(d) (Law Co-op 1998). That figure is adjusted for inflation for each year since 1990 by I.R.C. §151(d)(4). \$2,700 is the correct figure for tax years beginning in 1998.

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absolute dollars<sup>14</sup> than it would save a tax indigent. However, it is quite likely that the exemptions and other benefits deriving from the dependent status would save a greater proportion of a tax indigent's total tax liability and often reduce it to zero.

Although there are other problem areas for tax indigents,<sup>15</sup> the remainder of this paper will focus primarily on dependent status under I.R.C. §152 and the consequences of such status in several contexts.

## II. DEPENDENT STATUS

### A. In General

Among the most troublesome problems faced by tax indigents, and other taxpayers, is the question of whether another individual is a "dependent" of the taxpayer.<sup>16</sup> The status of "dependent" is directly relevant for determining a taxpayer's dependent exemption<sup>17</sup> and also for the taxpayer's medical expense deduction.<sup>18</sup> In addition, a taxpayer's head of household status (or other filing status),<sup>19</sup> earned income

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<sup>14</sup> This may not be true for very high income taxpayers, because of the phase out of exemptions for such taxpayers by I.R.C. §151(d)(3).

<sup>15</sup> Slightly higher income indigent taxpayers with many children may fall into the trap posed by the Alternate Minimum Tax (AMT) of I.R.C. §55. See *Klaassen v. Comm'r*, 1998 WL 352260, *aff'd*, 1999 WL 197172 (10th Cir. 1999) (unpublished opinion). The concurring judge stated that the statute is clearly against the taxpayers, and although the AMT was aimed at high income taxpayers, middle income taxpayers are now subject to the AMT because the threshold "exemption amount" is not indexed for inflation. *Id.* At 4. This case was discussed on page 1, Section 3, of the January 10, 1999 N.Y. Times. The Villanova Tax Clinic had a similar case with a family of 13 children, which was settled before trial by admitting that the additional tax created by the AMT was due. However, the penalties were abated.

<sup>16</sup> The term "taxpayer" herein refers to the person seeking to claim another person as a dependent so that the taxpayer gets a tax benefit, most commonly the dependent exemption deduction. Until I.R.C. §152(a) is satisfied, the other person is only a "potential dependent." Potential dependent is an awkward phrase, but it describes a person who may or may not potentially be claimed as a dependent by another taxpayer.

<sup>17</sup> I.R.C. §151 determines whether a taxpayer can claim a dependent exemption deduction for another person. I.R.C. §151(c)(1) specifically incorporates the definition of "dependent" from I.R.C. §152 as a prerequisite. For a dependent who also meets the requirements of the gross income test of I.R.C. §151(c), the no joint return test of I.R.C. §151(c)(2), and whose Social Security number appears on the taxpayer's return, I.R.C. §151(e), a dependent exemption deduction is allowed.

<sup>18</sup> I.R.C. §213(a) (Law Co-op 1998). A medical expense paid by a taxpayer for a dependent, as defined in I.R.C. §152, may be claimed by the taxpayer. *Id.*

<sup>19</sup> I.R.C. §2(b) (Law Co-op 1998). A "head of household" must have one or more individuals for whom he or she has maintained a household in which that person lived for at least half of the year. In addition, that individual must have qualified as the purported

credit,<sup>20</sup> dependent care credit,<sup>21</sup> child tax credit,<sup>22</sup> and the Hope Scholarship Credit and the Lifetime Learning Credit<sup>23</sup> each turn upon that taxpayer being entitled to a dependent exemption deduction for another person.<sup>24</sup> Because dependent status is a necessary requirement in determining the dependent exemption deduction (exemption), the definition of "dependent" under I.R.C. §152(a) must be the starting point for all of these issues. However, only three of these will be discussed in this article.

Most taxpayers use the calendar year as their reporting year, so there is no timing issue with respect to which period must be looked at for support. If, however, the taxpayer and the potential dependent have different taxable years, then the relevant support period is the calendar year within which the *taxpayer's* year begins.<sup>25</sup> *Caveat:* It is important to note that whether an individual is a "dependent" of a taxpayer is determined *solely* by I.R.C. §152(a). Once the individual is qualified as a "dependent" of the taxpayer under that section, he or she may entitle the taxpayer to the dependent exemption if the additional tests of I.R.C. §151 are satisfied.<sup>26</sup>

This may seem somewhat confusing, but it is true that a person may be a taxpayer's dependent without also qualifying that taxpayer for the dependent exemption. For example, if the dependent has gross income

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head of household for an I.R.C. §151(c) exemption. I.R.C. §2(b)(1) (Law Co-op 1998). This is discussed in more detail *see infra* at Part IV. A.

<sup>20</sup> I.R.C. §32 (Law Co-op 1998). An "eligible individual" cannot claim the credit with respect to a person (other than a "qualifying child") if another taxpayer is entitled to a §151(c) exemption for that individual. I.R.C. §32(c)(1)(A)(ii)(III) (Law Co-op 1998). In addition, if a "qualifying child" is married, the taxpayer must be entitled to a dependent exemption for that married child. *See discussion infra* Part IV. B.

<sup>21</sup> I.R.C. §21(b)(1)(A) requires that the taxpayer be entitled to an exemption for a child under age 13. But I.R.C. §21(b)(1)(B) requires a physically or mentally handicapped person to be a dependent of the taxpayer to claim the credit by the taxpayer for that person (even if that person does not qualify the taxpayer for the I.R.C. §151(c) exemption).

<sup>22</sup> I.R.C. §24 (Law Co-op 1998). The definition of "qualifying child" requires that the individual seeking the credit was allowed an exemption under I.R.C. §151(c) for that child.

