Week of July 22, 2019

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ACCOUNTING
CONTINUING EDUCATION



CURRENT FEDERAL TAX DEVELOPMENTS WEEK OF JULY 22, 2019 © 2019 Kaplan, Inc. Published in 2019 by Kaplan Financial Education.

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SECTION: 152

DESPITE FINALLY OBTAINING SIGNED FORM 8332, NONCUSTODIAL PARENT DENIED DEPENDENT EXEMPTION

Citation: DeMar v. Commissioner, TC Memo 2019-91, 7/18/19

Although it's an issue we've discussed before, it's important to remember to remind noncustodial parents of the requirement to submit a signed Form 8332, *Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent* with their tax return to claim the child as a dependent. In the case of *DeMar v. Commissioner*, TC Memo 2019-91,¹ the taxpayer was denied such benefits due to his failure to submit the form. And even though the taxpayer did eventually obtain a signed form, he failed to prove that his former spouse had filed an amended return to give up her tax benefit—a condition imposed in proposed regulations when taxpayers attempts to submit Form 8332 after initially filing a return for the year.

Divorces often leave the parties with hard feelings, and the issues surrounding children can be especially sensitive. To keep the Tax Court from getting into the middle of such squabbles between former spouses, the law provides a very mechanical test for which of the divorced parents will be able to claim the child as a dependent.

Note that while the dependency exemption no longer is available temporarily after the Tax Cuts and Jobs, other items, such as the child tax credit, still depend on the party that can claim the child as a dependent.

The law provides special rules for children of divorced parents, found at IRC §152(e). So long as the child receives over ½ of his/her support from the combined contributions of both parents, the parent who is deemed the *custodial parent* as defined in the IRC by default has the right to claim the child as a dependent.² This is true regardless of how much of the support is provided by that parent, since the support test could be fulfilled by contributions solely from the non-custodial parent.

Which parent is the custodial parent does not depend on state law, or what the divorce decree says—this is a matter of federal law, specifically that found in Title 26 of the US

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¹ https://www.ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=12004, retrieved July 18, 2019

² IRC §152(e)(1)(B)

Code (the IRC). Reg. §1.152-4 provides the following detailed "count the nights" rule for determining custody:

- (d) Custodial parent.
- (1) In general.

The custodial parent is the parent with whom the child resides for the greater number of nights during the calendar year, and the noncustodial parent is the parent who is not the custodial parent. A child is treated as residing with neither parent if the child is emancipated under state law. For purposes of this section, a child resides with a parent for a night if the child sleeps --

- (i) At the residence of that parent (whether or not the parent is present); or
- (ii) In the company of the parent, when the child does not sleep at a parent's residence (for example, the parent and child are on vacation together).
- (2) Night straddling taxable years.

A night that extends over two taxable years is allocated to the taxable year in which the night begins.

- (3) Absences.
 - (i) Except as provided in paragraph (d)(3)(ii) of this section, for purposes of this paragraph (d), a child who does not reside (within the meaning of paragraph (d)(1) of this section) with a parent for a night is treated as residing with the parent with whom the child would have resided for the night but for the absence.
 - (ii) A child who does not reside (within the meaning of paragraph (d)(1) of this section) with a parent for a night is treated as not residing with either parent for that night if it cannot be determined with which parent the child would have resided or if the child would not have resided with either parent for the night.
- (4) Special rule for equal number of nights.

If a child is in the custody of one or both parents for more than onehalf of the calendar year and the child resides with each parent for an equal number of nights during the calendar year, the parent with the higher adjusted gross income for the calendar year is treated as the custodial parent.

(5) Exception for a parent who works at night.

If, in a calendar year, due to a parent's nighttime work schedule, a child resides for a greater number of days but not nights with the parent who works at night, that parent is treated as the custodial parent. On a school day, the child is treated as residing at the primary residence registered with the school.

Note that nothing in the above rules refers to any language in the divorce decree.

