

ADOPTION TAX CREDIT IS ALIVE AND WELL

by Mark T. McDermott*

The adoption tax credit was scheduled to terminate after 12/31/10. In March, it was extended for one additional year by the health care reform legislation (Patient Protection and Affordable Care Act of 2010 — Public Law 111-148). That law also increased the amount of the maximum credit by \$1,000 to \$13,170 and made the credit refundable (i.e. a taxpayer who owes less tax than \$13,170 will receive cash from the government).

On 12/17/10, President Obama signed the legislation that extended the Bush tax cuts (Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 — Public Law 111-312). That law extended all of the tax cuts through 2012, and the adoption tax credit was among the provisions which were extended. As a consequence of the tax cut legislation, the adoption tax credit will be in existence at least through 2012. The only limitation is that the augmentation caused by the healthcare reform bill will be lost after 2011. This means that the \$1,000 increase in the maximum credit and the refundability provision will cease at that point.

It is not surprising that numerous questions have arisen regarding the details and ramifications of the new legislation. The following are some of the most frequently asked questions.

How does the adoption tax credit affect parents in 2010?

- the maximum adoption tax credit is \$13,170 for qualified adoption expenses (including special needs adoptions)
- the maximum exclusion from income for employer-provided adoption assistance is \$13,170
- the allowable credit and the income exclusion begins to phase out for taxpayers with adjusted gross income of \$182,520 and is completely

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eliminated for taxpayers with adjusted gross income of \$222,520

- the credit is refundable, which means that a taxpayer's qualified adoption expenses, up to the full \$13,170, will be fully reimbursed by the government regardless of the taxpayer's overall tax liability
- in an adoption of a special needs child, taxpayers may claim the full \$13,170 credit without regard to the amount of qualified adoption expenses paid or incurred and regardless of their tax liability
- any portion of an adoption credit claimed in an earlier taxable year that a taxpayer carries forward to 2010 is allowable as a refundable tax credit in 2010
- the IRS will require taxpayers to provide documentation substantiating claims for the adoption credit. In addition, a taxpayer claiming the adoption credit for a child with special needs must attach a copy of the state determination of special needs to the taxpayer's income tax return

How does the adoption tax credit affect parents in 2011?

- the maximum adoption tax credit is \$13,360 for qualified adoption expenses (including special needs adoptions)
- the maximum exclusion from income for employer-provided adoption assistance is \$13,360
- the allowable credit and the income exclusion begins to phase out for taxpayers with adjusted gross income of \$185,210 and is completely eliminated for taxpayers with adjusted gross income of \$225,210
- the credit is refundable, which means that a taxpayer's qualified adoption expenses, up to the full \$13,360, will be fully reimbursed by the government regardless of the taxpayer's overall tax liability

- in an adoption of a special needs child, taxpayers may claim the full \$13,360 credit without regard to the amount of qualified adoption expenses paid or incurred and regardless of their tax liability
- any portion of an adoption credit claimed in an earlier taxable year that a taxpayer carries forward to 2011 is allowable as a refundable tax credit in 2011
- the IRS will require taxpayers to provide documentation substantiating claims for the adoption credit. In addition, a taxpayer claiming the adoption credit for a child with special needs must attach a copy of the state determination of special needs to the taxpayer's income tax return

How does the adoption tax credit affect parents in 2012?

- after December 31, 2011, the refundability of the adoption tax credit and the increase in the maximum credit amount and income exclusion that were in effect for 2010 and 2011 will be repealed
- as a result of the *Tax Relief, Unemployment Insurance Reauthorization, And Job Creation Act of 2010, PL 111-312*, the maximum credit and exclusion from income will be reduced to \$12,170 (but with an adjustment for inflation since 2010) and the credit will not be refundable

How does the adoption tax credit affect parents in 2013?

- the adoption tax credit and the income exclusion will sunset on December 31, 2012, unless extended

What is a refundable tax credit and how does one work?

