

Office of Chief Counsel
Internal Revenue Service

SCA 1998-041
Released 12/04/98

memorandum

TL-N-6671-97

date: APR 3 1998

to: District Counsel, New England

from: Assistant Chief Counsel (Income Tax & Accounting) CC:DOM:IT&A

subject: Significant Service Center Advice

This responds to your request for Significant Advice dated November 21, 1997, in connection with a question posed by the Andover Service Center.

Disclosure Statement

Unless specifically marked "Acknowledged Significant Advice, May Be Disseminated" above, this memorandum is not to be circulated or disseminated except as provided in CCDM (35)2(13)3:(4)(d) and (35)2(13)4:(1)(e). This document may contain confidential information subject to the attorney-client and deliberative process privileges. Therefore, this document shall not be disclosed beyond the office or individual(s) who originated the question discussed herein and are working the matter with the requisite "need to know." In no event shall it be disclosed to taxpayers or their representatives.

Issue

(1) Whether two unmarried individuals, each living with their own dependent children in a shared dwelling, can each claim head of household filing status?

(2) What expenses should be considered in determining whether each taxpayer furnished more than one-half the cost of maintaining a household?

(3) What constitutes acceptable verification of expenses for the cost of maintaining a household?

Conclusion

(1) The determination of whether two unmarried individuals, each living with their own dependent children in a shared dwelling, may each claim head of household

filing status is not a matter simply determined by physical boundaries, but by all the facts of a case.

(2) Section 1.2-2(d) of the Income Tax Regulations details the expenses that should be considered in determining whether a taxpayer has furnished more than one-half the cost of maintaining a household. Such expenses include property taxes, mortgage interest, rent, utility charges, upkeep and repairs, property insurance and food consumed on the premises. The cost of maintaining a household under § 2 of the Internal Revenue Code does not include the cost of clothing, education, medical treatment, vacations, life insurance, and transportation, or any amount which represents the value of services rendered in the household by the taxpayer or by a person qualifying the taxpayer as a head of household.

(3) Acceptable verification of expenses for the cost of maintaining a household includes cancelled checks and receipts for the expenses such as taxes, interest, rent, utilities, repairs, insurance, and food consumed on the premises, records to show who paid or contributed toward the payment of the expenses and the amount contributed by each person involved, and amounts received from governmental agencies such as rent subsidies.

Facts

Taxpayers X and Y are single parents, each with their own dependent children, who share a dwelling. Neither X nor Y is a surviving spouse or a nonresident alien. The kitchen, and other living areas are common areas, but the adults have their own bedrooms. X and Y each claimed head of household filing status, relying on the case of Estate of Fleming v. Commissioner, 33 T.C.M. 619 (1974), acq., 1974 AOD LEXIS 65. X itemized his deductions, while Y took the standard deduction for herself. X and Y maintain joint accounts from which they paid household bills. As in the Fleming case, X paid over one-half of the expenses attributable to himself and his dependent children. Y also paid over one-half the expenses attributable to herself and her dependent children.

Discussion

Background

Section 1(b) of the Internal Revenue Code provides for slightly lower tax rates for heads of households than the rates for single individuals or married individuals filing separately. A taxpayer who qualifies as a head of household may use the § 1(b) tax rate schedule which contains rates that fall between the rates payable by single individuals and those payable by married individuals filing joint returns.

Section 2(b) generally provides that an individual shall be considered a "head of household" if the individual: (1) is not married at the close of the taxable year¹; (2) is not a "surviving spouse" (as defined in § 2(a)); (3) maintains as his or her home a household which constitutes for more than one-half of the taxable year the principal place of abode, as a member of such household, of a qualified dependent (as defined in § 2(b)(1)(A)), or maintains a household which constitutes for the taxable year the principal place of abode of the individual's father or mother, if the individual is entitled to a § 151 dependency exemption for the parent; (4) furnishes more than one-half the cost of maintaining the household during the taxable year; and (5) is not a nonresident alien.