<sup>23</sup> I.R.C. §25A(f)(1)(A) limits these credits to the tuition of the taxpayer, the taxpayer's spouse and any dependent of the taxpayer for whom the taxpayer can claim an I.R.C. §151(c) exemption.

<sup>24</sup> One cannot claim a dependent exemption deduction unless the dependent's Social Security number is included on the return claiming the dependent exemption deduction. I.R.C. §151(e) (Law Co-op 1998).

<sup>25</sup> I.R.C. §152(a) (Law Co-op 1998).

<sup>26</sup> *See supra* note 18.

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in excess of the sums stated in I.R.C. §151(c)(1), the taxpayer cannot claim the dependent exemption for him.

B. *The Relationship Test*

I.R.C. §152(a) begins, "For purposes of this subtitle...the term 'dependent' means *any of the following individuals* over half of whose support...was received from the taxpayer...."<sup>27</sup> (Emphasis supplied.) The "following individuals" referred to in the quotation above are listed in I.R.C. §152(a)(1) through (9). The first seven paragraphs of I.R.C. §152(a) specifically limit the relationship test to certain close blood relatives of the taxpayer.<sup>28</sup> The eighth paragraph lists a quite limited number of in-laws who may also qualify as a taxpayer's dependent.<sup>29</sup> In addition, an unrelated person who has the taxpayer's home as her principal place of abode will qualify under I.R.C. §152(a)(9), unless "...the relationship between such individual and the taxpayer is in violation of local law."<sup>30</sup>

Most potential issues with respect to the relationship test are spelled out in the Code or case law. For example, half-brothers and sisters are considered as those of the whole blood.<sup>31</sup> A legally adopted or foster child of the taxpayer is generally treated as a child by blood.<sup>32</sup> However, a live-in housekeeper or other live-in employee cannot qualify as a

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<sup>27</sup> The Internal Revenue Code of 1986 is Title 26 of the United States Code. "This subtitle" is subtitle A of Title 26, which encompasses the entire income tax.

<sup>28</sup> These relatives are the taxpayer's lineal ancestors and descendants, step-parents, step-children, and step-siblings, and also uncles, aunts, nieces and nephews, but not cousins.

<sup>29</sup> Your spouse's niece is not your in-law, because she is not listed as an in-law in I.R.C. §152(a)(8) (Law Co-op 1998). However, spouses filing a joint return are two taxpayers with one aggregate taxable income. I.R.C. §6013(d)(3) (Law Co-op 1998); Treas. Reg. §1.6013-4(b) (as amended 1971). One spouse may satisfy the support test for a dependent while the other spouse supplies the relationship. Treas. Reg. §1.152-2(d) (as amended 1973). Thus, an in-law who is not within I.R.C. §152(a)(8) may be a blood relative of the other spouse, and therefore that in-law may be claimed as a dependent on a joint return. Once such a relationship by affinity has been established, it continues even if the spouses divorce or if one of them dies. Treas. Reg. §1.152-2(d) (as amended 1973).

<sup>30</sup> This "anti-mistress" provision may be antiquated to some. However, there still are adultery laws on the books in many states. The Tax Court has disallowed dependent status because the relationship was in violation of local law. See *Turnipseed v. Commissioner*, 27 T.C. 758 (1957); *Eichbauer v. Commissioner*, 30 T.C.M. (CCH) 581 (1971). Query the result if the state law has not been enforced in many years.

<sup>31</sup> I.R.C. §152(b)(1) (Law Co-op 1998).

<sup>32</sup> I.R.C. §152(b)(2) (Law Co-op 1998). A legally adopted or a foster child may qualify, "...as if by blood." *Id.*

dependent. What a live-in employee receives is compensation for services, not support.<sup>33</sup>

In general, the relationship test presents few problems to tax indigents or other taxpayers, because the facts of any relationship are obvious in virtually all cases.

### C. *The Citizenship Test*

A potential dependent must be either a citizen or national of the United States or a resident of the United States, Mexico, or Canada.<sup>34</sup> In most cases the requisite residence or citizenship is clear. The tax indigent faces no more difficult a standard than other taxpayers, except that some tax indigents may support a recent immigrant who would not satisfy this test.

### D. *The Support Test*

#### 1. In General

After the "following individuals" language discussed above, the introductory paragraph of I.R.C. §152(a), continues: "...the term 'dependent' means any of the following individuals *over half of whose support...was received from the taxpayer....*" (Emphasis added.)

The support test and the taxpayer's proof thereof presents no real problem in most typical family situations, whether or not the taxpayer is a tax indigent. The taxpayer claiming the exemption and the potential dependent generally live in the same household. Furthermore, the taxpayer (or both spouses, if a joint return is filed) is the primary source of all, or almost all, living expenses of that household. Assuming that the potential dependent furnishes little or none of his own support<sup>35</sup> and there is no other source of substantial support for the potential

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<sup>33</sup> *Hamilton v. Commissioner*, 34 T.C. 927 (1960); *Newsome v. Commissioner*, 33 T.C.M. (CCH) 1188 (1974).

<sup>34</sup> I.R.C. §152(b)(3) (Law Co-op 1998). An exception exists for a legally adopted child who is a member of the taxpayer's household.

<sup>35</sup> It is presumed that a taxpayer, including a potential dependent, uses all of his income, taxable or excludable, for his own support unless he can show to the contrary. Treas. Reg. §1.152-1(a)(2)(ii) (as amended 1971).



dependent or for the household,<sup>36</sup> the support test is automatically satisfied.

However, atypical household arrangements abound today. Households sometimes contain more than one family living together, or the household may include several children with different parents, or some member of the household may be receiving government payments, such as welfare or Social Security, or some member of the household may be living on accumulated savings, or two or more wage earners (not spouses) may live in the same household and contribute to the support of all of the members of the household. All of these factors and more enter into the determination of the support of a potential dependent. Whether the potential dependent receives tax free income or is withdrawing from savings is not relevant. The key questions are:

- 1) how many dollars *from whatever source* were needed for the potential dependent's support; and
- 2) what are the sources of these dollars.

