Office of Chief Counsel
Internal Revenue Service
memorandum

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Commissioner, Wage & Investment Division

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subject: Administration of the Child Tax Credit for Objectors to Social Security Numbers

Section 24(h)(7) of the Internal Revenue Code, applicable to taxable years 2018 through 2025, requires all taxpayers claiming the child tax credit (CTC) to provide their qualifying children's social security numbers (SSNs) on their returns. Some taxpayers object to obtaining SSNs for themselves or for their children for religious or other conscience-based reasons.

Issue

Must the Service administratively accommodate taxpayers with religious or conscience-based objections to obtaining SSNs?

Conclusion

No, the Service need not provide administrative relief for these taxpayers.

- The Supreme Court and other Federal courts have long held that requiring a person to provide a dependent child's SSN in order to obtain a tax benefit or other government benefits is valid under the First Amendment to the Constitution, if (1) the statute requiring the SSN is facially neutral and applies to all applicants, and (2) the use of the SSN clearly promotes a legitimate and important public interest.

- Under the Religious Freedom Restoration Act of 1993 (RFRA), the government may not substantially burden the free exercise of religion, even if a statute is facially neutral and applies to all applicants, unless it demonstrates that the burden (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that interest.

- In implementing section 24(h)(7), the Service has compelling governmental interests to ensure uniform and orderly tax administration and to prevent improper CTC claims. For the Service, the least restrictive, and the only, means to further those compelling interests is to require a qualifying child's eligible SSN.

Background

Taxpayer Identification Number Requirement of Section 151,[1] and the Administrative Exception for Certain Taxpayers

Under section 151(e), a taxpayer (and the taxpayer's spouse, if married and filing a joint return) claiming a personal exemption deduction for any individual must provide "the TIN of such an individual . . . on the return claiming the exemption." A TIN, or a taxpayer identification number, may be an SSN issued by the Social Security Administration (SSA), an individual taxpayer identification number (ITIN, for individuals ineligible for an SSN) issued by the Service or an adoption taxpayer identification number (ATIN, temporary numbers for children placed in prospective adoptive parents' households) also issued by the Service.[2]

The Service has applied an administrative exception to the TIN requirement under section 151(e).[3] Under this exception, the Service permits taxpayers with religious or conscience-based objections to obtaining SSNs to claim the personal exemption deduction without providing any TIN. This administrative exception, however, does not apply to section 32 (earned income credit or EIC). Section 32(c), by way of section 32(m), requires that an eligible taxpayer seeking EIC based on a qualifying child include the child's SSN.[4] The Service does not permit taxpayers who object to obtaining SSNs to claim the EIC without SSNs.

This differing treatment is justified by the text of section 32 and is consistent with the holding of a 1986 Supreme Court case. In Bowen v. Roy, the Supreme Court held that the Department of Health and Human Services did not violate the Free Exercise clause of the First Amendment when it required an individual to provide a dependent child's SSN in order to obtain welfare benefits.[5] The Court found that the statute requiring the SSN was "wholly neutral in religious terms and uniformly applicable" and that the SSN requirement was "a reasonable means of promoting a legitimate public interest."[6]

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[1] Under section 151(d)(5), the amount for each personal exemption deduction is zero for taxable years 2018 through 2025.

[2] See generally §§ 301.6109-1(a)(1), -3, Proced. Admin. Regs. Section 7701(a)(41) defines the term "TIN" as "identifying number assigned to a person under section 6109."

[3] See, e.g., CCA 199950034 (Oct. 21, 1999).

[4] Sec. 32(c)(1)(F), (c)(3).

[5] 476 U.S. 693 (1986).

[6] Roy, 476 U.S. at 703, 708. See also United States v. Lee, 455 U.S. 252 (1982); Hansen v. Dept. of Treasury, 528 F.3d 597 (9th Cir. 2007).