EXAMPLE

Custodial Parent Based on Nights Test

Paul and Kristie are the parents of Brandon. Paul and Kristie divorced two years ago. The divorce decree provided that Brandon would be in the custody of Kristie and specified that Paul would have Brandon with him one weekend a month, and for two weeks in the summer.

Kristie was offered a new job out of state in April of 202X for substantially higher pay. Brandon, 16, was completing his junior year of high school and did not want to move away. Since Paul resided nearby, the couple and Brandon agreed he would live with Paul until he graduated from high school. From May 1, 202X through December 31, 202X Brandon resided with Paul.

Despite the language in the divorce decree that provided that Kristie had custody of Brandon, Paul is treated as the custodial parent for 202x since Brandon spent more nights at Paul's residence than he did at Kristie's.

The law does allow for the custodial to transfer the exemption to the noncustodial parent which is found at IRC §152(e)(2):

(2) Exception where custodial parent releases claim to exemption for the year

For purposes of paragraph (1), the requirements described in this paragraph are met with respect to any calendar year if—

- (A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and
- (B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

The regulations provide detailed instructions on the nature of such a release, effectively mandating the use of Form 8332 or a form that for all intents in purposes duplicates everything on the IRS form:

- (e) Written declaration.
- (1) Form of declaration.
 - (i) In general.

The written declaration under paragraph (b)(3)(i) of this section must be an unconditional release of the custodial parent's claim to the child as a dependent for the year or years for which the declaration is effective. A declaration is not unconditional if the custodial parent's release of the right to claim the child as a dependent requires the satisfaction of any condition, including the noncustodial parent's meeting of an obligation such as the payment of support. A written declaration must name the noncustodial parent to whom the exemption is released. A written declaration must specify the year or years for which it is effective. A written declaration that specifies all future years is treated as specifying the first taxable year after the taxable year of execution and all subsequent taxable years.

(ii) Form designated by IRS.

A written declaration may be made on Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent, or successor form designated by the IRS. A written declaration not on the form designated by the IRS must conform to the substance of that form and must be a document executed for the sole purpose of serving as a written declaration under this section. A court order or decree or a separation agreement may not serve as a written declaration.

The divorce decree in the case of Mr. DeMar read as follows:

Mr. DeMar is divorced and has one son, TD, with his ex-wife, Amanda Renee DeMar. TD was born in 2008. In 2010 Mr. and Ms. DeMar agreed to custody and child support terms in a consent judgment of divorce. In the judgment they established TD's primary residence with Ms. DeMar. They also agreed that Mr. DeMar was entitled to claim TD as a dependent for even-numbered years. For odd-numbered years Mr. DeMar was entitled to claim TD only if he stayed current with his child support obligations and Ms. DeMar's

annual gross income was less than \$15,000. If these conditions were met, Ms. DeMar agreed to execute Form 8332 or a similar written declaration.³

For 2015, an odd-numbered year, Mr. DeMar claimed TD as his dependent. TD resided with Amanda for the year and Mr. DeMar did not attach a signed Form 8332 to his return for the year. Amanda also claimed TD as a dependent on her return. Not surprisingly, this double claim of the dependent brought the DeMars to the attention of the IRS who, after discovering Amanda was the custodial parent, disallowed the dependency exemption on Mr. DeMar's return.⁴

The Tax Court found that Mr. DeMar did not meet the requirements to claim the exemption, noting:

Mr. DeMar was not entitled to claim TD as a dependent for 2015 because he did not satisfy the requirements established under section 152. For a noncustodial parent to claim a qualifying child as a dependent under section 152, (1) the custodial parent must sign a written declaration stating that he or she will not claim the child as a dependent and (2) the noncustodial parent must attach that declaration to his or her return. Sec. 152(e)(2).⁵

But the story doesn't quite end here—in this case Mr. DeMar did obtain a signed Form 8332 from Amanda after he received the notice of deficiency (90-day letter).⁶ He argued that he and Amanda fulfilled the conditions in their judgment of divorce. And, let's remember, although late he now had the signed letter.