So, whenever more than one person is a source of support for the household or when the household contains several potential dependents, the calculation of whether the taxpayer's contribution exceeds half of total support of one potential dependent often becomes more complex.

If the Service wishes substantiation of the taxpayer's right to a dependent exemption, it will likely send the taxpayer a "Form 2038: Questionnaire—Exemption Claimed for Dependent." This form tracks the rules, but it may not be clear to the taxpayer how some of the information correlates with other parts of the form. Many taxpayers would find Form 2038 quite difficult to fill out, because the amount of particular items of support on the Form 2038 might be hard to determine and allocate.

For example, what is the fair rental value of a household? Even if the taxpayer is willing to pay a realtor for this estimate, the Service could probably find a lower estimated value. Because the taxpayer must bear the burden of proving<sup>37</sup> that he supplied over half of support, there is a

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<sup>36</sup> General family expenses are usually allocated pro rata to each member of the household. See *infra* note 85 and accompanying text. Significant support contributions from another source, such as a grandparent or the government, will be counted for support, so it will make it less likely that the parents can claim the exemption.

<sup>37</sup> See *infra* Part II. D. 3 for a discussion of the taxpayer's burden of proof.

great risk that if the Service's value is used, the taxpayer may not supply over fifty percent of support. In addition, it may be hard for the taxpayer to determine the amount spent on certain items, such as food, which is often paid with cash and without receipts. Even if receipts were received, most taxpayers do not know that they should keep track of them for this purpose. The *Cohan* rule<sup>38</sup> would permit reasonable estimates of expenditures for food, since there are some standards<sup>39</sup> as to what food cost a family of a given size. However, it would be difficult to calculate the fair rental value of an owned home under *Cohan*.

## 2. "Over One-Half"

Although it is not explicitly stated in the Code in these terms, the "over one-half of support" test requires the calculation of a fraction in which the numerator is the dollar amount<sup>40</sup> of the taxpayer's contribution to the support of the dependent. The denominator of that fraction is the dollar amount of the total support for that potential dependent from all sources, including the potential dependent's contribution to his own support.

Once the total items of support of the potential dependent (and the sources of that support) are identified, the Regulations adopt a literal approach to the "over one half of whose support" test.

First, the total dollar amount of the potential dependent's total support, as broadly defined by the case law,<sup>41</sup> from all sources, including the taxpayer, other relatives, friends, charities, the government and also the potential dependent's own contributions to his support must be determined.<sup>42</sup> Second, the dollar amount of the dependant's support

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<sup>38</sup> *Cohan v. Commissioner*, 39 F.2d 540 (2d Cir. 1930). Although I.R.C. §274 has overruled *Cohan* in some contexts, it is still generally applicable to those situations, as here, not covered by I.R.C. §274.

<sup>39</sup> For example, the Internal Revenue Manual Handbook, HB 4231 (11)30, (3)(b) (2/23/82), states that for purposes of determining hidden income on audit an agent could use Bureau of Labor Statistics figures if nothing better exists. See *Giddio v. Commissioner*, 54 T.C. 1530 (1970).

<sup>40</sup> The amount of an item of support supplied is normally the expense the contributor incurred in furnishing the item. Treas. Reg. §1.152-1(a)(2)(I) (as amended 1971).

<sup>41</sup> See discussion *infra* notes 66-99 and accompanying text.

<sup>42</sup> If the potential dependent is a child or stepchild of the taxpayer and is also a student, any scholarship received from the school does not enter into "support." I.R.C. §152(d)(2) (Law Co-op 1998). This rule does not apply to loans, which usually make up the bulk of "support" for a college student today. If the child is the debtor who is liable on the loan, those proceeds are deemed to come from the child for his own support. However, if the

coming from the taxpayer must be ascertained.<sup>43</sup> If the taxpayer's contribution to support (the numerator) divided by the total support of the potential dependent (the denominator) *exceeds* fifty percent, the taxpayer may claim the other person as a dependent.

If the critical fraction is exactly fifty percent or less, no one can claim that person as a dependent unless a multiple support agreement is filed.<sup>44</sup> This agreement can be elected if each of two or more taxpayers are contributing at least ten percent and no one taxpayer has contributed over fifty percent of the potential dependent's support. All contributors of at least ten percent of the potential dependent's support must agree and file a "multiple support agreement" and designate which of them gets the dependent exemption deduction.<sup>45</sup> They cannot divide the exemption deduction proportionally. Only one taxpayer can claim the dependent exemption, and it must be for the entire exemption amount.<sup>46</sup> Of course, the contributors to the potential dependent may alternate year to year or make any other agreement about sharing the exemption over time.

Without professional help, tax indigents are unlikely to calculate support in this way. Especially difficult for some tax indigents to believe is the fact that eligibility for the exemption is solely in monetary terms. A care giver who does not work outside the home and spends all of her time raising the children receives no credit for her personal services because she has no expense for her contribution.<sup>47</sup>

As noted previously, to aid taxpayers in determining whether they can claim someone as a dependent, the Service has issued Form 2038, entitled "Questionnaire—Exemption Claimed for Dependent." This is a questionnaire that is sent by a Revenue Agent who questions an

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student's parent is the obligor on the loan, the proceeds are deemed to come from the parent.

<sup>43</sup> Treas. Reg. §1.152-1(a)(2)(I) (as amended 1971).

<sup>44</sup> I.R.C. §152(c) (Law Co-op 1998).

