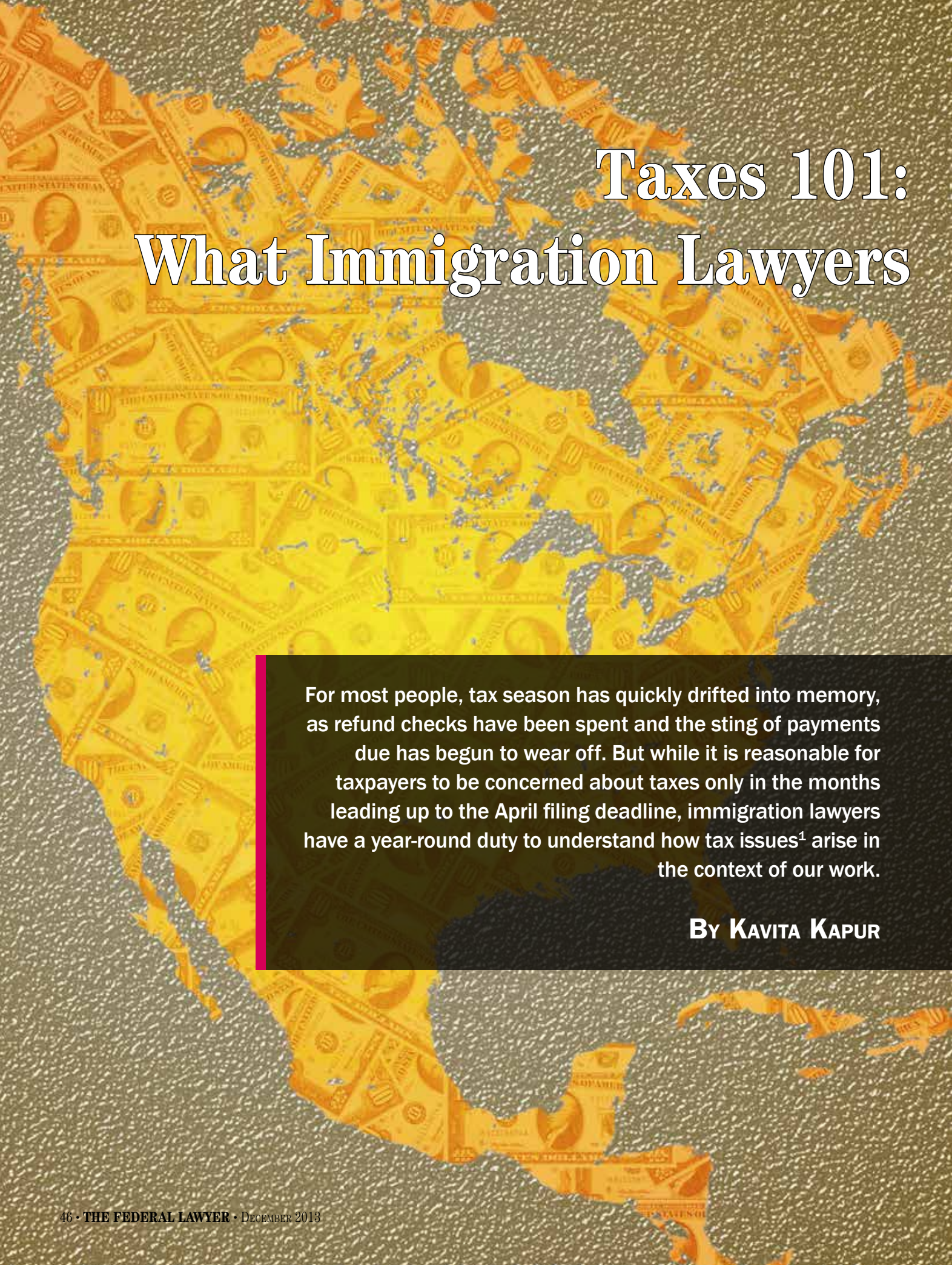

Taxes 101: What Immigration Lawyers

For most people, tax season has quickly drifted into memory, as refund checks have been spent and the sting of payments due has begun to wear off. But while it is reasonable for taxpayers to be concerned about taxes only in the months leading up to the April filing deadline, immigration lawyers have a year-round duty to understand how tax issues[1] arise in the context of our work.