A refundable tax credit is a method for the government to directly subsidize an activity, such as adoption, that Congress wants to encourage. **Regular nonrefundable tax credits** reduce tax liability dollar for dollar, but only until

a taxpayer reaches zero taxes owed. A **refundable tax credit** reduces tax liability dollar for dollar, but if the credit reduces one's taxes to zero and there is still some of the credit left over, the government will refund to the taxpayer the amount left over. Here are two examples:

Example 1: If you are due a **tax refund** of \$2,000 (before figuring your adoption tax credit) with \$5,000 of qualified adoption expenses for that taxable year, you add the \$5,000 to the \$2,000 for a total refund of \$7,000.

Example 2: If you **owe** the IRS \$2,000 (before figuring your adoption tax credit) and then you determine that you had \$5,000 of qualified adoption expenses for that taxable year, you subtract the \$2,000 from the \$5,000, leaving \$3,000 left over. The IRS will send you a refund check for the \$3,000.

What is the income exclusion for employer-provided adoption benefits?

Taxpayers may be able to exclude up to \$13,170 for 2010 and \$13,360 for 2011 from their income to offset amounts paid by their employer under a qualified adoption assistance program. Taxpayers may qualify for the income exclusion if they adopted or attempted to adopt a child, and the program paid or reimbursed them for qualified expenses relating to the adoption. Expenses paid by an employer-provided adoption assistance program cannot also be claimed for the adoption tax credit.

What is a "carryover" and is a carryover amount refundable in 2010?

In the years when the adoption tax credit was not refundable, taxpayers who had qualified adoption expenses in excess of their tax liability could potentially use their remaining adoption tax credit amount on future tax returns by "carrying the credit balance forward" for up to five years. So, if a taxpayer carried forward into 2010 an adoption credit from 2005 or later, the carried-forward amount can be claimed as a refundable credit in 2010. (The amount of any unused carry-forward amount can be found on line 23 of the worksheet on page 5 of the 2009 Form 8839, Qualified Adoption Expenses.)

When can the adoption tax credit be claimed?

The following tables explain when to take the credit:

Adopting a child who is a U.S. citizen or resident

IF you pay qualifying expenses in	THEN take the credit in
Any year before the year the adoption is final	The year after the year of the payment.
The year the adoption is final	The year the adoption is final.
Any year after the year the adoption is final	The year of the payment.

Adopting a foreign child

IF you pay qualifying expenses in	THEN take the credit in
Any year before the year the adoption is final	The year the adoption is final.
The year the adoption is final	The year the adoption is final.
Any year after the year the adoption is final	The year of the payment.

If an adoption attempt fails, can the adoption tax credit or the exclusion from income still be taken?

Yes. Expenses paid in an unsuccessful attempt to adopt an eligible child, before finalizing the adoption of another child, can qualify for the credit. If qualified adoption expenses were paid in an attempt to adopt a child and the attempt was unsuccessful, treat those expenses in the same manner as expenses you paid for adoptions not final by the end of the year.

Is it true that people who adopted a special needs child in 2010 will receive a payment of \$13,170 from the IRS regardless of their qualified adoption expenses?

Yes. If the adoption was finalized in 2010 and the child was determined by the taxpayer's state to be a special needs child, then the IRS must allow the full refundable \$13,170 credit for the adoption. For example, if the taxpayer had zero tax liability otherwise, the IRS would send a refund of \$13,170. The same will be true for people who adopt a special needs child in 2011, but the amount of the refund will be \$13,360.

Are states required to notify potential adoptive parents of children from foster care about the adoption tax credit?

Yes. States are required by section 403 of PL 110-351, The Fostering Connections to Success and Increasing Adoptions Act of 2008, to provide information to individuals, who are considering or attempting to adopt a child from foster care, of their potential eligibility for the federal adoption tax credit.

Can a taxpayer file an electronic return and claim the adoption tax credit?

No. Taxpayers must file a paper tax return and Form 8839 [Qualified Adoption Expenses] to get the credit and must attach documents supporting the adoption, including, if applicable, a copy of the state determination of special needs. Taxpayers claiming the credit will still be able to use IRS Free File to prepare their returns, but the returns must be printed and mailed to the IRS, along with all required documentation.

Is there someone I can talk to at the IRS about questions I may still have?

Yes. For further information from the IRS regarding the adoption tax credit and the exclusion from income for adoption assistance, contact Marilyn E. Brookens of the Office of Associate Chief Counsel (Income Tax & Accounting) at 202-622-4920 (not a toll-free call).