<sup>45</sup> *Id.* The 10% contributors have the freedom to assign the entire dependent exemption deduction to any one of them. *Id.* They can agree to alternate each year or to give it all to one of them. *Id.* They can change their choice each year.

<sup>46</sup> *Id.*

<sup>47</sup> I.R.S. PUB. 17, YOUR FEDERAL INCOME TAX 25 (1998) states: "Total support includes amounts *spent* to provide food, lodging, clothing, education, medical and dental care, recreation, transportation, and similar necessities." (Emphasis added). This "amount spent" rule also applies to family members who take care of elderly relatives with their own services instead of paying for custodial care. See *Markarian v. Commissioner*, 352 F.2d 870 (7th Cir. 1965), *cert. denied* 384 U.S. 988 (1966).

exemption on the taxpayer's return. A tax indigent, and many other taxpayers, might have trouble understanding Form 2038. In addition, the taxpayer who does not understand the all or nothing aspect of the over fifty percent rule may forget or underestimate some items of support that they might have legitimately taken.<sup>48</sup> Finally, the form uses very small type, and many responses must be squeezed into the small space left for answers.

### 3. Burden of Proof Issues

Tax indigents will almost always either undergo an office audit<sup>49</sup> or a correspondence audit.<sup>50</sup> When a taxpayer disagrees with the Revenue Agent's recalculation of that person's true tax, a Revenue Agent's Report (RAR) is usually sent to the taxpayer, together with a so-called "30 day letter." Although there is no set form, this letter informs the taxpayer that he or she has thirty days to agree to pay the additional tax asserted in the RAR, to ask for a reconsideration if there is new evidence, or to ask for an appellate conference within the Service. For small deficiencies up to \$2,500 for any given year (including penalties), the taxpayer need simply ask orally for an appellate conference.<sup>51</sup> No written protest or brief need be filed.<sup>52</sup> For larger deficiencies, from over \$2,500 up to \$10,000 for any given year, a simple written statement of disputed issues is required, although a formal written protest may be submitted.<sup>53</sup> Larger deficiencies obviously do not arise for tax indigents, but if they did, a formal "protest" must be filed. However, many tax indigents do not understand the importance of the thirty day letter, do not know where to seek help, and therefore do not request an appellate conference within that period.<sup>54</sup>

Soon after the thirty day period has expired without the request for an appellate conference, the Service will normally send a Statutory

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<sup>48</sup> Many tax indigents have come to the Villanova Law School with this problem during the past seven years. Much of the time the taxpayer was entitled to the exemption at issue but did not know how to prove their claim.

<sup>49</sup> These occur in the Service's office. Different rules apply to field audits, which generally take place in the taxpayer's place of business.

<sup>50</sup> This is an audit by mail—to supply missing information or documentation.

<sup>51</sup> Treas. Reg. §601.106(a)(1)(iii)(a) (as amended by 52 Fed. Reg. 38,405 (1987)).

<sup>52</sup> *Id.*

<sup>53</sup> Treas. Reg. §601.106(a)(1)(iii)(b) (as amended by 52 Fed. Reg. 38,405 (1987)).

<sup>54</sup> The thirty day limit apparently is *not* set in stone. A request that is a day or two late may still arrive in time to prevent the Revenue Agent from sending a Statutory Notice of Deficiency.

Notice of Deficiency<sup>55</sup> (Statutory Notice) to the taxpayer. Even if the taxpayer has requested and has attended an appellate conference, a Statutory Notice will be sent to him if he does not agree with the appellate conferee.<sup>56</sup> The Statutory Notice will usually assert the tax deficiencies which are frequently copied from the RAR.

The Statutory Notice states that if the taxpayer does not file a petition in the Tax Court within ninety days, the Service will "assess"<sup>57</sup> the amount of tax as shown on the Statutory Notice. The supporting schedules of the Statutory Notice are generally copied from the RAR. Should the taxpayer file a petition with the Tax Court, the assertions in the Statutory Notice are presumed correct unless the taxpayer proves to the contrary.<sup>58</sup> Thus, at all stages of the dispute with the Service, the taxpayer has the "burden of disproof"<sup>59</sup> of the assertions made by the RAR, which usually appears as part of the Statutory Notice.<sup>60</sup>

In the context of dependent status, the Service's assertions with respect to the amounts of support supplied to a potential dependent is one of the assertions presumed to be correct. Therefore, if a taxpayer makes a showing of supplying fifty-one percent of support, it will not assure dependent status. For example, certain support items supplied to the potential dependent, such as groceries, are normally paid for in cash.<sup>61</sup> The dollar amount can only be estimated, and therefore, the taxpayer has the difficult burden of proving the dollar value of that support.<sup>62</sup> Although reasonable estimates are allowed under the *Cohan*

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<sup>55</sup> This Statutory Notice is often called the "90 day letter," because the Service cannot "assess" the tax owed and begin its collection process until 90 days have elapsed. However, if the taxpayer timely petitions the Tax Court, the tax cannot be assessed until the Tax Court's decision becomes final. The 90 day period is set in stone. A petition filed on the 91st day cannot give the Tax Court jurisdiction over the case. Because timely filing is jurisdictional, the time cannot be extended.

<sup>56</sup> Even if the taxpayer has filed a petition with the Tax Court, because the Appeals Office has concurrent jurisdiction with the District Counsel, the taxpayer may yet get his day before the Appeals Office.

<sup>57</sup> Assessment of a tax occurs when a tax asserted against a taxpayer is entered into the assessment rolls. No notice of the assessment needs be served on the taxpayer. Assessment of a tax is a necessary precursor to any collection attempts by the Service.

<sup>58</sup> *Welch v. Helvering*, 290 U.S. 111, 115 (1933); Tax Court Rule 142(a).