By Kavita Kapur

Should Know About Taxes

Immigration proceedings often cite tax returns as evidence of good moral character, to demonstrate residence in the United States or the bona fides of a marriage, or even to sway a discretionary decision. But given the complexity of federal tax law, which has been recognized as the only area of law more complicated than immigration law,[2] the presence or absence of a tax return may not always be probative of what it is submitted to prove. Perhaps a noncitizen who did not submit a return for a particular tax year was not required to do so under the filing requirements. Or maybe the noncitizen who listed as a dependent his mother who lives overseas fell within one of the exceptional situations in which this is appropriate. Just as many areas of immigration law are dictated by an intricate web of rules, exceptions, and technical definitions of common words that apply only "for immigration purposes," many concepts in tax law are more complicated than they might appear.

This article introduces some of the frequently misunderstood areas of tax law that affect noncitizens. Although it may seem daunting, those tasked with representing the interests of noncitizens or with analyzing their claims should be familiar enough with the basic principles of tax law to identify the seemingly simple tax issues that often demand more nuanced analysis. Given the complexity and highly technical nature of tax law, this article is intended only to prompt further inquiry into tax issues that arise in the context of immigration law and is not by any means an exhaustive discussion of the subjects addressed or an authoritative assertion of tax rules. As with immigration law, the many exceptions and qualifications to various tax rules should direct readers to consult the Internal Revenue Code or official publications of the Internal Revenue Service (IRS) for more precise information.

Filing Requirements: "Someone told me I didn't have to file."

Regardless of immigration status, any individual who earned money in the United States may be taxed by the federal government.[3] However, not everyone who earns money in the United States is required to file a federal tax return. In fact, each year the IRS promulgates filing requirements dictating who, in general, must file a federal tax return.[4] As a result, when a noncitizen fails to file taxes during a particular year, whether or not they have failed to fulfill their tax obligations requires some analysis.

Gross Income

The federal tax filing requirements are based on tax filing status, age, and amount of gross income earned during the tax year.[5] Notably, immigration status does not affect whether or not someone must file a tax return. Thus noncitizens without lawful status are subject to the same tax obligations as citizens and lawful permanent residents of the same filing status, age, and gross income levels. Filing status is discussed in detail below, but the key to understanding tax filing requirements is that an individual's income level can often dictate whether or not he or she must file a return. Thus, for example, if a 40-year-old unmarried man with no children or other dependents earns less than $9,750 of gross income during 2012, he will generally not be required to file a tax return.[6] Similarly, a married couple who are both older than 65 and elect to file their taxes jointly would only be required to file for 2012 if their combined gross income was at least $21,800.[7] Being aware of how filing requirements are determined by gross income levels can clarify why someone may or may not have filed a tax return in a particular year.

Self-Employment

While referring to the published list of filing requirements by gross income level will resolve most inquiries, there are important exceptions, including one that arises frequently with noncitizens. Federal tax law provides that all individuals who earned at least $400 from self-employment during the tax year must file a return, regardless of whether they would be required to file under the standard filing requirements.[8] Self-employment includes maintaining one's own business, including earning income from informal work activities, such as cleaning homes, landscaping, and providing child care, even if the person providing those services does not do so under the auspices of an established business.[9] Thus, under this rule, the 40-year-old unmarried man in the example above who earned less than $9,750 during 2012 would still be required to file if he earned $400 or more from any type of self-employment. Similarly, a day laborer with no lawful immigration status who worked for only a couple of weeks during 2012 and earned a total of $400 would also be required to file a tax return.

To determine whether income was earned from self-employment, it is useful to know whether or not the individual concerned received a Form W-2 reflecting their earnings. If so, then the earnings are likely based on the individual's status as an employee of an employer who transmitted Form W-2 to the IRS on their behalf. Alternatively, some individuals who are self-employed receive Form 1099-MISC from the payer, which is an acknowledgment of services performed and denial of any employer–employee relationship for tax purposes, thus evidence of self-employment. Additionally, many individuals who are paid in cash or "under the table" will be considered to be self-employed.[10] The main point here is that any self-employment that generates more than $400 in income also produces a filing requirement, regardless of the general rules on gross income.

Because many noncitizens work in the so-called informal economy, often because of various barriers to formalized employment, this requirement arises frequently in the immigration context. The lack of formality associated with many forms of self-employment, however, often means that noncitizens who engage in this type of work are entirely unaware of the filing requirement or have been misinformed that the absence of any formal work contract corresponds to the absence of a tax obligation. Taxpayers considered to be self-employed may be surprised at the amount of taxes due upon filing their returns, as taxes have not been withheld and submitted to the corresponding federal and state authorities during the tax year. Attention to the self-employment filing requirement is particularly important to ensuring tax law compliance for noncitizens. Taxpayers who previously failed to file based on ignorance may rectify the situation by preparing the appropriate returns and paying back taxes.

