United States Tax Court

T.C. Memo. 2022-10

JAMES LEE HICKS, JR.,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 10406-17. Filed February 23, 2022.

James Lee Hicks, Jr., pro se.

Emly B. Berndt, *John D. Davis*, and *Nancy P. Klingshirn*, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

GALE, *Judge*: Respondent determined a deficiency in petitioner's 2014 federal income tax of $3,975. The issues for decision are whether petitioner is entitled to dependency exemption deductions under section 151(a) and (c) and child tax credits under section 24(a).[1]

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The Stipulation of Facts and its Exhibits are incorporated herein by this reference. Petitioner resided in Ohio when he filed his Petition.

[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, all regulation references are to the Code of Federal Regulations, Title 26 (Treas. Reg.), in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

Served 02/23/22

[*2] Petitioner and Oddimissia N. Johnson had two children together who were minors in 2014. Petitioner and Oddimissia never married and were living separately throughout 2014. During 2014 Oddimissia and her mother, Juanita Johnson, lived in the same principal place of abode and the children resided with Oddimissia and Juanita for more than one-half of the year. Petitioner provided over one-half of the children's support for 2014.

On June 15, 2006, the Summit County Court of Common Pleas Domestic Relations Division (state court) adopted a "Shared Parenting Plan" that had been signed by petitioner and Oddimissia, which provided, inter alia, that "Mother [Oddimissia] will claim [Child 1[2]] every year and Father [petitioner] will claim [Child 2] every year for tax purposes unless [the] parties reach another agreement in writing."

The state court later entered an order and judgment on October 28, 2009, which adjusted petitioner's and Oddimissia's child support obligations and further stated: "Effective tax year 2009, Father [petitioner] shall claim the dependency exemption for both minor children each year." The October 2009 order and judgment were not signed by Oddimissia or petitioner.

A state court order entered on August 26, 2010, and in effect for the 2014 taxable year modified the periods in which each parent would have physical custody of the children. Under this arrangement petitioner had physical custody of the children for less than one-half of 2014 and Oddimissia had physical custody for more than one-half of that year. This August 2010 order did not modify the October 2009 order, which provided that petitioner "shall claim" the dependency exemption for both children each year.

Petitioner timely filed his 2014 federal income tax return, on which he claimed dependency exemption deductions and child tax credits for the two children. Petitioner did not attach any of the following to his 2014 return: (1) Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent, (2) a written declaration or any other waiver signed by Oddimissia, or (3) a pre-2008 court decree or separation agreement. He has, however, since

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[2] Although the Shared Parenting Plan refers to the children by their full names (which the parties have properly redacted), the Court typically refers to minor children only by their initials. *See* Rule 27(a)(3). Because the children in this case have identical initials, for clarity we refer to them as Child 1 and Child 2.

[*3] given respondent a copy of the Shared Parenting Plan that Oddimissia signed and the state court adopted in 2006.

Oddimissia did not file a federal income tax return for 2014.[3] Juanita did so, and she claimed a dependency exemption deduction for Oddimissia and for each of the two children on that return.

Respondent subsequently issued a notice of deficiency to petitioner denying the dependency exemption deductions and the child tax credits he claimed for the children. Petitioner filed a timely Petition for redetermination.

OPINION

I. *Burden of proof*

In general, the Commissioner's determinations set forth in a notice of deficiency are presumed correct, and the taxpayer bears the burden of proving otherwise. Rule 142(a); *Welch v. Helvering*, 290 U.S. 111, 115 (1933). The taxpayer bears the burden of proving entitlement to any deduction or credit claimed. *Segel v. Commissioner*, 89 T.C. 816, 842 (1987). Petitioner does not contend that the burden of proof should shift to respondent under section 7491(a), nor has he established that the requirements for shifting the burden of proof have been met. Accordingly, the burden of proof remains on petitioner. *See* § 7491(a)(2).