<sup>59</sup> Because the taxpayer in the Tax Court faces the presumption of correctness accorded to the assertions in the Statutory Notice of Deficiency, it can be said the taxpayer has the burden of disproof of those assertions.

<sup>60</sup> *Welch*, 290 U.S. at 115; Tax Court Rule 142(a).

<sup>61</sup> While some chain supermarkets accept credit cards, many tax indigents cannot qualify for a credit card, and neighborhood stores may not accept such cards.

<sup>62</sup> *Welch*, 290 U.S. at 115; Tax Court Rule 142(a).

rule,<sup>63</sup> the Revenue Agent might question some of the amounts or the allocation of payments, thus reducing the taxpayer to exactly fifty percent (or less) of total support. This would deny the dependent exemption for the taxpayer. Because of the danger of the Service adjusting some of the undocumented contributions to support upon an audit, the taxpayer should be prepared to prove at least fifty-five percent, and possibly more, of support in close situations.

#### 4. Items That Constitute Direct "Support"<sup>64</sup>

Although the Code is silent as to what payments qualify as "support," the Regulations state that "support" includes "...food, shelter, clothing, medical and dental care, education and the like."<sup>65</sup> The courts have greatly expanded the meaning of what types of payments constitute "support."<sup>66</sup> Support clearly is not limited to necessities.<sup>67</sup>

Generally, the dollar amount of an item of support is what the contributor paid for it.<sup>68</sup> If the contribution is of lodging or property, the amount of the support supplied is its fair market value.<sup>69</sup> However, the value of any personal services furnished by the taxpayer to the potential dependent does not count for support.<sup>70</sup>

At the same time as categorizing which payments are support for the potential dependent, it is also necessary to segregate each item of support into those supplied by the taxpayer and to those coming from all other sources (including the potential dependent himself, charities, and any governmental payments). The first category when totaled becomes the numerator of the over-fifty percent fraction. The denominator of that fraction is total support received from all sources, including the taxpayer.

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<sup>63</sup> *Cohan v. Commissioner*, 39 F.2d 540 (2d Cir. 1930). See *supra* note 38 and accompanying text.

<sup>64</sup> These are called "expenses for dependent only" on Form 2038, lines 25 through 29.

<sup>65</sup> Treas. Reg. 1.152-1(a)(2)(i) (as amended 1971).

<sup>66</sup> Most of the cases dealing with support discussed herein arose prior to the changes made in I.R.C. §152(e) by the Deficit Reduction Act of 1984, dealing with support involved in pre-1984 Act contests between separated parents. Although I.R.C. §152(e) has been amended, the definitions of what items constitute support in these cases are still relevant today. These divorce custody issues of support are discussed *infra* Part II. D. 6.

<sup>67</sup> *Muracca v. Commissioner*, 47 T.C.M. (CCH) 1762 (1984). Cf. I.R.S. PUB. 17, *supra* note 47, at 25, referring to "necessities."

<sup>68</sup> Treas. Reg. §1.152-1(a)(2) (as amended 1971).

<sup>69</sup> *Id.*

<sup>70</sup> See I.R.S. PUB. 17, *supra* note 47, at 25.

A payment for a "direct" benefit to the potential dependent, such as paying a medical expense or college tuition for that potential dependent, is support. Other direct expenses paid for the potential dependent include: medicines and vitamins, haircuts, a permanent wave, toothpaste, swimming pool admissions, weekly allowances, vacation expenses,<sup>71</sup> Christmas allowances, school supplies and books, dentist fees and eye glasses.<sup>72</sup> In addition, government payments such as Social Security, welfare, Medicaid, and food stamps count if they are used by the recipient for his support.<sup>73</sup> The expenses for a child's wedding, including the apparel, the church, and the cost of the reception, are part of support.<sup>74</sup>

Certain capital expenditures are treated as supplied for the support of the recipient in the year the asset was given to the potential dependent.<sup>75</sup> Thus, a television set purchased by a parent for the child's bedroom counts as part of the child's support.<sup>76</sup>

The purchase of an automobile is a capital expenditure, and the payments can enter into support in several ways. If a child buys a car with his own funds, he is deemed to be supplying the cost of the car to his own support, possibly exceeding his parents' contributions to his support.<sup>77</sup> If the parent buys the car and titles it in the child's name, the purchase price will count as support furnished by the parent.<sup>78</sup> If the car was purchased by the parent and not titled in the child's name, the parent's purchase price is not support; but the operating expenses of the car that benefits the dependent is part of the child's support.<sup>79</sup> In a possibly extreme case where the child's parents normally supply almost all of a child's support of \$20,000 per year and a grandfather gives the child title to a \$25,000 auto as a graduation present, the parents would lose the exemption.<sup>80</sup>

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<sup>71</sup> *Hastings v. Commissioner*, 16 T.C.M. (CCH) 928 (1957).

<sup>72</sup> If one parent has remarried after a divorce, support is attributable to that parent, even if the funds come from the new spouse. I.R.C. §152(e)(5) (Law Co-op 1998).

<sup>73</sup> *Treas. Reg.* §1.152-1(a)(2)(ii) (as amended 1971). Such payments are deemed to have been spent by the recipient for his own support, unless the presumption is rebutted. *Id.*

<sup>74</sup> *Rev. Rul.* 76-184, 1976-1 C.B. 44.

<sup>75</sup> *Rev. Rul.* 77-282, 1977-2 C.B. 52.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See I.R.S. PUB. 17, *supra* note 47 at 27.

Entertainment and vacations for the potential dependent are part of his support.<sup>81</sup> However, the cost of these types of expenses, if large enough, could easily upset the balance between two contributors to the support of a potential dependent.<sup>82</sup>

All of the above items, and all other items of the potential dependent's direct support, enter into the denominator of the critical fraction. The items actually supplied by the taxpayer seeking the deduction or credit enter into the numerator as well. Each item, other than the taxpayer's contributions, entered into the denominator makes it less likely that the taxpayer will be entitled to a dependent exemption.