Initially, the administrative exception from the section 151(e) TIN requirement applied only to the dependents of those taxpayers who proved themselves exempt from self-employment taxes under section 1402(g). Generally, under section 1402(g), members of recognized religious sects who are adherents of established tenets of the sect and are conscientiously opposed to accepting the benefits of any public or private insurance for old age, death, disability, retirement, or medical care may be exempted from paying self-employment taxes. To be exempt from self-employment taxes under section 1402(g), these taxpayers must first receive approval from SSA and the Service by filing a Form 4029, Application for Exemption from Social Security and Medicare Taxes and Waiver of Benefits.[7] To complete Forms 4029 properly, these taxpayers must provide SSNs for themselves.[8] These taxpayers need not obtain SSNs for their dependents, however, and would write the words "Form 4029," "Amish," and the like, wherever dependents' TINs are required on the tax returns. The Service then would allow the personal exemption deductions for the dependents and most other dependent tax benefits[9] claimed on those returns.

In 2001, the Service modified the section-1402(g)-based exception, and started accommodating all taxpayers with conscientious objections to obtaining SSNs or TINs. The change extended the reach of the administrative exception for the personal exemption deduction beyond the scope of section 1402(g). Although the personal exemption deduction is suspended for taxable years 2018 through 2025, the Service continues to apply the administrative exception as modified in 2001 to certain other dependent tax benefits.

The Child Tax Credit before TCJA

Before the enactment of the Tax Cuts and Jobs Act (TCJA) substantially amended section 24,[10] a taxpayer was allowed the CTC of up to $1,000 per qualifying child.[11] The CTC could be refundable to the extent that it exceeded the taxpayer's tax liability. The refundable portion of the CTC was known as the additional child tax credit (ACTC).[12] The taxpayer was required to provide each qualifying child's "taxpayer

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[7] Under section 1402(g), the process for obtaining an exemption from self-employment tax is divided between SSA (which determines whether a sect qualifies) and the Service (which determines whether an individual qualifies for the exemption).

[8] For SSA's standard operating procedures for assigning SSNs to individuals covered under section 1402(g), see Social Security Administration Program Operations Manual System, RM 10225.035 (available at http://policy.ssa.gov/poms.nsf/lnx/0110225035, last accessed on Mar. 26, 2019).

[9] E.g., benefits under sections 21 (dependent care credit), 23 (adoption credit), 25A (education credit). As discussed later, for 2017 and earlier taxable years, this administrative relief was available for the CTC under section 24.

[10] Pub. L. No. 115-97, § 11022(a), 131 Stat. 2054, 2073 (2017).

[11] For purposes of CTC, a qualifying child is a qualifying child of the taxpayer (as defined in section 152(c)) who has not attained age 17. Sec. 24(c)(1).

[12] Sec. 24(a), (d).

identification number" to receive the CTC (including the ACTC).[13] The pre-TCJA section 24 did not require a qualifying child's SSN. The Service applied the administrative exception developed for section 151(e) to the CTC.

The Child Tax Credit after TCJA

TCJA added subsection (h) to section 24. Section 24(h) applies to taxable years 2018 through 2025. Under section 24(h)(1), the amount of the credit has increased to $2,000 per qualifying child, up to $1,400 of which is refundable as ACTC. Under section 24(h)(7),[14] the taxpayer is now required to provide an eligible SSN for each qualifying child in order to receive the CTC (including the ACTC). An eligible SSN must be issued by SSA to a United States citizen or an alien authorized for employment in the United States.

In addition to changing the CTC rules, TCJA provides a new nonrefundable credit. Under section 24(h)(4), a taxpayer is allowed a partial CTC (popularly known as the credit for other dependents or ODC) of up to $500 for any qualifying dependent who is not a qualifying child for CTC purposes. Under section 24(h)(4)(C), the ODC is also allowable for any qualifying child ineligible to be claimed for the full $2,000 CTC solely because the child does not have an eligible SSN.[15] Under section 24, as amended by TCJA, therefore, a taxpayer who has a qualifying child and satisfies all relevant requirements may receive either a full or a partial CTC. However to claim the full CTC, the child must have an eligible SSN.