However the Tax Court did not find that any of these facts changed the results. The Court decided it did not need to determine if a Form 8332 could be submitted after the filing of an original return. The opinion noted that the law does not explicitly allow or prohibit a Form 8332 to be submitted on an amended return or during an examination.

The Court turns to a proposed regulation (Proposed Reg. \$1.152(e)(2)(i)) which provides:

(2) Attachment to return -- (i) In general. A noncustodial parent must attach a copy of the written declaration to the parent's original or amended return for each taxable year for which the noncustodial parent claims an exemption for the child. A noncustodial parent may

6 IRC §6212

³ https://www.ustaxcourt.gov/UstcInOp/OpinionViewer.aspx?ID=12004, p. 2

⁴ *Ibid*, p. 2-3

⁵ *Ibid*, p. 4

submit a copy of the written declaration to the IRS during an examination to substantiate a claim to a dependency exemption for a child. A copy of a written declaration attached to an amended return, or provided during an examination, will not meet the requirement of this paragraph (e) if the custodial parent signed the written declaration after the custodial parent filed a return claiming a dependency exemption for the child for the year at issue, and the custodial parent has not filed an amended return to remove that claim to a dependency exemption for the child.

These regulations were issued with a note in the preamble that "[p]ending the issuance of the final regulations, taxpayers may choose to apply these proposed regulations in any open taxable years."7

But, as the Tax Court notes, the taxpayer did not show he met the proposed regulations, since he produced no evidence that Amanda had amended her return to remove her claim for an exemption for TD. The Court did not explicitly say so, but most likely the Court felt that the provision was clearly there to prevent a double benefit to the two parents—and that unless Amanda had followed through and relinquished the exemption and paid back the tax benefit, a second benefit would not be granted to Mr. DeMar. As well, since the regulations in force now were silent on the issue, the Court felt comfortable looking to the proposed regulations for guidance on how to handle the matter.

The case highlights the fact that this issue is decided strictly based on conforming to required steps to transfer the exemption to a non-custodial parent. And it also clarifies that a non-custodial who fails to attach the exemption to his/her original return must show that if the custodial parent claimed the child on his/her return, that the custodial parent has filed an amended return to remove the claim for an exemption.

SECTION: 223

MORE PREVENTIVE CARE ITEMS ADDED TO LIST OF ITEMS ALLOWED TO BE PAID FROM HIGH DEDUCTIBLE HEALTH PLAN

Citation: Notice 2019-45, 7/17/2019

In Notice 2019-458 the IRS expanded the list of preventive care items that can be paid for under a high deductible health plan (HDHP) for taxpayers with health savings accounts.

⁷ Preamble to Proposed Regulations, REG-137604-07, January 18, 2017

⁸ https://www.irs.gov/pub/irs-drop/n-19-45.pdf, retrieved July 17, 2019

Under IRC §223, for a taxpayer to be eligible to contribute to a health savings account, the taxpayer must be covered by a qualified HDHP program and have no disqualifying coverage. Aside from payments for certain preventive care, an HDHP cannot provide reimbursement to the taxpayer until the taxpayer has paid for care equal to the deductible.

In this notice the IRS added the following items to the list of allowable preventive care:

Preventive Care for Specified	
Conditions	For Individuals Diagnosed with
Angiotensin Converting Enzyme (ACE) inhibitors	Congestive heart failure, diabetes, and/or coronary artery disease
• ` ` `	,
Anti-resorptive therapy	Osteoporosis and/or osteopenia
Beta-blockers	Congestive heart failure and/or coronary artery
	disease
Blood pressure monitor	Hypertension
Inhaled corticosteroids	Asthma
Insulin and other glucose	Diabetes
lowering agents	
Retinopathy screening	Diabetes
Peak flow meter	Asthma
Glucometer	Diabetes
Hemoglobin A1c testing	Diabetes
International Normalized Ratio	Liver disease and/or bleeding disorders
(INR) testing	
Low-density Lipoprotein (LDL)	Heart disease
testing	
Selective Serotonin Reuptake	Depression
Inhibitors (SSRIs)	
Statins	Heart disease and/or diabetes