II. *Dependency exemption deduction*

Section 151(a) and (c) allows a taxpayer a deduction for each individual who is a dependent of the taxpayer as defined in section 152. Section 152(a) defines the term "dependent" to mean either a "qualifying child," *see* § 152(a)(1), (c), or a "qualifying relative," *see* § 152(a)(2), (d), of the taxpayer. We note that while respondent failed to address the issue of whether the children are qualifying relatives of petitioner, such an inquiry is necessary to determine whether he is entitled to any dependency exemption deductions for 2014.

A. *Qualifying child*

In order to be a taxpayer's qualifying child, an individual must: (A) bear a specified relationship to the taxpayer, including being a child

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[3] Respondent's computer-generated transcripts for Oddimissia for 2014 show that she attempted to file a return for that year but that respondent rejected it.

[*4] or grandchild thereof; (B) have the same principal place of abode as the taxpayer for more than one-half of the taxable year; (C) meet certain age requirements; (D) have not provided more than one-half of his or her own support for the year; and, if married, (E) have not filed a joint return (other than only for a claim of refund) with his or her spouse. § 152(c)(1) and (2).

Petitioner concedes that the children resided with Oddimissia for more than one-half of 2014. Thus, the children did not have the same principal place of abode as petitioner for more than one-half of 2014 and, for that reason, are not his qualifying children for 2014. *See* § 152(c)(1)(B).

B. *Qualifying relative*

The term "qualifying relative" means an individual: (A) who bears a specified relationship to the taxpayer, including being a child or grandchild thereof; (B) whose gross income is less than the exemption amount ($3,950 for 2014); (C) with respect to whom the taxpayer provides over one-half of his or her support; and (D) who is not a qualifying child of the taxpayer or of any other taxpayer. § 152(d)(1) and (2).

Respondent concedes that petitioner provided over one-half of the children's support for 2014, and they satisfy the foregoing relationship and income tests.[4] We shall therefore examine whether the children are the qualifying children of any other taxpayer, as we have already determined that the children are not the qualifying children of petitioner.

The children meet the requirements under section 152(c)(1) to be the qualifying children of both Oddimissia and Juanita: (A) they are the children of Oddimissia and the grandchildren of Juanita; (B) they had the same principal place of abode as Oddimissia and Juanita for more than one-half of 2014;[5] (C) they were minors during 2014; (D) each did

[4] We are satisfied on this record that neither child had income exceeding $3,950 for 2014, as the parties have stipulated they were both minors in that year.

[5] We note that petitioner concedes that the children lived with Oddimissia for more than one-half of 2014. Oddimissia and Juanita lived in the same principal place of abode for 2014. Therefore by extension the children lived with Juanita for more than one-half of 2014.

[*5] not provide more than one-half of his own support for 2014; and (E) they did not file joint returns for 2014.[6]

A "tie-breaker" rule under section 152(c)(4)(A) provides that if an individual "may be claimed as a qualifying child" by two or more taxpayers, such individual shall be treated as the qualifying child of the taxpayer who is the parent of the individual (or, if a parent does not so qualify, the taxpayer with the highest adjusted gross income for the taxable year). However, section 152(b)(1) provides that if an individual is a dependent of a taxpayer for any taxable year, that individual shall be treated as having no dependents for that year. Since Juanita claimed Oddimissia as a dependent for 2014, Oddimissia is treated as having no dependents in 2014 under section 152(b)(1). Consequently the children may not be claimed as qualifying children by Oddimissia for 2014, and the tie-breaker rule under section 152(c)(4)(A) does not apply. Accordingly, the children are treated as the qualifying children of Juanita for 2014.

Since the children are the qualifying children of Juanita for 2014, they cannot be the qualifying relatives of petitioner for that year. *See* § 152(d)(1)(D).

C. *Special rule for separated parents*

As we have explained, the children are not qualifying children of petitioner for 2014 under the usual requirements of section 152(c) because they did not have the same principal place of abode as petitioner for more than one-half of the year, as required by section 152(c)(1)(B). However, section 152(e) establishes a special rule for children of divorced or separated parents. Under this special rule, if several criteria are satisfied, a child may be treated as the qualifying child of a parent with whom he or she did not share a principal place of abode for a sufficient portion of the year, regardless of the usual requirement of section 152(c)(1)(B) or the tie-breaker rule of section 152(c)(4).[7] *See*

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[6] We are satisfied that as minors the children were not married and therefore ineligible to file such returns.