Where can I obtain copies of relevant IRS documents and guidance?

- **IRS Form 8839 and Instructions:**
 1. www.irs.gov/pub/irs-pdf/f8839.pdf to download Form 8839, Qualified Adoption Expenses
 2. www.irs.gov/pub/irs-pdf/i8839.pdf to download the instructions for the form
- **IRS Guidance:**
 1. www.irs.gov/irb/2010-42_IRB/aro9.html to read the published guidance regarding the refundable adoption tax credit

2. www.irs.gov/irb/2010-42_IRB/ar10.html to read the guide for the adoption tax credit and the adoption assistance program dollar levels for 2010
3. www.irs.gov/irb/2010-40_IRB/ar10.html to read the revenue procedure that provides taxpayers with safe harbors for claiming the adoption credit and exclusion for Hague Convention adoptions, and guidance on filing amended returns to claim the credit or exclusion for Hague Convention adoptions that became final in 2008 or 2009. Rev. Proc. 2005-31 continues to apply to foreign adoptions not governed by the Hague Convention (non-Convention adoptions)
4. www.irs.gov/newsroom/article/0,,id=236174,00.html to read an IRS news release entitled, Seven Facts about the Expanded Adoption Credit
5. www.irs.gov/individuals/article/0,,id=231663,00.html to read the IRS's Adoption Benefits FAQs

What are some non-government sources of information about the adoption tax credit and the exclusion from income for adoption assistance programs?

The IRS is the most authoritative, up-to-date, and comprehensive source of information regarding the adoption tax credit and the exclusion from income for adoption assistance provisions of the tax code, but the following sources may also be helpful.

- The Congressional Coalition on Adoption Institute is a non-profit organization that works to raise awareness about the needs of children without families and to remove policy barriers that hinder children from being adopted www.ccaainstitute.org/images/stories/ccai_in_focus_-_the_adoption_tax_credit_web.pdf
- Creating a Family is a nonprofit organization providing education and

support for infertility and adoption www.creatingafamily.org/adoption-resources/adoption-tax-credit.html

- The National Council for Adoption (NCFA) is an adoption advocacy nonprofit that promotes adoption through education, research, and legislative action www.adoptioncouncil.org/publications/adoption-advocate-no21.html

NCFA recently issued a publication explaining the adoption tax credit. The following is a copy of that document which is being republished with NCFA's permission.

TAX BENEFITS FOR ADOPTION: THE ADOPTION TAX CREDIT*

Author: Herbert Newell, M.A.†

Updated: March 2011

Introduction

Adoption is a long and often emotionally laborious process. One of the many stressors for families is the financial challenge of adopting. Since its inception in 1997, the adoption tax credit has helped many thousands of middle-income American families defray the high costs of adoption, making adoption a reality and providing loving, permanent families for millions of children who might have otherwise languished in foster care or institutions.

History

After years of advocacy by adoption organizations, including the National Council For Adoption (NCFA), the Federal Adoption Tax Credit went into effect for tax year 1997. This initial adoption assistant program was part of the 1996 Small Business Job Protection Act and set the maximum credit at \$5,000 per child (\$6,000 per child with special needs), and allowed for the

credit to sunset (expire) on December 31, 2001.

In 2001, Congress passed parts of President Bush's tax incentive package, the Economic Growth and Tax Relief Reconciliation Act of 2001.¹ This act extended the adoption tax credit until December 31, 2010 and increased the initial maximum credit to \$10,000 per child (for both special needs and non-special needs adoptions) and also indexed this amount for inflation annually. The process of indexing the credit allows for adjusting the maximum allowed amount annually for inflationary factors as they pertain to adoption and the economy. The credit for adopting a child with special needs was made permanent with this act. For 2010, the indexed tax credit maximum was \$13,170 per child.²

Where Things Currently Stand

The adoption tax credit as provided for in the 2001 legislation was set to sunset in tax year

*This information is provided for general educational purposes and is not meant as tax advice. This is a general summary and does not cover every specific tax issue and is not inclusive of every situation. You should consult a competent tax adviser for individual advice regarding your own situation.