Other items of support include:<sup>83</sup> medical insurance premiums for the dependent; school tuition, lunches and milk; tuition payments and allowances under the G.I. Bill; child care expenses; armed forces dependency allotments; board; personal hygiene expenses; movies and other entertainment; gifts; recreation; travel; transportation; tax-exempt military quarters allowances; and Armed Services academy appointment.

Items not includible in total support are:<sup>84</sup> Federal, state, local or FICA taxes paid by dependent on his own income; life insurance premiums for the dependent; funeral expenses of the dependent; child support arrearages; medical insurance benefits; basic and supplementary Medicare benefits; payments to war orphans; nursing student's room and board furnished by a school of nursing; value of education, room, and board which a school provides for a handicapped child.

##### 5. Items That Constitute Indirect "Support"<sup>85</sup>

A payment may be indirectly made on behalf of the potential dependent if it is made for the benefit of the household in which the potential dependent lives. That potential dependent is allocated that

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<sup>81</sup> See Information Guide—Exemptions for Dependents, listing "movies and other entertainment," "recreation" and "travel" as part of support.

<sup>82</sup> For example, the father's payment was held to contribute to his son's support where the son was a talented hockey player, the father took the son to 30 hockey games, and the father paid for the son's ice time and the son's travel costs of going with his hockey team.

<sup>83</sup> These items are includible in support according to the Information Guide to Form 2038. The list is not exhaustive.

<sup>84</sup> These items are not includible in total support according to the Information Guide to Form 2038. The list is not exhaustive.

<sup>85</sup> These are called "Expenses of entire household" on Form 2038, lines 16 through 21.



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fraction of the total general family expenses that is deemed to have been made on behalf of the potential dependent. These general family expenses include most of the expenses of operating the household, not just those of the potential dependent.<sup>86</sup> Usually these expenses are simply allocated *pro rata* among the members of the household<sup>87</sup> unless a specific allocation can be made.<sup>88</sup> Accordingly, if four persons live in a household, each one is generally allocated twenty-five percent of the general family expenses.

Any amount of the potential dependent's income, taxable or excludable, of his withdrawals from savings, or of a return of his capital is presumed to have been first spent on his own support.<sup>89</sup> This can be rebutted by a showing that these dollar sums were not used for his support, but were, for example, invested or saved.<sup>90</sup> Similarly, any contribution to the household, generally, which is made by any member of the household, is presumed first to have been spent on that individual's own support.<sup>91</sup>

If the household is in a rented home, the potential dependent's allocable share of the rent paid for her household is part of his support supplied by the payer.<sup>92</sup> If the household is owned, rather than rented, the owner is deemed to have contributed the *fair rental value* of the *furnished* home to the support of the residents in that home.<sup>93</sup> Support does *not* include the amount of any mortgage payments, real estate taxes, and interest on the mortgage, because these factors enter into the calculation of what is a fair market rent.<sup>94</sup> If the home is owned jointly

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<sup>86</sup> See, e.g., *Hastings v. Commissioner*, 16 T.C.M. (CCH) 928 (1957).

<sup>87</sup> On Form 2038, the total household expenses (line 21) are simply divided by the number of persons living in the household, including the potential dependent (line 22). No adjustment seems to be made for the number of residents who do not partake of a general expense, like allowing a six month old a share of the telephone bill.

<sup>88</sup> *Id.* See also Rev. Rul. 77-282, 1977-2 C.B. 52 (citing *Gajda v. Commissioner*, 44 T.C. 783 (1965) where a typewriter and a microscope were held not to be support for a six year old because of the remoteness of any benefit to the child). Query whether a court would rule similarly today, where a six year old is possibly more computer (cf. typewriter) literate than an adult.

<sup>89</sup> Treas. Reg. 1.152-1(a)(2)(i) (as amended 1971).

<sup>90</sup> See I.R.S. PUB. 17, *supra* note 47, at 25.

<sup>91</sup> Treas. Reg. 1.152-1(a)(2)(ii) (as amended 1971).

<sup>92</sup> *Id.*

<sup>93</sup> See I.R.S. PUB. 17, *supra* note 47, at 25.

<sup>94</sup> *Taitt v. Commissioner*, 37 T.C.M. (CCH) 1140 (1978).

by two taxpayers, the fair rental value is divided equally between the two owners.<sup>95</sup>

Other items included in general family expenses that will usually be categorized as part of support are hospital insurance, automobile insurance, car license fee, car operating expenses, personal property tax, utilities, and laundry expenses.<sup>96</sup> Similarly, support includes church and Sunday School donations and Christmas gifts, as well as toys,<sup>97</sup> and the cost of cable TV and newspapers.<sup>98</sup>

The above discussed general family expenses are totaled;<sup>99</sup> that sum is apportioned among the members of the household. The potential dependent's share of these indirect support expenses are added to the direct support expenses to determine total support—the denominator of the critical fraction. Only those indirect support payments that are made by the taxpayer enter into the numerator.

#### 6. Unmarried Parents and Dependent Status of Their Children

When the parents of a child are not living together, some problems can arise concerning which of them, if either, is entitled to claim their child as a dependent. I.R.C. §152(e) goes a long way to solving many of these potential problems. But even though that section solves many problems, these problems remain if that section becomes inapplicable.

The general rule of I.R.C. §152(e) is that the custodial parent for the greater part of the calendar year is entitled to the exemption deduction if:

- 1) the child receives over half of her support from *both* parents;
- 2) the child is in the custody of *one or both* parents for more than half of the calendar year; and
- 3) the parents are either divorced or legally separated under a court decree of divorce or separate maintenance, or they are separated under a written separation agreement between them, *or they live*

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<sup>95</sup> *Id.*

<sup>96</sup> *Hastings v. Commissioner*, 16 T.C.M. (CCH) 928 (1957).

