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## CHILD TAX CREDIT: Amend Internal Revenue Code § 24(c)(1) to Conform With § 152(c)(3)(B) for Permanently and Totally Disabled Individuals Age 17 and Older

### PROBLEM

In general, Internal Revenue Code (IRC) § 24 entitles a taxpayer to claim a Child Tax Credit (CTC) of up to \$2,000 (for tax years (TYs) 2018-2025) for each qualifying child, as defined in IRC § 152(c), who is under age 17 at the end of the TY (with an exception for certain noncitizens).<sup>1</sup> The amount of the credit is applied to any taxes due and, in some instances, is refundable (the refundable portion is known as the Additional Child Tax Credit, or ACTC).<sup>2</sup>

Under IRC § 24(c)(1), a qualifying child for the child tax credit must generally meet the definition of a qualifying child as defined in IRC § 152(c) with an exception for certain noncitizens and with a different age requirement: the child must not have attained the age of 17. However, IRC § 152(c)(3)(B) provides an exception to the general age requirement within the definition of a qualifying child under IRC § 152(c), if the individual is permanently and totally disabled<sup>3</sup> at any time during the calendar year, permitting a guardian to claim as a qualifying child an individual who is totally and permanently disabled, regardless of age.<sup>4</sup>

The result is that a guardian may have a permanently and totally disabled dependent older than the general age limit who meets the definition of a qualifying child for purposes of other sections of the IRC,<sup>5</sup> but not for purposes of the CTC.<sup>6</sup> This difference undermines the *right to a fair and just tax system*.<sup>7</sup>

Changes to the tax law under the Tax Cuts and Jobs Act (TCJA) render this issue more pressing.<sup>8</sup> While the TCJA added a new credit of \$500 for other dependents under IRC § 24 and expanded the CTC, it also suspended dependency exemptions, leaving taxpayers with a permanently and totally disabled child who has attained the age of 17 potentially worse off than under the previous tax law.<sup>9</sup>

- 1 Internal Revenue Code (IRC) § 24(a) and (c), as modified by the Tax Cuts and Jobs Act (TCJA), P.L. No. 115-97, § 11022. The amendment to section 24 by the TCJA is in effect for tax years 2018 through 2025. The amount of the Child Tax Credit (CTC) is reduced (but not below zero) by \$50 for each \$1,000 (or fraction thereof) by which the taxpayer's modified adjusted gross income exceeds the threshold amount (\$400,000 in the case of a joint return, \$200,000 for any other filing status). IRC § 24(b)(1) and (2) as modified by the TCJA, P.L. No. 115-97, § 11022.
- 2 IRC § 24(d). For a further discussion of the National Taxpayer Advocate's concerns about various family status provisions of the IRC, see National Taxpayer Advocate 2017 Annual Report to Congress 453-461; National Taxpayer Advocate 2016 Annual Report to Congress 325-357.
- 3 The definition of permanently and totally disabled for this purpose is contained in IRC § 22(e)(3).
- 4 IRC § 152(c)(3).
- 5 See, e.g., IRC § 32.
- 6 IRC § 24(c)(1).
- 7 See Taxpayer Bill of Rights (TBOR), [www.TaxpayerAdvocate.irs.gov/taxpayer-rights](http://www.TaxpayerAdvocate.irs.gov/taxpayer-rights). The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).
- 8 Pub. L. No. 115-97 (2017).
- 9 TCJA, Pub. L. No. 115-97, §§ 11022 and 11041 (2017). These provisions are effective for tax years 2018 through 2025.

## EXAMPLE

Taxpayers Jane and John Doe are parents of a permanently and totally disabled 27-year-old son, Will. On their 2017 tax return, the taxpayers claimed a dependency exemption of \$4,050 and a CTC of \$1,000 for their son. The IRS allowed the dependency exemption but disallowed the CTC, because their son was over age 17.

Congress passed tax reform legislation at the end of 2017 that effective for TYs 2018-2025, suspended dependency exemptions, but added a \$500 credit for a dependent who is not a qualifying child for the CTC. As a result, Jane and John Doe may not now claim a dependency exemption or a CTC for Will, and are only eligible for a \$500 credit.

## RECOMMENDATION

To assist taxpayers with a permanently and totally disabled child age 17 or older, the National Taxpayer Advocate recommends that Congress amend IRC § 24(c)(1) to provide that, in general, the term “qualifying child” means a qualifying child (as defined in section 152(c)) of the taxpayer who has not attained age 17 or who meets the exception under IRC § 152(c)(3)(B), which provides a special rule for an individual who is permanently and totally disabled.

## PRESENT LAW

For TYs 2018 through 2025, IRC § 24 entitles a taxpayer to claim a CTC of up to \$2,000 for each qualifying child, as defined in IRC § 152(c), who is under age 17 at the end of the tax year (with an exception for certain noncitizens).<sup>10</sup> The amount of the credit is applied to any taxes due and, in some instances, is refundable (the refundable portion is known as the ACTC).<sup>11</sup>

IRC § 24(c)(1) provides that, a qualifying child for the CTC must meet the definition of a qualifying child as defined in IRC § 152(c) with an exception for certain noncitizens and with a different age requirement: the child must not have attained the age of 17. IRC § 152(c)(3)(B) provides an exception to the general age requirement for a qualifying child in IRC § 152(c), if the individual is permanently and totally disabled<sup>12</sup> at any time during the calendar year, permitting a guardian to claim as a qualifying child an individual who is totally and permanently disabled, regardless of age.<sup>13</sup> A similar exception does not apply for purposes of the age requirement under IRC § 24(c).