¹ Economic Growth and Tax Relief Reconciliation Act of 2001. Pub. L. No. 107-16 (2001).

² IRS. (2009). *Expansion of adoption tax credit*. Retrieved from <http://www.irs.gov/formspubs/article/0,,id=177982,00.html>

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2010 unless it was renewed by Congress. The Patient Protection and Affordable Care Act of March 2010 temporarily increased the adoption expense credit and fringe benefit exclusion limit for adoption assistance programs and made the credit refundable. The changes are effective for tax years beginning after Dec. 31, 2009.

This extension allows for the maximum adoption credit to be increased to \$13,170 per eligible child. This increase applies to both non-special needs adoptions and special needs adoptions. Also, the adoption credit is made refundable, meaning that families will realize the full benefit regardless of taxes paid. The scheduled sunset relating to the adoption credit is delayed for one year (i.e., the sunset becomes effective for tax years beginning after Dec. 31, 2011).

On December 17, 2010 the 2010 Tax Relief Act was signed into law which extended the Bush era tax cuts through tax year 2012. The extension for tax year 2012 is not refundable as it is with the Patient Protection and Affordable Care Act which only applies for tax years 2010 and 2011.

If the adoption tax credit is allowed to expire after this current extension, the maximum tax credit for the adoption of children with special needs would decrease to \$6,000 per child, with the credit for adoptions of non-special needs children expiring altogether.

Adoption Tax Credit

For the tax year 2010, the maximum adoption tax credit was \$13,170 per child for qualified adoption expenses. The tax credit phase-out began for taxpayers with a modified adjusted gross income (AGI) in excess of \$182,180, and was completely phased out for taxpayers with a modified AGI of \$222,180 or higher.

The Internal Revenue Code §23(a)³ defines the adoption tax credit as follows: “In the case of an individual, there shall be allowed a credit against the tax imposed by this chapter the

amount of the qualified adoption expenses paid or incurred by the taxpayer.”

Furthermore, the Code defines “Qualified Adoption Expenses” to be “reasonable and necessary adoption fees, court costs, attorney fees, and other expenses which directly relate to, and the principle purpose of which is for, the legal adoption of an eligible child by the taxpayer.”

Examples of qualified expenses include fees paid to an adoption agency, legal fees, travel-related expenses, all official costs, and any other reasonable cost associated with adopting the identified child. Excluded expenses include any expenses deemed illegal by State or Federal Statute, expenses for surrogate parenting arrangements, expenses related to step-parent adoption, or expenses reimbursed through grants or employer assistance programs.

The Code further defines an “eligible child” to be “an individual who has not attained age 18 or is physically or mentally incapable of caring for himself.” To apply for the credit, married couples must file a joint return and the maximum credit limits are the same for both married couples and single adoptive parents.

The adoption tax credit differs from a deduction, exclusion, or exemption in that it actually reduces, dollar-for-dollar, the taxpayer’s tax liability by subtracting the amount from taxes owed. A tax credit is specifically different from a deduction, in that while a tax credit offsets a taxpayer’s tax liability, a deduction offsets income from a taxpayer’s adjusted gross income to come to taxable income (the amount of income taxable). Therefore, a tax credit is much more advantageous than a deduction, because the tax credit is a refund of applicable taxes to offset the cost of adoption. More simply, an adoptive parent’s tax dollars go to fund approved adoption expenses rather than the federal government.

With the exceptions of tax years 2010 and 2011, the adoption tax credit has historically been

³ For a copy of the tax code referenced throughout this document, see: <http://www.law.cornell.edu/uscode/26/23.html>



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nonrefundable, allowing for a five year carry-forward for those portions within the maximum allowed amount not able to be utilized in the taxable year in which the credit arose. The carry-forward is applicable for future tax years even if the taxpayer's modified AGI in those years exceeds the amount allowable or extends into the phase-out range. The carry-forward credit must be used within four subsequent years of the taxable year in which the adoption occurred.

As previously stated, for tax years 2010 and 2011, the tax credit was made refundable by The Patient Protection and Affordable Care Act of March 2010, meaning that regardless of the taxes paid, families will be able to receive the maximum allowed benefit in the year of finalization.