<sup>97</sup> *Svendsen v. Commissioner*, 37 T.C.M. (CCH) 1851-63 (1978).

<sup>98</sup> *Muracca*, 47 T.C.M. (CCH) at 1762.

<sup>99</sup> *See, e.g., Hastings*, 16 T.C.M. (CCH) at 928.

*apart at all times during the last six months of the calendar year.*<sup>100</sup> (Emphasis supplied.)

There are three exceptions to the above general rule:

- 1) where the custodial parent signs a written declaration that he will not claim the exemption for the year, and the noncustodial parent attaches that declaration to his return for the year;
- 2) where there is a multiple support agreement<sup>101</sup> for the child; and
- 3) if there is a pre-1985 agreement concerning claiming the exemption, the law in effect at that time is deemed to apply.

In most instances, this rule gives the dependent exemption to the parent who has the child for the longer time during the year. It does not turn on whether that parent supplied over half of the support for the child as long as the two parents (in combination) provide over half of the child's support.<sup>102</sup> In addition, any amount that is includable in the custodial parent's income as alimony under I.R.C. §71 or §682 can not be support supplied for the child by the payor.<sup>103</sup>

In all cases where the rules of I.R.C. §152(e) do not apply, the situation reverts to the balancing act created by the fractional calculations described earlier in this article.

### III. THE SUPPORT TEST VERSUS THE GROSS INCOME TEST

The I.R.C. §152(a) support test must be distinguished from the gross income test of I.R.C. §151(c)(1)(A) and (B).<sup>104</sup> The support test looks at each potential dependent and ascertains the source of all payments for her support; it ignores the potential dependent's gross income and

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<sup>100</sup> The emphasized last phrase, on its face, can apply to parents who were never married, as well as to the separated or formerly married.

<sup>101</sup> See *supra* note 44 and accompanying text.

<sup>102</sup> *Id.*

<sup>103</sup> I.R.C. §152(b)(4).

<sup>104</sup> Some Code provisions look to see only if a potential dependent is a "dependent" under I.R.C. §152. However, for other areas of the income tax, where the "dependent exemption" concept appears, both I.R.C. §152 and §151 tests apply. See *supra* notes 16-26 and accompanying text.

whether or not the sources of the payments for support come from gross income. On the other hand, the gross income test ignores the issue of what funds are used for support; it only looks at gross income as defined in I.R.C. §61.

Only after a person is determined to be a "dependent" of the taxpayer under I.R.C. §152(a) can that taxpayer attempt to claim a dependent exemption for him, and then only if two additional tests are satisfied.<sup>105</sup> The §151(c)(1) tests deal with a dependent's gross income as defined in I.R.C. §61.<sup>106</sup> Thus this test ignores the dependent's tax-free interest, prior savings, or return of capital, none of which appear in gross income. These funds do not enter into the calculation of gross income. However, if the potential dependent uses all or some of his own tax-free income or savings for his own support, those sums go into the denominator of the taxpayer's support test.

As mentioned earlier, the §151(c)(1) tests deal with a dependent's gross income as defined in I.R.C. §61. If a dependent has gross income in excess of the "exemption amount,"<sup>107</sup> the taxpayer cannot claim an exemption for that dependent because his gross income was too high. However, the gross income test has no dollar limitation for a child of the taxpayer who is under nineteen. Similarly, there is no dollar limitation for a child of the taxpayer who is a full time student and who is under twenty-four.

Thus, a twelve year old movie star may have gross income of \$1,000,000 and still satisfy the gross income test, because there is no dollar limit on the gross income test of a child of the taxpayer who is under nineteen.<sup>108</sup> However, it is a question of fact as to how much, if any, of that child's gross income was used for his own support. Generally speaking, the Service assumes that all of a dependent's income was used for his own support.<sup>109</sup> This presumption can be rebutted if it could be shown that all of his income had been saved or invested and, therefore, was not used for his own support. The problem occurs when

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<sup>105</sup> In addition to the gross income test discussed below, the dependent cannot file a joint return. I.R.C. §151

<sup>106</sup> The first clause of I.R.C. §61(a) states "Except as otherwise provided in this subtitle, gross income means...." "This subtitle" refers to subtitle A of Title 26 of the United States Code, dealing with the entire income tax.

<sup>107</sup> I.R.C. §151(d)(1) says the "exemption amount" is \$2,000. It is adjusted for inflation by I.R.C. §151(d)(4). For 1998 it was \$2,700.

<sup>108</sup> I.R.C. §151(c)(1)(B) (Law Co-op 1998).

<sup>109</sup> See question 15 on Form 2038.

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it is the dependent who uses part or all of his or her income for his or her support.<sup>110</sup> To the extent that he or she supplies his or her own support, that figure must be accounted for in the denominator of the support fraction discussed above.

Another aspect of the gross income test versus the support test is that a taxpayer may receive tax-free income, such as interest on state obligations.<sup>111</sup> If he uses all or part of the tax exempt income for his support, the fact that he is spending tax exempt income is not relevant to the issue of the support test. The Service's presumption that a potential dependent used all of his income for her own support is rebuttable only by the potential dependent showing that he or she did not use at least part of his or her income for his or her own support.<sup>112</sup>

For example, assume that the taxpayer's mother is the potential dependent, that she is collecting Social Security, and that it is all tax free to her. She generally uses most or all of her monthly Social Security check for her own support. Suppose that her daughter supplies some support in an amount approximately equal to the same dollar amount as Social Security. The Service could discount the value of some of the daughter's support, lowering the daughter's support from fifty-one percent to fifty percent, and thus the exemption would be lost. Either the taxpayer proves this element of support or she loses the exemption. This is true even though the grandmother used tax free income for some of her support.