[7] When the relevant criteria are satisfied, section 152(e) also allows a child to be treated as a qualifying relative of a parent who has not provided over one-half of the child's support for the calendar year as required by section 152(d)(1)(C). But as we have explained, in this case the reason the children are not petitioner's qualifying relatives is the requirement in section 152(d)(1)(D) that a taxpayer's qualifying relative not be a qualifying child of any other taxpayer. Section 152(e) does not alter that

[*6] § 152(e); *Swint v. Commissioner*, 142 T.C. 131, 133 (2014); *Seeliger v. Commissioner*, T.C. Memo. 2017-175, at *4–6.

Section 152(e) applies to a child who is in the custody of one or both parents for more than one-half of a calendar year, receives over one-half of his or her support during the year from his or her parents, and whose parents are divorced, separated, or living apart throughout the last six months of the year. § 152(e)(1). When section 152(e) applies, a child is generally treated as the qualifying child of the "custodial parent." *See* § 152(e)(1), (4); *Swint*, 142 T.C. at 133. The custodial parent is "the parent having custody [of the child] for the greater portion of the calendar year," while the "noncustodial parent" is "the parent who is not the custodial parent." § 152(e)(4); *see also Maher v. Commissioner*, T.C. Memo. 2003-85, slip op. at 10 (stating that the Court has repeatedly looked to where a child resided to determine which parent had physical custody for purposes of section 152(e)(1)); Treas. Reg. § 1.152-4(d)(1).

Petitioner provided over one-half of the children's support for 2014, and he and Oddimissia lived apart throughout the year. Additionally, as we have noted, petitioner concedes that the children resided with Oddimissia for more than one-half of 2014. We therefore find that, for purposes of section 152(e), Oddimissia was the children's custodial parent and petitioner was their noncustodial parent for 2014. Accordingly, both children would ordinarily be treated as Oddimissia's qualifying children, and she would thus ordinarily be entitled to claim both dependency exemption deductions pursuant to sections 151(c) and 152(a).

However, a child is instead treated as the qualifying child of the noncustodial parent—thus shifting the right to claim the dependency exemption deduction for that child to the noncustodial parent—if two conditions are met: (1) the custodial parent "signs a written declaration (in such manner and form as the Secretary may by regulations prescribe)" stating that he or she "will not claim such child as a dependent" for the year at issue, and (2) the noncustodial parent "attaches" the written declaration to his or her return for that year. § 152(e)(2). Consequently, as the noncustodial parent, petitioner's eligibility to claim a dependency exemption deduction for either child for

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requirement, and therefore does not affect our conclusion that the children are not qualifying relatives of petitioner for 2014.

[*7] 2014 depends on whether these written declaration and attachment requirements have both been satisfied.[8]

1. *Written declaration requirement*

The written declaration requirement may be satisfied either by a completed Form 8332 or by a statement conforming to the substance of Form 8332. *See Swint*, 142 T.C. at 133–34 (citing *Miller v. Commissioner*, 114 T.C. 184, 189 (2000)); Treas. Reg. § 1.152-4(e)(1)(ii). Form 8332 provides a uniform method for a custodial parent to make the written declaration necessary to relinquish his or her right to claim a child as a dependent in favor of a noncustodial parent. *See Swint*, 142 T.C. at 134 (citing *Armstrong v. Commissioner*, 139 T.C. 468, 472 (2012), *aff'd*, 745 F.3d 890 (8th Cir. 2014)).

Because petitioner did not provide a completed Form 8332 to respondent, he could have satisfied the written declaration requirement only by means of some other document conforming to the substance of Form 8332. The only other documents in the record that purport to shift the right to claim the children as dependents from Oddimissia to petitioner—and thus the only other documents that could potentially stand in place of a Form 8332—are two state court orders: the Shared Parenting Plan entered in 2006, which stated that each parent was entitled to "claim" one of the two children for tax purposes, and the order entered in 2009, which stated that petitioner "shall claim" the dependency exemption deductions for both of the children beginning with the 2009 taxable year.

