

Legislative Recommendation #56**Clarify Whether Dependents Are Required to Have Taxpayer Identification Numbers for Purposes of the Credit for Other Dependents****PRESENT LAW**

The Tax Cuts and Jobs Act (TCJA) created a new tax credit, referred to as the credit for other dependents (ODC), by amending IRC § 24.¹ IRC § 24 also provides for the child tax credit (CTC). Taxpayers whose dependents are not eligible to be claimed for the CTC (a credit of \$2,000 per “qualifying child,” of which \$1,400 is refundable) may be eligible to be claimed for the ODC (a nonrefundable credit of \$500 per “dependent”).²

IRC § 24(e) provides that a “qualifying child” must have a Taxpayer Identification Number (TIN) for a taxpayer to claim a credit for the child under this section.³ IRC § 24(h)(7) further provides that the qualifying child’s TIN must be a Social Security number (SSN) valid for employment.⁴ Where the lack of the required SSN prevents a child from meeting the definition of a “qualifying child,” the child is treated as a dependent for the ODC.⁵

Under IRC § 24(h)(4), the ODC is available regarding a “dependent of the taxpayer (as defined in section 152).” There is no requirement in IRC § 152 that to be a “dependent,” an individual must have a TIN (either an SSN or an ITIN).⁶

REASONS FOR CHANGE

Despite the absence of a TIN requirement in the statute, the IRS has instructed taxpayers that to claim a dependent for the ODC, the dependent must have a TIN.⁷ The IRS has used its summary assessment

1 Tax Cuts and Jobs Act (TCJA), Pub. L. 115-97, § 11022, 131 Stat. 2054, 2073 (2017), adding IRC § 24(h)(4), applicable to taxable years beginning after Dec. 31, 2017, and before Jan. 1, 2026.

2 IRC § 24(h)(4).

3 Taxpayers are generally required to include their “identifying number,” which is generally a Social Security number for an individual, on the tax returns they file with the IRS. See IRC § 6109(a), (d). Individuals who are not eligible to be issued SSNs may be issued individual taxpayer identification numbers (ITINs) by the IRS. See Treas. Reg. § 301.6109-1(a)(1)(ii)(B) & (d)(3)(i).

4 IRC § 24 (h)(7).

5 IRC § 24(h)(4)(C).

6 The House version of the TCJA included a requirement that a dependent have a TIN for purposes of the ODC. This provision was dropped in the Senate version. See H.R. Conf. Rep. No. 115-466, 115th Cong., 1st Sess. at 225-227 (Dec. 15, 2017), <https://www.congress.gov/115/crpt/hrpt466/CRPT-115hrpt466.pdf>.

7 See, e.g., IRS Pub. 972, Child Tax Credit and Credit for Other Dependents 2 (Jan. 21, 2020). See also IRS Form 1040 and 1040-SR Instructions 17 (Jan. 8, 2020).

authority to disallow the ODC claimed by nearly 113,000 taxpayers on their 2018 returns because their dependents did not have TINs.⁸

In response to TAS's inquiry, the IRS Office of Chief Counsel (OCC) explained its legal rationale as follows: "[I]n order to avoid treating dependents for whom a taxpayer may claim a credit under section 24(h)(4)(A) [*i.e.*, the ODC] inconsistently, section 24(e)(1) [which imposes a TIN requirement for claiming a "qualifying child" for a credit under section 24] should be interpreted as applying to all dependents for whom a taxpayer claims a credit under section 24(h)(4)(A), not only a qualifying child described in section 24(h)(4)(C) [*i.e.*, who is a "qualifying child" but lacks the SSN required by section 24(h)(7)]."⁹

It is a basic canon of statutory construction that the plain language of a statute controls absent a clearly expressed legislative intent to the contrary.¹⁰ Here, there is no statutory requirement that a dependent have a TIN to be claimed for the ODC. The OCC simply invented that requirement, albeit it may further a reasonable policy goal. If taxpayers could claim ODC tax benefits without having to provide dependent TINs, the number of fraudulent ODC claims might increase.¹¹

Nevertheless, the TCJA legislative history suggests Congress considered a TIN requirement and did not adopt it. The House version of the TCJA included a requirement that a child have a TIN for purposes of the ODC but the subsequent Senate version of the TCJA did not, and the enacted bill followed the Senate approach. It is possible that a drafting error was made, but if so, Congress — not the IRS — should fix it.¹²

To resolve the inconsistency between the absence of a TIN requirement in the ODC statute and the IRS's decision to impose the requirement on its own, the National Taxpayer Advocate recommends that Congress clarify its intent.

8 We presume that the IRS exercised its summary assessment authority in reliance on IRC § 6213(g)(2)(I), which includes in the definition of "mathematical or clerical error" "an omission of a correct TIN required under section 24(e) (relating to child tax credit) to be included on a return." As noted above, IRC § 24(e) imposes a TIN requirement for a "qualifying child" with respect to whom a taxpayer claims CTC. In any event, over 109,000 taxpayers were issued summary assessment notices, removing 112,714 dependents with respect to whom the ODC had been claimed because the dependents had invalid or missing TINs. IRS, Compliance Data Warehouse Individual Master File Individual Returns Transaction File (IRTF) Form 1040 and Entity tables, TY 2018, returns posted by cycle 202047. If \$500 of ODC was claimed with respect to each dependent, then the total amount of disallowed ODC would be over \$56 million (112,714 times \$500).

9 Email communication from the office of Division Counsel/Associate Chief Counsel (National Taxpayer Advocate Program) to TAS Management & Program Analyst (Dec. 19, 2019) (on file with TAS). The email does not contain any references or citations to any legal authority for this position.

10 See, *e.g.*, *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 245, 254 (1992) ("[W]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'").

11 See, *e.g.*, IRS, 1990 Research Conference Report 162-63 (1990) (Szilagyi, John, *Where Some of Those Dependents Went*).

12 A technical correction was proposed, but the correction was not enacted into law. See Joint Committee on Taxation, JCX-1-19, *Technical Explanation of the House Ways and Means Committee Chairman's Discussion Draft of the "Tax Technical and Clerical Corrections Act"* 5 (Jan. 2, 2019), <https://www.jct.gov/publications.html?func=startdown&id=5154>. The fact that Congress sought to make this correction is further evidence that the law does not require dependents to have a TIN for purposes of the ODC.

RECOMMENDATIONS

- Clarify whether dependents whom a taxpayer claims the credit for other dependents under IRC § 24(h)(4) must have a taxpayer identification number.
- If dependents are required to have a taxpayer identification number for the credit for other dependents, clarify the type of taxpayer identification number required.