But if the mother deposits her November and December Social Security checks into her own bank account, the amounts of those two checks would not count toward her total support, because she did not spend it on herself.<sup>113</sup> Then the daughter could claim the mother as a dependent, assuming the other tests are also satisfied.

### IV. HEAD OF HOUSEHOLD AND EARNED INCOME CREDIT

#### A. "Head of Household"<sup>114</sup>

A head of household is taxed at a rate that is lower than that applicable to other unmarried individuals.<sup>115</sup> Thus, single taxpayers

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<sup>110</sup> Treas. Reg. §1.152-1(a)(2)(ii) (as amended 1971).

<sup>111</sup> I.R.C. §103 (Law Co-op 1998).

<sup>112</sup> See *supra* note 89 and accompanying text.

<sup>113</sup> See question 15 d on Form 2038.

<sup>114</sup> Defined in I.R.C. §2(b).

have a strong incentive to try to qualify as a head of household. Qualification for this status, among other things, squarely depends on the taxpayer having someone for whom he may claim a dependent exemption.<sup>116</sup>

A head of household is an unmarried taxpayer,<sup>117</sup> who is not a surviving spouse,<sup>118</sup> and who either:

- 1) maintains his home as the principal abode for a lineal descendent for whom he can claim an I.R.C. §151 dependent exemption;<sup>119</sup> or
- 2) maintains his home as the principal abode for an unrelated<sup>120</sup> dependent for whom he can claim the dependent exemption of I.R.C. §151;<sup>121</sup> or
- 3) maintains a household (not necessarily his own) as the principal abode of his parent, who qualifies as an exemption of I.R.C. §151 for the taxpayer.<sup>122</sup>

Obviously, the "head of household" status depends on that taxpayer having a dependent exemption under I.R.C. §151, which in turn depends on that person being a "dependent" under I.R.C. §152.

<sup>115</sup> Compare I.R.C. §1(b) with §1(c). This rate is set between the unmarried rate and the joint return rate.

<sup>116</sup> See notes 16-24 and accompanying text.

<sup>117</sup> A married person is defined in I.R.C. §7703(a) as one legally married at the end of the year, except one who is legally separated or divorced. In addition, I.R.C. §7703(b) treats as unmarried a married person who maintains the principal abode of a child who qualifies him or her for a dependent exemption, who supplies over half of the support of that household, and whose spouse has not lived in that household during the last six months of the year.

<sup>118</sup> Defined in I.R.C. §2(a).

<sup>119</sup> I.R.C. §2(b)(1)(A)(i) (Law Co-op 1998). Married lineal descendants of the taxpayer may also qualify as long as the taxpayer is entitled to a dependent exemption for that person. Remember that I.R.C. §151(c)(2) says that if such dependent files a joint return, the dependent exemption is disallowed if they file a joint return. In addition, these lineal dependents will still be deemed to qualify even if they would fail to qualify for a dependent exemption solely because of I.R.C. §152(e)(2) or (4).

<sup>120</sup> A dependent who satisfies the relationship test by virtue of I.R.C. §152(a)(9).

<sup>121</sup> I.R.C. §2(b)(1)(A)(ii) (Law Co-op 1998).

<sup>122</sup> I.R.C. §2(b)(1)(B) (Law Co-op 1998).

*B. Earned Income Credit.*

The complexities of the Earned Income Credit (EIC)<sup>123</sup> are well beyond the scope of this article. However, "support" does have a role, albeit a small role, in determining whether a taxpayer may avail himself or herself of the EIC.

An "eligible individual" for the credit is either one with a "qualifying child,"<sup>124</sup> or, if that individual does not have a "qualifying child," an individual who can satisfy each of these three tests:

- 1) that individual's principal place of abode is in the United States for more than one half of a year; and
- 2) that individual has attained age 25, but not 65, by the end of the year; and
- 3) that individual cannot be claimed as an exemption by another taxpayer under I.R.C. §151.<sup>125</sup>

The other role of support with respect to the EIC is that a "qualifying child," if married, must also qualify the taxpayer for a dependent exemption for that child.<sup>126</sup>

V. CONCLUSIONS

"Support" has many ramifications in federal income tax law. Many of them involve Code sections that specially target low income taxpayers, such as the Earned Income Credit. Others, such as the dependent exemption, are of general application, but indirectly target tax indigents because the potential benefits of these sections are often a significantly large part of their tax liability.

Conceptually, the definition of support is rather clear. In practice, most tax indigents who bear the burden of proving that they supplied over half of another person's support have no notion of how to prove those facts. Even if the taxpayer is sent a Form 2038, without guidance he or she may have no way of determining the dollar sums, such as the

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<sup>123</sup> I.R.C. §32 (Law Co-op 1998).

<sup>124</sup> I.R.C. §32(c)(1)(A)(i) (Law Co-op 1998).

<sup>125</sup> I.R.C. §32(c)(1)(A)(ii)(III) (Law Co-op 1998).

<sup>126</sup> In effect, this usually means that the married child did not file a joint return with her spouse. I.R.C. §151 (Law Co-op 1998).

fair rental value of a furnished home. The neat category of "food" can be hard to prove exactly, as can the amount spent on clothing for a potential dependent.

The creation of other tax clinics, the aim of I.R.C. §7526, clearly will help tax indigents by providing them with knowledgeable advisors. But often the advice comes too late, because the deficiency has already been assessed. It would make sense for the Service to include two Forms 2038 in the annual forms mailing with instructions to file only if the taxpayer is claiming dependent exemptions other than for children living with both parents. It would also be helpful if the Service had a WATS line dedicated to issues of support and the associated concepts.