Religious Freedom Restoration Act of 1993[16]

RFRA prohibits the federal government from "substantially burden[ing] a person's exercise of religion" unless it demonstrates that application of the burden to the person (1) "is in furtherance of a compelling governmental interest" and (2) "is the least

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[13] Sec. 24(e).

[14] Section 24(h)(7) provides that a child's TIN must be an SSN valid for employment issued before the due date of the tax return:

> (7) Social security number required. No credit shall be allowed under this section to a taxpayer with respect to any qualifying child unless the taxpayer includes the social security number of such child on the return of tax for the taxable year. For purposes of the preceding sentence, the term "social security number" means a social security number issued to an individual by the Social Security Administration, but only if the social security number is issued--
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> (A) to a citizen of the United States or pursuant to subclause (I) (or that portion of subclause (III) that relates to subclause (I)) of section 205(c)(2)(B)(i) of the Social Security Act, and
>
> (B) before the due date for such return.

[15] For purposes of ODC, a qualifying dependent is a dependent of the taxpayer, and a qualifying child not having an eligible SSN is treated as a qualifying dependent eligible for ODC. Sec. 24(h)(4)(A), (C).

[16] Pub. L. No. 103-141, 107 Stat. 1488 (1993), codified at 42 USC § 2000bb et seq. The description of RFRA is based on the Department of Justice Memorandum on Federal Law Protections for Religious Liberty (Oct. 6, 2017) (available at https://www.justice.gov/opa/press-release/file/1001891/download).

restrictive means of furthering that compelling governmental interest."[17] RFRA applies even where the burden arises out of a "rule of general applicability" passed without animus or discriminatory intent.[18] It applies to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[19]

Subject to a limited number of exceptions not relevant here, a law "substantially burden[s] a person's exercise of religion," if it bans an aspect of the adherent's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice. The denial of, or condition on the receipt of, government benefits may substantially burden the exercise of religion,[20] as does the threat of criminal sanction.[21]

To justify a substantial burden on a person's exercise of religion, the government must demonstrate its application to the person furthers a compelling governmental interest.[22] "Only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."[23] Those governmental interests include the "fundamental, overriding interest in eradicating racial discrimination in education,"[24] and the interest in ensuring the "mandatory and continuous participation" that is "indispensable to the fiscal vitality of the social security system."[25]

Even if the government can identify a compelling interest, the government must also show that it is using the least restrictive means to further that compelling governmental interest.[26] This requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which may include expending additional funds, modifying existing exemptions, or creating a new program.[27] If there are exemptions for other individuals or entities that could be expanded to accommodate the claimant, while still serving the government's stated interests, the government's defense against an RFRA claim will generally fail, as the government bears the burden to establish that no accommodation is viable.[28]

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[17] 42 U.S.C. § 2000bb-1(a), (b).

[18] "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

[19] 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A).

[20] Sherbert v. Verner, 374 U.S. 398, 405-406 (1963).

[21] Yoder, 406 U.S. at 208, 218.

[22] 42 U.S.C. § 2000bb-1(b)(1).

[23] Thomas v. Review Bd. Of Ind. Emp't Sec. Div., 450 U.S. 707, 718 (1981) (alteration in original) (quoting Yoder, 406 U.S. at 215).

[24] Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983).

[25] United States v. Lee, 455 U.S. 252, 258-259 (1982).

[26] 42 U.S.C. § 2000bb-1(b)(2).

[27] See Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728-729 (2014).

[28] See Hobby Lobby, 573 U.S. at 730-731.

Application of RFRA to CTC Allowance

Substantial Burden on Religious Exercise

The SSN requirement under section 24(h)(7) is a "rule of general applicability" and reflects no animus or discriminatory intent toward taxpayers with religious or conscientious objections to obtaining SSNs. The strict application of the requirement for an SSN may substantially burden taxpayers who, because of their sincerely held belief, object to obtaining SSNs for their otherwise qualifying children, thereby losing entitlement to the CTC. Arguably, the SSN requirement does not substantially burden the religious exercise of members of religious sects or denominations to whom section 1402(g) applies, as many members will obtain SSNs in the course of their lives in order to seek exemption from social security taxes.[29] In the case of those who object to obtaining SSNs outside the framework of section 1402(g), however, the requirement may substantially burden the affected taxpayers' exercises of religion by forcing a choice between their religious belief and the full amount of the CTC.