Filing When Not Required

Individuals who do not meet the gross income and characteristics of self-employment may still want to file tax returns. In most cases, this involves a monetary incentive, such as being refunded overpaid income tax that was withheld during the tax year or receiving certain refundable tax credits. Additionally, noncitizens may find that tax returns provide documentation of residence or demonstrate positive equities that may be relevant in immigration proceedings. Accordingly, the fact that a particular individual is not *required* to file a federal tax return does not mean that they cannot or should not.

Taxpayer Identification: "I couldn't file taxes—I didn't have a Social Security number."

Individual Taxpayer Identification Number

Tax returns are typically filed under a taxpayer's Social Security number so the IRS may properly identify who has filed the return.[11] Many noncitizens, including those without lawful immigration status in particular, do not have, nor are eligible to obtain, Social Security numbers. This, however, does not prevent or excuse tax filing when it is otherwise required (*See* "Filing Requirements," above). Instead, the IRS has developed a process for issuing an Individual Taxpayer Identification Number (ITIN)[12] for individuals who are required to report their income, regardless of their immigration status.[13]

Not all noncitizens will need an ITIN. Any noncitizen who possesses an Employment Authorization Document from U.S. Citizenship and Immigration Services or who is otherwise authorized to work is eligible to obtain a Social Security number and should apply for one from the Social Security Administration.[14] Only individuals who are ineligible or have had an application denied by the Social Security Administration should apply for an ITIN.[15] By law, a noncitizen cannot have both an ITIN and a Social Security number.

Noncitizens may apply for an ITIN using Form W-7, which requires the applicant to submit a federal income tax return for which they are seeking the ITIN, as well as proof of identity and foreign status.[16] Once acquired, an ITIN can facilitate filing of prior year returns when a noncitizen was required to file but did not.[17]

Borrowed Social Security Numbers

Sometimes noncitizens will borrow Social Security numbers for employment purposes when they are not authorized to work in the United States. When this happens, tax documents provided by an employer, including Form W-2, will report wages paid to and taxes paid on behalf of the borrowed Social Security number. In this situation, the IRS requires that earnings from Form W-2 still be reported. The taxpayer will use his or her ITIN on the tax return but report all income earned using the borrowed Social Security number. Although this creates a mismatch, wherein the return is being filed under the ITIN and the wages were earned on the borrowed Social Security number, this is a technical requirement of the IRS.[18] This mismatch will alert both the IRS and the Social Security Administration to dissociate the taxpayer's earnings from the borrowed Social Security number. This ensures that the individual from whom the Social Security number was borrowed does not incur taxes on income that he or she did not actually earn.

Additionally, filing in this manner allows the IRS to credit the taxpayer who borrowed the number for the federal taxes that were already withheld on the borrowed Social Security number, notwithstanding the fact that they are filing their return with an ITIN. This will often protect noncitizens who have borrowed Social Security numbers from being reassessed for the taxes which were already deducted from their income. Most state tax systems, however, do not operate in this manner. In those systems, taxes withheld during the tax year are understood to have been paid by the Social Security number's taxpayer and not by someone who borrowed it. State agencies often do not detect the mismatch like the IRS does. As a result, the state tax agency will consider that a noncitizen using a borrowed Social Security number has not had taxes withheld and will assess a tax obligation accordingly. This may result in double payment, as

the noncitizen will be required to pay taxes that have already been taken out of his or her paycheck. In this way, using a borrowed Social Security number can cause additional complications.

Residency Status: "She cannot receive tax credits because she does not have a green card."

U.S. citizens may have tax obligations regardless of their residence, but for noncitizens, filing requirements will vary depending on where an individual has lived and, more particularly, their residency status for tax purposes. This is because the code delineates two different tax regimes for noncitizens: one for resident aliens and another for nonresident aliens.[19] The IRS taxes noncitizens who meet the tax law definition of resident alien in the same manner as U.S. citizens.[20] This includes the obligation to pay tax on all income, regardless of whether it was earned within the United States or in some other country. By contrast, the IRS taxes nonresident aliens only on income earned from business or another source located in the United States.[21] Residency status also affects eligibility for various tax benefits, including some refundable tax credits.[22]

Any noncitizen who possesses an Employment Authorization Document from U.S. Citizenship and Immigration Services or who is otherwise authorized to work is eligible to obtain a Social Security number and should apply for one from the Social Security Administration. By law, a noncitizen cannot have both an Individual Taxpayer Identification Number and a Social Security number.