SECTION: 6011

FAREWELL 1040 POSTCARD, WE HARDLY KNEW YE

Citation: Draft 2019 Forms 1040 and 1040-SR and Schedules 1, 2 and 3, 7/15/19

"Friends, Romans, countrymen, lend me your ears; I come to bury Caesar, not to praise him." (William Shakespeare, Julius Caesar, spoken by Mark Anthony)

The IRS has now moved to update yet again the Form 1040, adding the Form 1040-SR that was mandated in the Bipartisan Budget Act of 2018 and updating the regular Form

1040, at least partially abandoning the much maligned postcard 1040 that was introduced for 2018 tax returns.

The 1040-SR was mandated for tax years beginning after February 3, 2018 by Section 41106 of the Bipartisan Budget Act of 2018. The law directed the IRS to develop a form that:

- Could only be used by individuals who have attained age 65 by the end of the year and
- Must be able to be used to file returns even if the taxpayer's income for the year includes:
 - Social security benefits;
 - Distributions from qualified retirement plans, annuities or similar deferred payment arrangements
 - Interest and dividends; and
 - Capital gains and losses
- The form is to be available regardless of the amount of any items of taxable income or the total amount of taxable income for the year.

The draft form for 2019 consists of the following two pages.

1040	-SR Department of	the Treasury—Internal Revenu x Return for Se	e Service (99) 20	19 OMB No. 1545-	2074 IDS Use Only	Do not write	or staple in this space.
Filing Status	☐ Single ☐ Head of hous		☐ Married filing ☐ Qualifying wi	jointly	☐ Married filin	373.0003.000000000000000000000000000000	
Check only one	If you checked the	MFS box, enter the	name of spouse. If	you checked the HO	OH or QW box, e	enter the	child's
Your first nam	name if the qualify ne and middle initial	ring person is a child	but not your depen	ident. ►		Your soci	al security numbe
				AG			
If joint return,	spouse's first name a	nd middle initial La	ast name			Spouse's s	ocial security number
Home addres	s (number and street)	If you have a P.O. box	, see instructions.	AC	Apt. no.	Check here if	al Election Campaigr
City, town or p	oost office, state, and 2	IP code. If you have a fo	oreign address, also co	mplete spaces below (s	ee instructions).	Checking a bo	3 to go to this fund. x below will not change yo
Foreign count	try name		Foreign province/sta	ate/county Fo	oreign postal code		You Spous
							ınd √here ► 🗌
Standard Deduction		aim:		Your spouse as a c e a dual-status alie			
Age/Blindness		oorn before Januar		Are blind			
Dependen	Spouse: ☐ Wa ts (see instruction	s born before Janu	uary 2, 1955 LI (2) Social security numbe	s blind (3) Relationship to you	(4) /	if qualifies f	or (see inst.):
(1) First name	Last nam		(L) could county hambo	(b) Horadonomp to you	Child tax cre		edit for other dependen
				_			
					+ +		
	1 Wages, sal	aries, tips, etc. Atta	ach Form(s) W-2			1	
Attach							
Schedule B	•	t interest	2a		nterest		
if required.	3a Qualified di	vidends	3a	b Ordinary	dividends	3b	
)	4a IRA distribu	itions	4a	b Taxable a	mount	4b	
	c Pensions a	nd annuities .	4c	d Taxable a	mount	4d	
	5a Social secur	ity benefits	5a	b Taxable a	mount	5b	
	6 Capital gain	or (loss). Attach Sch	edule D if required.	If not required, chec	k here . ▶ [6	
	7a Other incor	ne from Schedule	1, line 9			7a	
	b Add lines 1	, 2b, 3b, 4b, 4d, 5l	o, 6, and 7a. This	is your total incor	ne >	- 7b	
	8a Adjustment	s to income from S	Schedule 1 line 2:	>	NO. 2 0 0 10 10	8a	
		e 8a from line 7b.				▶ 8b	
Standard				<u> </u>		OU	
Deduction See Standard		eduction or itemize					
Deduction Chart		ness income deduction		or Form 8995-A 10			
below.		and 10				11a	
		come. Subtract lin				11b	
Standard		of boxes checked in					.
Deduction Chart	IF your filing status is	boxes checked is.	of THEN your standa deduction is \$12,200		AND the num boxes checke		HEN your standard deduction is
Don't use this chart if someone can	Single	1	\$12,200 13,850	Head of	1		\$18,350 20,000
claim you (or your spouse if filing		2	15,500	household	2		21,650
spouse it filing jointly) as a dependent, your	Married	0	24,400		0		12,200
spouse itemizes on	filing jointly	1	25,700	Married filing	1		13,500
a separate return, or you were a dual- status alien. Instead	or Qualifying	2	27,000 28,300	separately	2		14,800 16,100
status alien. Instead, see instructions	widow(er)	4	29,600		4		17,400