Furthermore, for taxpayers who has finalized adoptions before tax year 2010, yet had applicable carryforwards from previous credits, these taxpayers remaining credit will be fully refundable in tax year 2010.

The IRS Code also defines in which tax year the credit becomes applicable, which differs slightly for domestic and some international adoptions. If the child is "a United States Citizen or a child who is foreign born, but who is a resident at the time the adoption commences," the taxable year for which the adoption tax credit can be claimed is the year in which the adoption became finalized. Simply put, once you have received the final adoption decree from the court, you may claim the credit in that tax year. Any expenses paid prior to this filing are eligible as if incurred in the tax year the decree is entered. This is also applicable for those families who adopt their child on a legal guardianship decree from the country of origin or any family whose child enters the country on an IR-4 visa. The credit is applicable once an adoption is finalized in the United States.

In the case of adoptions for which The Hague Convention determines the finality of the adoption, the IRS will accept that declaration of finality for the purposes of allowing the tax credit. For those international adoptions not under the auspices of The Hague, finality is determined

when the competent authority in the sending country enters a decree of adoption or the adoption is finalized in the home state of the adopting parents.

For additional expenses that may occur in subsequent years pertaining to an adoption that occurred in a previous tax year, the taxpayer may claim those expenses in the tax year they are incurred, as long as the total amount claimed is within the maximum allowable amount per child. For families who are adopting multiple children, it is important to understand that the maximum amount is *per child*; therefore, families are able to claim a credit for each child adopted, even if such adoptions take place in the concurrent tax year.

An example of the application of the tax credit: John and Jane Doe adopt a child in 2009. John and Jane incur \$20,000 in eligible adoption expenses. In 2009 their tax liability on their Form 1040 was \$15,000, and they had \$13,500 withheld from their paychecks during the year. In a normal year, without the adoption tax credit, they would expect to pay \$1,500 to the Federal government before April 15. However, with the maximum adoption tax credit they are permitted to take (\$12,150), their tax liability is reduced to \$2,850, which means they will receive a refund of taxes withheld of \$10,650. Instead of paying the government in taxes, their tax dollars were applied to their adoption.

The tax credit and subsequent carry-forward is especially beneficial to lower-income and middle-income families, in that any part of the credit not taken in year one may be carried forward for five years. This helps families plan their adoption expenses with loans that can be repaid as taxes are offset during subsequent years. Families can thus make lump-sum payments towards the loans, in effect paying them off faster, while reducing the amount of interest paid.

An example of application of the carry-forward: John and Jane Doe adopt a child in 2009. John and Jane incur \$15,000 in eligible adoption expenses. In 2009 their tax liability on their Form 1040 was \$6,000, and they had \$5,000 withheld



from their paychecks during the year. In a normal year, without the adoption tax credit, they would expect to pay \$1,000 to the Federal government before April 15. However, with the adoption tax credit they are permitted to take, their liability is reduced to \$0, which means they will receive a refund of taxes withheld of \$5,000. Instead of paying the government in taxes, their tax dollars were applied to their adoption. Since they only used \$5,000 of the tax credit in 2009, they have \$7,150 to carry forward to offset tax liability in 2010.

Adopting a Child with Special Needs

The designation of “Child with Special Needs” only applies to children who are U.S. citizens. A child qualifies as a “Child with Special Needs” if the taxpayer adopts a child who has been deemed by the State to qualify for adoption subsidy assistance (State assistance or SSI). The taxpayer may claim the entire credit after adopting a child from U.S. foster care or a child who is a U.S. citizen who has been deemed to have special needs by a competent American authority, even if the expenses they incurred were less than the maximum amount (\$12,150 for 2009).

An example of this special needs application: John and Jane Doe adopt a child from foster care in 2009. John and Jane incur \$2,500 in eligible adoption expenses. In 2009 their tax liability on their Form 1040 was \$14,000, and they had \$13,000 withheld from their paychecks during the year. Although their qualified adoption expenses were only \$2,500, John and Jane are still eligible to take the entire \$12,150 tax credit, reducing their tax liability to \$1,850. John and Jane will receive a refund of taxes withheld of \$11,150.