Thus, whether a particular individual is a resident alien for tax purposes will significantly affect his or her tax responsibility. Those familiar with immigration law concepts may assume that a resident alien is the tax law equivalent of an individual with lawful permanent resident status. This is *not* the case, however, under the tax law. In a tax context, resident aliens include both noncitizens who at any time during the year were lawful permanent residents and thus satisfied the so-called green card test, as well as any noncitizens who were not lawful permanent residents but who satisfy the IRS's substantial presence test. Under the substantial presence test, any noncitizen who has been physically present in the United States for a specified number of days over a three-year period (calculated according to a complicated formula that factors a fraction of the total presence in each year) will be considered a resident alien. Under this test, a noncitizen without lawful immigration status who has been in the United States for at least 183 days during the tax year will be considered to have met the substantial presence test and will be deemed a resident alien.[23]

The code further elaborates the scope of "in the United States" as well as "presence" and provides certain categories of noncitizens who are exempt. Notably, various nonimmigrant visa holders, including students, are exempt because the period spent in the United States pursuant to that visa is not meaningful physical presence that could result in them being considered resident aliens by the IRS and subject to general taxation rules.[24]

Under this residency status test, an undocumented individual who has been continuously present in the United States for a sufficient amount of time would be considered a resident alien, in the same way as an individual with Temporary Protected Status or some other nonexempt category of immigration status. These rules function to impose some tax responsibilities and benefits on people who have forged sufficient ties to the United States through their residency, regardless of what their immigration status may be. A noncitizen who does not meet the requirements of a resident alien, however, must file pursuant to the standards for nonresident aliens if he earned income in the United States during the tax year.[25]

Filing Status: "My spouse is undocumented, so I just file as single."

The code delineates a number of filing statuses that categorize taxpayers to determine their tax obligation and eligibility for tax benefits.[26] Like most other legal categories, tax filing statuses correspond to particular circumstances that do not necessarily reflect an intuitive or common sense understanding of their names. The process of determining filing status confuses many, and the added factors of immigration status and the phenomena of mixed-status families often complicate things further.

If a taxpayer is legally married, he may *not* file as single, even if his spouse lacks lawful immigration status or is not physically present in the United States, until a legal separation or a formal dissolution occurs.[27] Instead, married taxpayers may file in one of the other available tax statuses. If the couple elects to file their taxes jointly, they would do so in the married filing jointly category.[28] This is the generally thought to be the preferred tax category, but taxpayers may nonetheless opt to file separately from their spouses. The fact that one spouse may lack lawful immigration status is inconsequential to a couple's ability to file a joint return.

If a married couple does not wish to file a joint return, an individual partner may file as married filing separately or, if the circumstances allow,[29] as head of household.[30] Because of the implications for tax obligations and eligibility for tax benefits, married filing separately is a disfavored tax status, whereas head of household is considered highly favorable, second only to married filing jointly. The code states that married taxpayers wishing to file as head of household must, among other requirements, live in a separate residence from his or her spouse for the last six months of the year.[31] However, the IRS provides an important qualification to this rule: a taxpayer who is a U.S. citizen or a resident alien under the tax code and who is married to a nonresident alien is deemed to have lived apart for the purpose of head of household status.[32] Thus, a U.S. citizen who lives with her noncitizen husband and meets all of the other requirements for head of household status may file as such so long as her husband does not satisfy the green card or substantial presence test, which would prevent him from being considered a nonresident alien.[33] If, however, her husband has been present in the United States for a sufficient amount of time, such as for 183 days out of the tax year, and has satisfied the substantial presence

test, the wife cannot file as head of household. As a general rule, only one taxpayer per home can claim head of household status.[34]

Claiming Dependents: "I send money home to support my mother."

Exemptions serve to reduce a taxpayer's taxable income and by doing so, lessen the amount of tax owed. The amount of an exemption is a fixed value published by the IRS, which is excluded from gross income for the purpose of assessing a tax obligation.[35] Generally, each taxpayer can take a personal exemption for himself, as well as his spouse if filing a joint return, and can take additional exemptions for dependents.[36] Because of the significant monetary benefits that dependency exemptions can yield, most people are inclined to take exemptions for everyone that they support.