Paid Preparer									3rd Party Designee Self-employed
	Pre	parer's name	Preparer's si	gnature		Date	PTIN		Check if:
	Pho	ne no.		Email address			4-33	,	
Keep a copy for your records.	Spo	pouse's signature. If a joint return, both must sign. Date			Id			ity Prote	nt your spouse an ection PIN, enter it her
Joint return? See instructions.				Date	0	a!	10000000	inst.)	
	You	ur signature		Date	Your occupation		Prote	ection P	nt you an Identity IN, enter it here
Here	of which	ch preparer has any knowledge				a. (oursi tridit)			
Sign		penalties of perjury, I declare the							
(Other than paid preparer)		ignee's ne ▶		Phone no. ▶			nal identific er (PIN)	ation •	
Designee			a.a., ou p						
Third Party	24 Do:	Estimated tax penalty (s you want to allow another person (c	NOW AND DESCRIPTION OF THE PARTY OF THE PART		DV 822 SF SF NL	th the IRS? See i	nstructions.		Yes. Complete below.
You Owe		Amount you owe. Subtract			. 1	200000	lions 🟲	23	
Amount	22	Amount of line 20 you want				22	U 5		
instructions.		Account number							
See		Routing number			► c Type: □	inecking [_	Savings		
B		Amount of line 20 you wan	i rerunaea t	-				218	
		If line 19 is more than line 10						21a	
Refund	20					mount you ex	ornaid	20	
	19	Add lines 17 and 18e. The				oranidable ci	ouits -	19	
	e	Add lines 18a through 18d.	These are you	ir total other	navments and		adite 🕨	18e	
combat pay, see instructions.		Schedule 3, line 14	- Calciloniii (0000, 11		18d	_		
If you have nontaxable		American opportunity cr				18c			
child, attach Sch. ElC.		Additional child tax cred		chedule 88	12	18b			
 If you have a qualifying 	a	Earned income credit (E	/a			18a			
	.18	Other payments and refe							
	17	Federal income tax with	(2)		nd 1099			17_	
	16	Add lines 14 and 15. Thi						16	
	15	Other taxes, including se				line 10		15	
	14	Subtract line 13b from li						14	
		Add Schedule 3, line 7,						13b	
		Child tax credit or credit				13a			
	b	Add Schedule 2, line 3,			the total			12b	
		1 Form(s) 8814 2				12a			
	12a	Tax (see instructions). C	heck if any	from:					

Note that the form has more lines that the 2018 postcard Form 1040. While nothing on the form would make it unusable by those under age 65, since the law required the IRS to limit its use to individuals who attained age 65 by year end presumably those who have not attained that age will not be allowed to file with this form.