"[A] court order or decree or a separation agreement entered prior to July 2, 2008, can be a written declaration *if* it satisfies the other requirements in effect at the time of entry." *Swint*, 142 T.C. at 136 (citing Treasury Regulation § 1.152-4(e)(5)). However, a court order entered after July 2, 2008, does not satisfy the written declaration requirement for any taxable year beginning after that date. *See* Treas. Reg. § 1.152-4(e)(1)(ii), (h). Consequently the state court order entered in 2009 cannot satisfy the written declaration requirement for petitioner's 2014 taxable year. But the Shared Parenting Plan *can* satisfy that requirement, as long as it meets the requirements governing

[8] As discussed *infra* Part 2, respondent has waived the attachment requirement under the circumstances of this case. *See* Prop. Treas. Reg. § 1.152-5(e)(2)(i), 82 Fed. Reg. 6370, 6387 (Jan. 19, 2017).

[*8] written declarations for purposes of section 152(e) that were in effect when the state court entered it in 2006.

In 2006 section 152(e)(2)(A) provided that a custodial parent could release his or her claim to a dependency exemption deduction for a child by "sign[ing] a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent."[9] Our precedents make clear that this provision imposes several requirements on any document that a taxpayer offers as a written declaration for purposes of section 152(e). First, it must be signed by the custodial parent. *See Swint*, 142 T.C. at 136–37. Second, it must not place any conditions on the custodial parent's declaration that he or she will not claim a child as a dependent. *See id.* at 137–39. And third, it must otherwise meet the manner and form requirements the Secretary has prescribed by regulation. *See Miller*, 114 T.C. at 188–90.

The Shared Parenting Plan meets all of these requirements. In addition to bearing Oddimissia's signature, it grants petitioner the unconditional right to "claim" one child "every year for tax purposes unless [the] parties reach another agreement in writing." We are aware of no written agreement between Oddimissia and petitioner that limits this right. Although the state court modified the Shared Parenting Plan in its 2009 order (which neither Oddimissia nor petitioner signed,[10] though the order represents that they both agreed with its terms), those modifications did not diminish, for federal income tax purposes, the right that Oddimissia granted to petitioner in the Shared Parenting Plan. Rather, the 2009 order purported to expand that right by allowing petitioner to claim both children instead of just one. The agreement reflected in the Shared Parenting Plan therefore remains in effect, regardless of the later state court order purporting to expand on that agreement.

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[9] This provision was first enacted in 1984. *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 423(a), 98 Stat. 494, 799. Although section 152(e)(2)(A) was briefly amended in 2004, *see* Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 201, 118 Stat. 1166, 1173, that amendment was retroactively repealed in 2005, *see* Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, § 404(a), (d), 119 Stat. 2577, 2632–34.

[10] We note that the lack of Oddimissia's signature means that the 2009 order would not satisfy the written declaration requirement even if Treasury Regulation § 1.152-4(e)(1)(ii) and (h) did not independently prevent the 2009 order from satisfying that requirement because it was entered after July 2, 2008.

[*9] Finally, the Shared Parenting Plan also comports with the other manner and form requirements prescribed by the regulations that were in effect in 2006. At that time, a noncustodial parent could satisfy the written declaration requirement with either a completed Form 8332 or a statement conforming to the substance of Form 8332. *See Himes v. Commissioner*, T.C. Memo. 2010-97, slip op. at 5; Temp. Treas. Reg. § 1.152-4T(a), Q&A (3) (1984) (removed by T.D. 9408, 2008-33 I.R.B. 323). Therefore, if the Shared Parenting Plan conformed to the substance of Form 8332, it could have been used to satisfy the written declaration requirement.

"In order for a document to qualify as a statement conforming to the substance of Form 8332, it must contain substantially the same information required by Form 8332." *Miller*, 114 T.C. at 191. Form 8332 would have required: (1) the names of the children for whom exemption claims were released; (2) the years for which the claims were released; (3) the custodial parent's signature; (4) the date of the custodial parent's signature; (5) the noncustodial parent's name; and (6) both parents' Social Security numbers. *See Himes*, T.C. Memo. 2010-97, slip op. at 5. The Shared Parenting Plan included: (1) the name of the child that petitioner would be allowed to claim; (2) the years for which petitioner could claim that child ("every year"); (3) Oddimissia's signature; (4) the state court's date stamp; and (5) petitioner's name.