However, determining who qualifies as a dependent requires more than a superficial consideration of whether the taxpayer provides financial support for another person. Some of the factors involved include residence in the taxpayer's household, relationship to the taxpayer, age and student status, disability status, and income levels.[37] The biggest determinant of dependency is whether the purported dependent provides the majority of his or her own support or whether the claiming taxpayer provides more than half.[38] Each factor contains various qualifications.

Applying these standards to consider whether noncitizens can be claimed as dependents produces various unexpected outcomes. Notably, the rules for dependency require that the claimed dependent be a U.S. citizen, a resident alien, a U.S. national, or a resident of Canada or Mexico.[39] Thus, taxpayers, whether they are U.S. citizens or not, can claim certain categories[40] of family members in Mexico or Canada as dependents if they provided more than half of the family members' support and if the family members earned less than a certain level of income.[41] This rule is a specific exception to the general rule that dependents must reside with the taxpayer who claims them.

Additionally, a taxpayer can claim a relative who meets the criteria of resident alien as a dependent even if they are not lawfully present in the United States,[42] regardless of the purported dependent's country of nationality and whether he or she resided in the United States for the entire tax year. So long as the relative satisfied the substantial presence test and other requirements for dependency, the taxpayer can claim him or her.

In short, the dependency rules produce unintuitive results authorizing exemptions to be claimed for residents of Canada or Mexico who have never set foot in the United States, so long as they maintained a certain relationship with a taxpayer, make less than the established income ceiling, and receive a majority of their support from the taxpayer. Residents of other countries may also be properly claimed as dependents for exemption purposes if they meet the requirements to be considered resident aliens of the United States under the code. As a result, determining the propriety of a claimed exemption on behalf of a noncitizen requires particularized analysis.

Tax Credits: "Undocumented immigrants cannot claim tax credits."

Tax law provides for various credits that can serve to reduce the amount of tax owed (in the case of nonrefundable credits) or even in the receipt of a payment (in the case of refundable credits). While numerous credits exist—including ones for retirement savings contributions, education expenses, and even child care expenses and having its own set of requirements—some credits raise particular issues for noncitizens and warrant further discussion.

Child Tax Credit

The Child Tax Credit is a nonrefundable credit intended to reduce the amount of tax owed by taxpayers with qualifying children.[43] Any taxpayer with a qualifying child may claim the Child Tax Credit regardless of the taxpayer's own immigration status. The child, however, must have U.S. citizen, U.S. national, or resident alien status.[44] Thus a child who resides in Mexico and was properly claimed as a dependent cannot be claimed as a qualifying child for the purpose of the Child Tax Credit. But, a child without lawful immigration status who lives in the United States and meets the definition of a resident alien for tax purposes may qualify. Beyond the residency status, eligibility also depends on the age of the child, his or her relationship to the taxpayer, whether he or she was claimed as a dependent, residency with the taxpayer, and whether the child provided more than half of his or her own support.[45] Accordingly, determining whether a particular noncitizen can be claimed for the purposes of the Child Tax Credit requires consideration of all of these factors. Dependent status is only one part of the analysis.

Earned Income Credit

The Earned Income Credit is a refundable tax credit for working taxpayers that has even greater benefit for taxpayers with children. To be eligible, the taxpayer, the taxpayer's spouse, and all qualifying children must have valid Social Security numbers that authorize employment.[46] This means that ITINs or Social Security numbers that expressly do not authorize employment are insufficient. Accordingly, noncitizens who do not have an Employment Authorization Document or other authorization to work cannot claim the Earned Income Credit. Taxpayers filing as married filing separately cannot claim the credit, so a taxpayer cannot avoid his or her spouse's lack of employment authorization by doing so.[47]

If a noncitizen has a Social Security number that is valid for employment, then he or she may claim the Earned Income Credit if he or she meets the requirements for a resident alien for the entire tax year. Under this rule, a noncitizen with immigration status that allows for employment would remain eligible for the Earned Income Credit. If he or she is married and the spouse is a nonresident alien, the taxpayer will remain eligible only if he or she is filing the return as married filing jointly. Before concluding eligibility for the Earned Income Credit, a careful analysis according to these nuanced standards should be undertaken.