Compelling Governmental Interests: Uniform Tax Administration and Denial of Benefits to Aliens Not Authorized for Employment in the United States

The Supreme Court in Hernandez v. Commissioner considered whether the Service's disallowance of payments for auditing and training sessions as a charitable contribution under section 170 violated a taxpayer's free exercise of religion under the First Amendment. Stating "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden," the Court found a compelling interest in that "'[t]he tax system could not function if denominations were allowed to challenge the tax system' on the ground that it operated 'in a manner that violates their religious belief.'"[30]

The Tax Court has consistently held that Code provisions and related administrative rules, including those requiring taxpayers to provide SSNs, are based on compelling governmental interests. In Miller v. Commissioner, the taxpayers invoked RFRA to challenge the requirement to provide SSNs to claim personal exemption deductions for their dependents, and instead offered to apply for ITINs for them. The Tax Court found that "the Government has a compelling interest in effectively tracking claimed dependency exemptions" and that "[e]nforcing the SSN requirement . . . supports the Government's compelling interest in implementing the Federal tax system in a uniform, mandatory way."[31]

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[29] See note 8 above and the text accompanying it.

[30] Hernandez v. Commissioner, 490 U.S. 680, 699-700 (1989) (quoting Lee, 455 U.S. at 260).

[31] Miller v. Commissioner, 114 T.C. 511 , 516, 517 (2000). Miller did not involve the application of section 1402(g). Nevertheless, the Tax Court took note of the Service's practice of allowing the personal exemption deductions to taxpayers to whom section 1402(g) applied. See Miller, 114 T.C. at 517-18.

In Cansino v. Commissioner, the taxpayers challenged the TIN requirement of section 151(e) on grounds that it violated the Due Process clause of the Fifth Amendment as well as RFRA. Noting that "deductions are strictly a matter of legislative grace" and that "a taxpayer must satisfy requirements for any deduction claimed," the Tax Court emphasized the Miller holding:

> It is settled in this Court that the SSN requirement is the least restrictive means of achieving the Government's compelling interests in implementing the Federal tax system in a uniform, mandatory way and in detecting fraudulent claims to dependency exemptions. The SSN serves as a mechanism in determining whether an SSN has been claimed on another return for the year and serves as verification of the existence of a claimed dependent. Petitioners' attempt at limiting the applicability of section 151(e) is, therefore, without merit.[32]

The legislative history of section 24(h)(7) suggests that Congress added the SSN requirement for the CTC in an effort to make the CTC eligibility criteria comparable to those for EIC eligibility. In discussing the addition of section 24(h)(7), the Conference Report for TCJA observes that, under section 32(m), the EIC is allowable based only on those dependent children who are eligible for and do have SSNs.[33] Section 32(m) was added to the Code when Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).[34] In the legislative history of PRWORA, Congress clearly indicated that individuals not authorized for employment in the United States should not be able to claim the EIC.[35] In light of this direct and indirect legislative history, the SSN requirement of section 24(h)(7) reflects not only a compelling governmental interest in maintaining the tax system in a uniform manner (as the Supreme Court suggested and the Tax Court recognized) but also another compelling governmental interest in preventing children who neither are United States citizens nor are authorized for employment in the United States from being claimed by taxpayers for the CTC. For more than two decades Congress has consistently expressed this other compelling interest by introducing a number of Code provisions requiring SSNs or otherwise preventing aliens not authorized for employment in the United States from receiving various tax benefits.[36]

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[32] Cansino v. Commissioner, T.C. Memo. 2001-134, at *4 (internal citations omitted). See also Turnidge v. Commissioner, T.C. Memo. 2003-169 (denying a personal exemption deduction for a dependent without an SSN).