Under the facts at issue, we will assume that taxpayers X and Y each clearly fulfill the above-mentioned first, second and fifth requirements of § 2(b). Therefore, this guidance will focus on the third and fourth requirements of § 2(b) to determine whether taxpayers X and Y can each be considered as maintaining and furnishing more than one-half the costs of a separate household.

Section 2(b)(1)(A)(i) of the Code, in pertinent part, provides, that a taxpayer who is not married at the close of the taxable year can qualify for head of household filing status by maintaining as his home a household which is, for more than half of the taxable year, the principal place of abode of a child.

Section 1.2-2(c)(1) of the regulations, provides, in pertinent part, the following parameters for what constitutes "maintaining a household:"

In order for a taxpayer to be considered as maintaining a household by reason of an individual described in (a)(1) or (b)(3) of this section (e.g., taxpayer X and Y's children), the household must actually constitute the home of the taxpayer for the taxable year. A physical change in the location of such home will not prevent a taxpayer from qualifying as a head of household. Such home must also constitute the principal place of abode of at least one of the persons specified in such paragraph (a)(1) or (b)(3) of this section.

Section 1.2-2(d) details the expenses that should be considered in determining whether a taxpayer has furnished more than one-half the cost of maintaining a household as follows:

A taxpayer shall be considered as maintaining a household only if he pays more than one-half the cost thereof for his taxable year. The cost of

¹ However, § 2(c) provides that certain married individuals living apart from their spouses may qualify for head of household status if they satisfy certain conditions under § 7703(b).

maintaining a household shall be the expenses incurred for the mutual benefit of the occupants thereof by reason of its operation as the principal place of abode of such occupants for such taxable year. The cost of maintaining a household shall not include expenses otherwise incurred. The expenses of maintaining a household include property taxes, mortgage interest, rent, utility charges, upkeep and repairs, property insurance and food consumed on the premises. Such expenses do not include the cost of clothing, education, medical treatment, vacations, life insurance, and transportation. In addition, the cost of maintaining a household shall not include any amount which represents the value of services rendered in the household by the taxpayer or by a person qualifying the taxpayer as a head of household or as a surviving spouse.

In the Estate of Fleming case, the Tax Court specifically addressed the issue of whether two individuals, each with their own children, who share a dwelling can each be considered to maintain a separate household for tax purposes. Estate of Fleming, 33 T.C.M. at 619. During the years involved, a residence constituted the principal place of abode of petitioner-decedent (hereinafter "decedent"), Jean Foster Fleming, decedent's unmarried daughter, Jean F. Fleming (Jean), decedent's married daughter, Louise Fleming Mercke, decedent's son-in-law, Evans Mercke, and three of decedent's grandchildren, the three Mercke children. The Merckes contributed two-thirds of the total cost for food consumed on the premises, utilities and servant hire used by both the Merckes and the Flemings, and the Flemings contributed one-third. The Merckes and Flemings each contributed fifty percent of the total cost for residence maintenance expenses consisting of mortgage interest, property taxes, upkeep and repairs, property insurance, replacement costs and yard care. Although decedent contributed more than fifty percent of the household expenses jointly contributed by her and Jean, she did not contribute more than fifty percent of the expenses relating to the residence. Id. at 620.

The family residence occupied by the Merckes and Flemings contained four levels. The first level consisted of a game room, recreation room, two garages for four cars, kitchenette, storage room, utility room, workshop and patio. The second level consisted of a bedroom, sitting room, office, bath and one-half, storage rooms, laundry, servants' living room, servants' bath, and servants' bedroom. Decedent and Jean were the principal occupiers of the second level's bedroom, sitting room, office and bath. The third level consisted of an entrance hall, living room, family room, sun room, dining room, kitchen, pantry and bar. The fourth level consisted of four bedrooms, office, three baths and storage rooms. This fourth level was principally occupied by the Merckes. The first level, a portion of the second level and the third level were common areas shared by all seven family members. In addition, all seven family members had free access to all portions of all four levels. The Merckes

and Flemings also shared a common dinner table and took their meals together as one family. Id.