The TCJA added a new credit for other dependents under IRC § 24 for a dependent who is not a qualifying child for purposes of the CTC, it significantly increased the CTC, and it suspended dependency exemptions.<sup>14</sup>

10 IRC § 24(a) and (c), as modified by the TCJA, P.L. No. 115-97, § 11022. See § 24(h). The amount of the CTC is reduced (but not below zero) by \$50 for each \$1,000 (or fraction thereof) by which the taxpayer’s modified adjusted gross income exceeds the threshold amount (\$400,000 in the case of a joint return, \$200,000 for any other filing status). IRC § 24(b)(1) and (2) as modified by the TCJA, P.L. No. 115-97, § 11022.

11 IRC § 24(d). For a further discussion of the National Taxpayer Advocate’s concerns about various family status provisions in the IRC, see National Taxpayer Advocate 2017 Annual Report to Congress 453-461; National Taxpayer Advocate 2016 Annual Report to Congress 325-357.

12 The definition of permanently and totally disabled for this purpose is contained in IRC § 22(e)(3).

13 IRC § 152(c)(3).

14 TCJA, Pub. L. No. 115-97, §§ 11022 and 11041 (2017). These changes to the tax law are effective for tax years 2018-2025.

## REASONS FOR CHANGE

A recent court case illustrates the impact this disparity has on families with permanently and totally disabled adult children, particularly under the current law due to the suspension of dependency exemptions. In *Polsky v. United States*, the court found that the taxpayers were not entitled to the CTC for their daughter.<sup>15</sup> The Polskys are parents of a permanently and totally disabled adult. On their 2010 and 2011 tax returns, the taxpayers claimed their daughter as a qualifying child for the CTC, and the IRS disallowed the credit as the child was over age 17 and did not meet the age requirement to be a qualifying child for the CTC. On appeal, the taxpayers argued that IRC § 152(c)(3)(B) controls, not the general age requirement in IRC § 24. IRC § 24(c)(1) states generally that a qualifying child must meet the requirements of IRC § 152(c) and be under the age of 17. IRC § 152(c)(3)(B) provides that an individual meets the age requirements for purposes of IRC § 152(c)(3)(A) if at any time during the year the individual was permanently and totally disabled. The Polskys argued that as their daughter was permanently and totally disabled in the years at issue and, therefore, was a qualifying child under IRC § 152(c), she was also a qualifying child for purposes of IRC § 24. The court agreed with the rationale of the lower court's decision that IRC § 24 incorporates the basic requirements of IRC § 152(c) and adds the additional age limitation of not having attained age 17 for purposes of the CTC. The exception under IRC § 152(c)(3)(B) for permanently and totally disabled individuals is intended to allow taxpayers, such as the Polskys, to continue to claim the individual as a dependent, so long as their daughter remains permanently and totally disabled and meets the other requirements under IRC § 152(c). Thus, the court held that the taxpayers were not entitled to claim the CTC for the years at issue.<sup>16</sup>

As the Court noted in the case of *Polsky v. United States*, while IRC § 24(c)(1) incorporates the basic requirements of IRC § 152(c), it adds the additional requirement that the child must not have attained the age of 17.<sup>17</sup> The Court postulated that § 152(c)(3)(B) was crafted to allow taxpayers to extend the dependency exemption, regardless of the age of the permanently and totally disabled child, and IRC § 24(c)(1) was crafted to end the CTC once a child attains the age of 17. However, under the TCJA, the dependency exemption under IRC § 151 has been suspended through 2025.<sup>18</sup> While taxpayers who have a dependent who does not meet the definition of a qualifying child for purposes of the CTC may now claim a \$500 credit for other dependents, the changes to the law by TCJA may leave taxpayers with a permanently and totally disabled child in a worse position than before the enactment of the TCJA and undermine the *right to a fair and just tax system*.<sup>19</sup>

## EXPLANATION OF RECOMMENDATION

TAS reviewed tax returns filed for TY 2017 and found that approximately 380,000 returns were filed claiming a dependent who was also receiving Social Security Disability Income and was at least 15 years younger than the primary or secondary taxpayer on the tax return.<sup>20</sup> While this information is not a perfect proxy for the number of taxpayers claiming a permanently and totally disabled child age 17 or older as a dependent (due to the limitations of data the IRS has available), it provides a picture of the number of families who may be impacted by the age limitation of the CTC and the suspension

15 844 F.3d 170 (3d Cir. 2016).

16 *Polsky v. United States*, 844 F.3d 170 (3d Cir. 2016).

17 *Id.*

18 TCJA, Pub. L. No. 115-97, § 11041 (2017).

19 *Id.*

20 IRS, Compliance Data Warehouse (CDW), data retrieved by TAS (Dec. 6, 2018).

of the dependency exemption for TYs 2018-2025. Compared to a family without a permanently and totally disabled child age 17 or older, these families may face higher costs associated with child care, exacerbating the impact of not being able to claim the CTC. In the most recent National Survey of Children with Special Health Care Needs, nearly 22 percent of all respondents indicated that the condition their child has creates financial problems for their family, while nearly 39 percent of families who indicated their children have conditions that usually, always, or a great deal affect the child's abilities report financial problems.<sup>21</sup> Amending IRC § 24(c)(1) to conform with the requirements of IRC § 152(c)(3)(B) will assist these families and support the *right to a fair and just tax system*.

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21 Department of Health and Human Services, *The National Survey of Children with Special Health Care Needs* 53 (2010).