Conclusion

This article provides only an introduction to some of the most common and confusing tax issues that arise with noncitizens. Regardless of their immigration status, most taxpayers are advised by a professional or certified preparer on the extent of their tax obligations. However, even those familiar with tax law may be unaware of some of its specific applications to noncitizens, sometimes resulting in incorrect advice. Even when correctly prepared, misconceptions about the taxation of noncitizens may lead to misinterpretations of the absence of a return or the contents of a tax form. Careful immigration lawyers can play an important role in assisting noncitizens to comply with tax laws and ensuring that their compliance is properly appreciated. ⊙

Kavita Kapur is an attorney advisor with the Executive Office for Immigration Review (EOIR) at the Arlington Immigration Court. Any views expressed herein are those of the author and do not represent the positions of the EOIR, the Department of Justice, the attorney general, or any other entity of the United States government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the Immigration Court Practice Manual or the Board of Immigration Appeals Practice Manual.

Endnotes

[1]This article deals with principles of federal tax law and not with the tax systems of the various states. Some of the issues discussed here will overlap with state taxation systems, but lawyers dealing with state tax returns should familiarize themselves with state-specific requirements and definitions.

[2]*See Castro-O'Ryan v. U.S. Dep't of Immigration and Naturalization*, 847 F.2d 1307, 1312 (9th Cir. 1988).

[3]*See* IRS Publication 519, U.S. Tax Guide for Aliens (2012).

[4]IRS Publication 17, Your Federal Income Tax (2012), Table 1-1.

[5]*Id.*

[6]*See Id.*

[7]*See Id.*

[8]*See* Publication 17 at 5.

[9]*See Id.*

[10]Self-employed taxpayers often face additional challenges to tax filing arising out of their lack of formal payment records. Particularly where no contractual agreement is in place with the entity issuing payments, taxpayers who receive payments by cash or check are responsible for maintaining their own records as to the amount of income that they earned. In these situations, it is advisable for self-employed taxpayers to keep written accounts of the amounts they were paid organized by the date that payment was received, as well as to note any expenses directly associated with their work.

[11]Under 26 U.S.C. § 6109, if a person is required to file a return, statement, or other document with the IRS, the person must include an identifying number.

[12]Like Social Security numbers, ITINs are nine digit numbers that begin with the number nine and have a range of 70 to 99 in the fourth and fifth digits.

[13]*See* IRS Publication 1915, Understanding Your IRS Individual Tax Payer Identification Number (2012).

[14]*See Id.*

[15]*See Id.*

[16]*See Id.*

[17]*See Id.*

[18]*See* IRS, Individual Taxpayer Identification Number (ITIN) Reminders for Tax Professionals, available at www.irs.gov/Individuals/Individual-Taxpayer-Identification-Number-%28ITIN%29-Reminders-for-Tax-Professionals.

[19]*See* Publication 519.

[20]*See Id.*

[21]*See Id.*

[22]For an extensive discussion of residency status and its implications on taxation, see IRS, Publication 519, U.S. Tax Guide for Aliens.

[23]*See Id.*

[24]Under some circumstances, a noncitizen may be considered both a resident alien and a nonresident alien during a tax year and would thus be deemed "dual status." In this case, both a resident and a nonresident tax return should be filed.

[25]*See Id.*

[26]Publication 17 at 19-24.

[27]*See Id.*

[28]*See Id.*

[29]Generally if a taxpayer is legally married, but has lived apart from his spouse for the last six months of the year and has a qualifying dependent, he may file as head of household. *See Id.* at 22.

[30]*See Id.*

[31]*See Id.*

[32]*Id.* at 22.

[33]*See Id.*

[34]*Id.*

[35]*See* Publication 17 at 25.

[36]*Id.*

[37]*See Id.*

[38]*See Id.*

[39]Publication 17, Table 3-1.

[40]Relatives who do not have to live with the taxpayer to be claimed as dependents include son, daughter, stepchild, foster child, or a descendant of any of them; brother, sister, half-brother, half-sister, or a son or daughter of any of them; father, mother, or an ancestor or sibling of either of them; stepbrother, stepsister, stepfather, stepmother, son-in-law, daughter-in-law, father-in-law, brother-in-law, or sister-in-law.

[41]For 2012, a dependent must have made less than $3,800 in taxable income.

[42]Publication 17, Table 3-1.

[43]The Internal Revenue Code also provides for an Additional Child Tax Credit that is refundable. Eligibility for this credit depends on the amount of taxable earned income or the number of children. Because eligibility is premised on qualification for the Child Tax Credit, only those children who qualify under the Child Tax Credit will qualify for the purposes of the Additional Child Tax Credit.

[44]*See* IRS Publication 972, Child Tax Credit (2012).

[45]*Id.*

[46]*See* IRS Publication 596, Earned Income Credit (2012).

[47]*See Id.*