The Service contended that the house constituted only one household, and being only one household the petitioner had failed to prove that she furnished more than one-half the cost of maintaining such household. However, petitioner successfully argued that the house contained two households, one of which consisted of the decedent and Jean. Id. at 621-622.

The Tax Court stated that the extent of a household is not determined solely by physical or tangible boundaries, but by all the facts of the case. Id. See also, Robinson v. Commissioner, 51 T.C. 520 (1968), aff'd. 422 F.2d 873 (9th Cir. 1970), acq. 1970-1 C.B. XVI; Reardon v. United States, 158 F.Supp. 745 (D.S.D. 1958). The Tax Court also found that "it would be an elevation of form over substance to say only one household existed simply because only one building was involved and certain areas were used in common." Id. at 621. The Court found that separate households were intended and resulted. Accordingly, the Court held that decedent qualified as a head of household. Id.²

In Jackson v. Commissioner, 71 T.C.M. 2022 (1996), the Tax Court also considered the issue of whether petitioner, who during the year at issue, was unmarried and resided in a two-bedroom apartment with Jewel M. Cleckley, two of Ms. Cleckley's children, and petitioner's daughter, Fatimah, born to Ms. Cleckley and petitioner was entitled to claim head of household filing status. Id. at 2023.

In Jackson, petitioner testified that he paid \$175 per month in cash to Ms. Cleckley pursuant to an oral leasing agreement between petitioner and Ms. Cleckley for himself and Fatimah for the exclusive use of one room of an apartment owned by Ms. Cleckley. In addition to the \$175 per month, petitioner testified he paid everything towards his daughter's clothing, food, and medical insurance. However, other than petitioner's testimony, petitioner presented no evidence of the amounts expended. Id.

Petitioner contended that the room he rented in Ms. Cleckley's apartment constituted a household. He also stated that he could not use the telephone or kitchen without permission. Id. at 2024. Other than the \$175 per month allegedly paid, petitioner incurred no additional expenditures for utilities, repairs or any other household expenses. Id. The Service contended that petitioner failed to satisfy the head of household filing requirements.

² The Service acquiesced with the decision as "the Court's findings are not without support in the record and cannot be considered clearly erroneous." 1974 AOD LEXIS 65.

The Tax Court found that (1) petitioner bears the burden of proving that respondent's determination is incorrect; (2) the Court is not bound to accept the unverified, undocumented testimony of petitioner; and (3) a taxpayer is required to substantiate the amounts claimed as deductions, credits, etc., by maintaining the records needed to establish such entitlement. *Id.* at 2024-2025. Specifically, The Tax Court found that petitioner failed to prove that he paid \$175 a month or, if paid, that it constituted more than half the cost of maintaining a household as his home. The Tax Court was unconvinced that petitioner provided more than half of the cost of maintaining a principal place of abode for his daughter given that Ms. Cleckley apparently paid all expenses of maintaining the household to which petitioner allegedly contributed only \$175 per month. The Tax Court found that the one room allegedly lived in by petitioner and Fatimah in the two-bedroom apartment owned by Fatimah's mother, without use of a kitchen or telephone, does not constitute a separate household. *Id.*³

Taxpayers X and Y's Head of Household Status

As the above two cases demonstrate, the determination of whether taxpayers X and Y may each claim head of household filing status is not a matter simply determined by physical boundaries, but by all the facts of the case. Given the fact-specific nature of this determination, and that neither X nor Y is married, a surviving spouse or a nonresident alien, the first issue to determine is whether each X and Y is maintaining a household by reason of his/her children. Under the facts presented, the shared dwelling constitutes the home of X and Y for the taxable year and the principal place of abode of X and Y's children. The kitchen, and other living areas are common areas, but the adults have their own bedrooms. X and Y's children share a room. However, other facts are necessary to establish whether X and Y conduct themselves as separate households or one household.

Pursuant to § 1.2-2(c)(1), in order for X and Y to be considered as maintaining a household by reason of their children, the household must actually constitute the home of X and Y for the taxable year. A physical change in the location of such home will not prevent X and Y from qualifying as a head of household. Such home must also constitute the principal place of abode of at least one of X's children and one of Y's children.