[33] H.R. Rep. No. 115-466, at 230-233 (2017) (Conf. Rep.).

[34] Pub. L. No. 104-193, 110 Stat. 2105 (1996). What now is section 32(m) was added by section 451 of PRWORA.

[35] H.R. Rep. No. 104-651, at 1455 (1996).

[36] For example, section 36B(e) provides that the premium tax credit for a family may not take into account any family member who is not lawfully present in the United States. Similarly, section 36A, now repealed, limited the making work pay credit to taxpayers who provided their SSNs. Under section 36A, taxpayers with TINs that were not SSNs were ineligible for the credit.

Least Restrictive Means of Furthering the Compelling Governmental Interests

To implement section 24(h)(7) in accordance with RFRA, the Service must employ the least restrictive means of furthering the compelling governmental interests of uniform and orderly tax administration and denial of tax benefits claimed based on children who are aliens not authorized for employment in the United States. In light of the unambiguous language of section 24(h)(7), the least restrictive, and indeed the only, means to further those compelling interests is to require a qualifying child's eligible SSN for CTC. The Service has no "viable alternative"[37] to implement this clear congressional mandate to require an eligible SSN for a qualifying child. The Service's over-20-year policy of disallowing EIC under section 32 to taxpayers who do not provide their qualifying children' SSNs further underscores the propriety of implementing section 24(h)(7) as written.

Administering the pre-TCJA CTC under the Service's existing administrative exception to the TIN requirement of section 151(e) was reasonable, because a "taxpayer identifying number" referred to in section 24(e) means not only an SSN, but also an ITIN, ATIN, or other taxpayer identification number that the Service may define. It is unreasonable, however, to expand this exception to the realm of section 24(h)(7) because the statute clearly requires an SSN of a qualifying child. The Service is authorized to issue certain taxpayer identifying numbers under section 6109 but has no authority to issue SSNs. If the Service were to expand the existing administrative exception to section 24(h)(7) in an attempt to provide a less burdensome method for obtaining a taxpayer identifying number, the Service would be ignoring the mandate in the statute that specifically calls for a particular type of identifying number (an SSN) issued by another agency (SSA). In addition, it would be ignoring the statutory distinction between the benefits available to an individual having a SSN and those available to an individual not having an SSN.

The existence of the administrative exception to the TIN requirement under section 151(e) raises a question as to whether the SSN requirement of section 24(h)(7) is indeed the least restrictive means of furthering the government's interests in uniform tax administration and denial of benefits to aliens not authorized for employment. In Burwell v. Hobby Lobby Stores, Inc., three closely held for-profit corporations brought an RFRA challenge against a regulatory requirement imposed by the Departments of Health and Human Services, Labor and the Treasury (the Departments) that specified employer group health plans should provide coverage for a number of contraceptive methods without cost sharing. The Supreme Court held, among other things, that the Departments had failed to prove that enforcement of the contraceptive mandate was the least restrictive means of furthering the government's asserted compelling interests in promoting public health and gender equality. Noting that the Departments had already developed an accommodation for nonprofit organizations with religious objections to the

[37] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).

regulation at issue, the Court ruled that not making a similar accommodation available for closely held for-profit corporations puts that regulation in violation of RFRA.[38]

The Court's holding in Hobby Lobby does not require the IRS to apply an administrative exception in administering the CTC. First, the SSN requirement of section 24(h)(7) is statutory and can be altered only by Congress, while the contraceptive mandate at issue in Hobby Lobby was purely regulatory. Second, and more importantly, the Departments had a program in place that they could modify to accommodate for-profit corporations as well as nonprofit organizations. In contrast, the existing administrative exception for personal exemption deductions cannot be modified to meet the requirements of section 24(h)(7) and accommodate taxpayers with conscience-based objections to obtaining SSNs.

If you have any questions about this advice, please call this office.

[38] Hobby Lobby, 573 U.S. at 728-731.