Adoption Tax Exclusion

As previously stated, the taxpayer must exclude amounts reimbursed via an employer program or otherwise when determining qualified

adoption expenses for the purpose of the adoption tax credit. There is, however, a provision in the Code (IRC §137)⁴ that provides an exception for income received through an employer adoption assistance program. It states: “gross income of an employee does not include amounts paid or expenses incurred by the employer for qualified adoption expenses in connection with the adoption of a child by an employee if such amounts are furnished pursuant to an adoption assistance program.”

The definition for qualified adoption expenses is the same as that used for the adoption tax credit, and the maximum exclusion amount and phase-out limits apply as those set forth for the credit. With the costs associated with adoption and the varied companies supplying adoption assistance programs to their employees, this exclusion can potentially save a family as much as \$3,500 in taxes.

Failed Adoptions

The Code does not include specific language to indicate that taking a credit is allowable for a failed adoption attempt. It also does not specify that the credit be taken only for successful adoption efforts. The only direct recognition of failed adoption attempts is found in the filing requirements, which note that the taxpayer may or may not know the name and age of the child for whom the credit is claimed. Furthermore, in the instructions for filling out Form 8839, the form that accompanies the 1040, on which the taxpayer claims the adoption tax credit, it states, “Complete all columns that apply to the eligible child you adopted or *tried to adopt.*”

Currently there are no clear requirements and no clear guidelines from the IRS that make it clear the adoption effort must have been successful to be eligible for the credit. If a taxpayer has experienced an unsuccessful adoption of an identified child and incurred qualified adoption expenses, it is highly recommended that they

⁴ See: http://www.taxalmanac.org/index.php/Internal_Revenue_Code:Sec._137._Adoption_assistance_programs



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seek professional help from a local CPA for guidance on how to best claim the credit for the qualified adoption expenses.

Other Tips for Adoptive Parents, Forms, and Suggestions

Once the taxpayer(s) have experienced a successful adoption, they should claim their child as a dependent on their tax return for the tax year the child entered the home. The child will need a Taxpayer Identification Number, which can be either the child's Social Security Account Number or an Adoption Taxpayer Identification Number (ATIN) (this can be applied for by using Form W-7A). This form requires approximately four to eight weeks for processing and expires on the two-year anniversary of its issuance or the issuance of the Social Security Account Number, whichever comes first. It is a good idea for the taxpayer to obtain the ATIN in situations where it appears that a Social Security Number will not be issued in time to file tax returns in a timely manner.

To take the adoption credit or exclusion, the taxpayer must complete Form 8839, entitled "Qualified Adoption Expenses," which is used to

itemize qualifying adoption-related expenses. Form 8839 is then attached to either the Form 1040 or Form 1040A, whichever is applicable.

The credit is also reported as a subtraction to taxes owed on the applicable form. Other applicable forms are the Form SS-5, which is used to apply for a Social Security Number for your child, and Form W-7A, mentioned above.

Adoptive parents should make sure to keep all applicable records, receipts, journals, and invoices from their adoption journey and retain this information for at least three years after the credit has been used in full. It is also a good idea for them to either consult a tax professional or their employer's human resources representative to plan for withholdings from their pay in the tax years that the adoption credit is applicable; otherwise, the availability of the funds released to the taxpayer through the tax credit will only be available annually at tax filing time.

While all families may not be able to recoup the entire tax credit in some years, a personal accountant or adoption agency representative can help the family estimate how much they should be able to receive within the allowable time period.

The IRS tax topic can be viewed at <http://www.irs.gov/taxtopics/tc607.html>

The entire IRS publication is available at <http://www.irs.gov/pub/irs-prior/p968--2002.pdf>

Forms referenced in this document can be accessed at:

<http://www.irs.gov/formspubs/index.html?portlet=3>

<http://www.ssa.gov/online/>

†About the author: Herbie Newell is the Executive Director/President of Lifeline Children's Services, Inc. of Birmingham, Alabama. Founded in 1981, Lifeline provides birthparent services, domestic adoption, intercountry adoption and residential maternity care. Mr. Newell holds a Master's in Accounting from Samford University in Birmingham, Alabama. Mr. Newell also currently serves as the Vice-Chairman of the National Christian Adoption Fellowship.

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