³ See also, Lyddan v. United States, 721 F.2d 873, 876 (2d Cir. 1983), cert. denied, 467 U.S. 1214 (1984)(denying head of household status to husband living with estranged spouse pursuant to a written separation agreement providing for mutual exclusivity of room use).

In addition, as in Estate of Fleming, the Service may consider whether each family acts independently of each other in matters not related to the house. For example, in Estate of Fleming, the Tax Court considered the following facts to determine that separate households existed: each family maintained and paid for a separate telephone, each family gave Christmas presents, Christmas cards, wedding gifts, and charitable contributions independently of the other. Estate of Fleming, 33 T.C.M. at 621. The Tax Court found that while the use of shared areas is a factor, it is not determinative. Id.

Taxpayers may argue that, in the case of multi-family dwellings, the standard set forth in § 1.44A-1(d)(2) that separate families are treated as separate households should also be used for purposes of head of household filing status under § 2(b).⁴ Under § 44A (redesignated as § 21 for tax years beginning after December 31, 1983), a credit for certain child care expenses is allowed for individuals who maintain a household that includes one or more qualifying individuals. With respect to multi-family dwellings, § 1.44A-1(d)(2) provides that "if two or more families occupy living quarters in common, each of the families is treated as constituting a separate household,..." While the term "household" is used in both §§ 2(b) and 44A in similar contexts, the standard set forth in § 1.44A-1(d)(2) does not control the determination of whether two or more families should be treated as separate households under § 2(b). First, § 1.44A-1(d)(2) specifically provides that the separate family/separate household rule applies "solely for purposes of section 44A and [§ 1.44A-1 of the regulations]." Further, it is clear from the cases discussed above that contrary to the standard set forth in § 1.44A-1(d)(2), all of the relevant facts and circumstances must be considered in determining whether, for purposes of using head of household filing status under section 2(b), two or more families occupying common living quarters maintain separate households.

⁴ Section 1.44A-1(d) (Expenses for household and dependent care services necessary for gainful employment) provides, in pertinent part, as follows:

(2) Two or more families. Solely for purposes of section 44A and this section, if two or more families occupy living quarters in common, each of the families is treated as constituting a separate household, and the taxpayer who provides more than one-half of the costs of maintaining such a separate household is treated as maintaining that household. Thus, for example, if two unrelated taxpayers each with children occupy living quarters in common and each taxpayer pays more than one-half of the household costs incurred by each respective family, each taxpayer will be treated as maintaining a separate household.

Assuming that the facts show that two separate households are intended to occupy the shared dwelling, then X needs to show that X contributed over one-half the household expenses jointly contributed by X and X's children, and Y has to show that Y contributed over one-half the household expenses jointly contributed by Y and Y's children. X does not need to show that X contributed over one-half of the total expenses of maintaining the shared dwelling, and Y does not need to show that Y contributed over one-half of the total expenses of maintaining the shared dwelling.

The cost of maintaining a household is the expenses incurred for the mutual benefit of the occupants thereof by reason of its operation as the principal place of abode of such occupants for such taxable year. § 1.2-2(d). The expenses of maintaining a household for X and Y include property taxes, mortgage interest, rent, utility charges, upkeep and repairs, property insurance and food consumed on the premises. Such expenses do not include the cost of clothing, education, medical treatment, vacations, life insurance, and transportation. In addition, the cost of maintaining a household does not include any amount which represents the value of services rendered in the household by the taxpayer or by a person qualifying the taxpayer as a head of household or as a surviving spouse.

Acceptable verification of expenses for the cost of maintaining a household includes cancelled checks and receipts for the expenses such as taxes, interest, rent, utilities, repairs, insurance, and food consumed on the premises, records to show who paid or contributed toward the payment of the expenses and the amount contributed by each person involved, and amounts received from governmental agencies such as rent subsidies. See, e.g., IRM 5300, Exhibit 5300-43; IRM 41(12)(0), Exhibit 900-2.