Thus, the only information that would have been required by Form 8332 that was not included in the Shared Parenting Plan was each parent's Social Security number. But the absence of either parent's Social Security number, standing alone, does not determine whether a document conforms to the substance of Form 8332. *See Boltinghouse v. Commissioner*, T.C. Memo. 2003-134, slip op. at 9 (noting that inclusion of the noncustodial parent's Social Security number elsewhere on a return renders it "superfluous" in a written declaration); *Bramante v. Commissioner*, T.C. Memo. 2002-228, slip op. at 6 ("Neither the statute nor the regulations require . . . the custodial parent's Social Security number."). Furthermore, any claim for a dependency exemption deduction must include the claimed dependent's taxpayer identification number. *See* § 151(e). Respondent's ability to identify duplicate exemption claims therefore is not hampered by a written declaration that lacks the parents' Social Security numbers. We accordingly conclude that the Shared Parenting Plan contains sufficient information to conform to the substance of Form 8332.

[*10] The Shared Parenting Plan thus satisfies all requirements applicable to written declarations for purposes of section 152(e) that were in effect when the state court entered it in 2006. For his 2014 taxable year, petitioner may therefore rely on the Shared Parenting Plan to satisfy the written declaration requirement with respect to the one child it allows him to claim as a dependent.

2. *Attachment requirement*

Under proposed regulations published in 2017, a noncustodial parent is generally required to attach a copy of the written declaration to a return that claims a dependency exemption. Prop. Treas. Reg. § 1.152-5(e)(2)(i), 82 Fed. Reg. at 6387. However, a noncustodial parent also may either attach a copy of the written declaration to an amended return or "submit a copy of the written declaration to the IRS during an examination." *Id.*; *see also Skitzki v. Commissioner*, T.C. Memo. 2019-106, at *10 n.10; *DeMar v. Commissioner*, T.C. Memo. 2019-91, at *5–6. Until the proposed regulations become final, "taxpayers may choose to apply [them] in any open taxable years." Preamble, Prop. Treas. Regs., 82 Fed. Reg. at 6377. A taxable year remains open while it is pending before this Court. *See* § 6503(a)(1).

Petitioner's 2014 taxable year thus remains open, and Proposed Treasury Regulation § 1.152-5(e)(2)(i) permits him to substantiate his claim to a dependency exemption by submitting the Shared Parenting Plan to respondent (which he has now done),[11] even though it was not attached to his original return. Furthermore, respondent in his Pretrial Memorandum and posttrial Opening Brief never mentions Proposed Treasury Regulation § 1.152-5(e)(2)(i), nor does he make any specific argument that petitioner failed to satisfy the attachment requirement with respect to the Shared Parenting Plan. Under the circumstances of this case, petitioner has therefore properly substantiated his right to claim one of the two children as a dependent for 2014. As provided by section 152(e)(1) and (2), that child is treated as petitioner's qualifying child for 2014, and he is accordingly entitled to one dependency exemption deduction for that year under section 151(c).

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[11] The record does not establish whether petitioner first submitted the Shared Parenting Plan to respondent during the examination of his return or while this case was pending, when the parties included it as a stipulated Exhibit filed before trial. Nevertheless, because petitioner could have submitted the Shared Parenting Plan as an attachment to an amended return after the conclusion of the examination but before trial, the timing of petitioner's submission of the Shared Parenting Plan is immaterial.

[*11] III. *Child tax credit*

A taxpayer may claim a child tax credit for "each qualifying child" for which the taxpayer is allowed a deduction under section 151. § 24(a). A qualifying child for purposes of section 24 is a "qualifying child" as defined in section 152(c) who has not attained the age of 17. § 24(c)(1).

Because we have held that petitioner is treated as having one qualifying child within the meaning of section 152(c) for the 2014 taxable year, it follows that he is also entitled to the child tax credit for one child for that year.

To reflect the foregoing,

Decision will be entered under Rule 155.