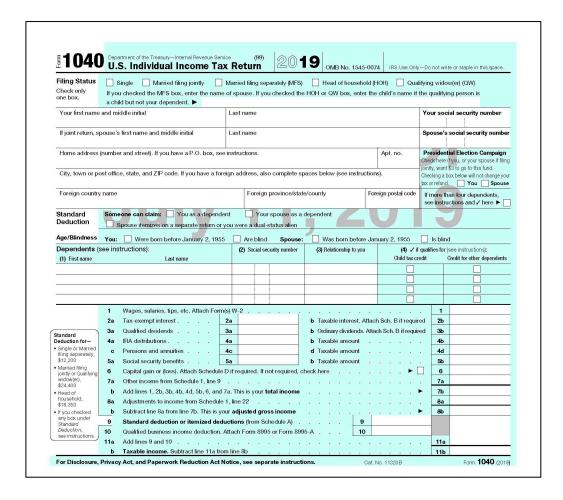
The fact that Form 1040-SR was longer than the postcard seemed a bit quirky at first, since the reasonable assumption when the law passed was that the IRS wanted a simpler form for seniors—but selling this form as simpler might be tough after the agency last year released what was touted as the simple postcard—simple because it only used two half pages.

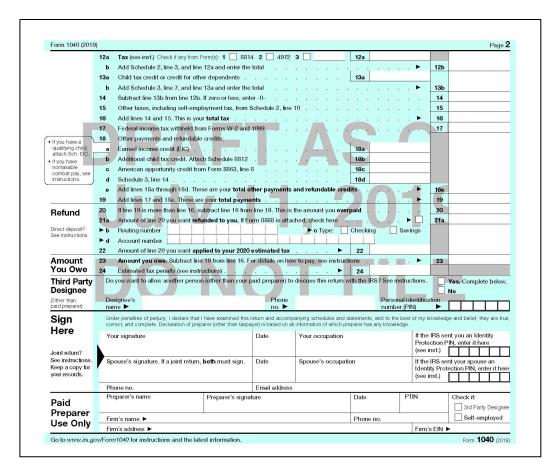
The mystery was cleared up a few days later when the IRS released the draft of the regular Form 1040 and the postcard 1040 proved to be mostly a one year phenomena.

The draft Form 1040 has a number of changes compared to the 2018 postcard Form 1040, including:

- The form has numbers on the front page, ending with taxable income on that page;
- There are separate lines for IRA and pensions and annuities, eliminating the somewhat confusing combined total distribution box from 2018 to return to two boxes;
- No longer do totals that never appear on the Form 1040 enter into the calculations;
 and
- Only three schedules now exist to attach to the Form 1040, down from the six used in 2018.

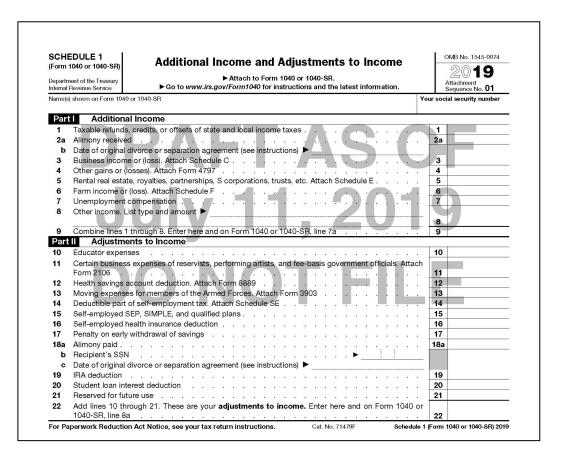
The 2019 draft Form 1040 is shown below:



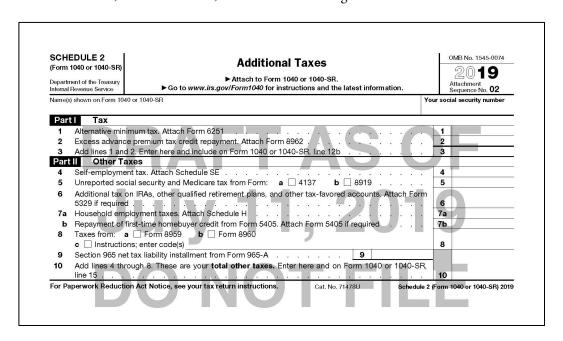


Not all of the old Form 1040 lines have returned but the form has significantly more information than 2018's postcard Form 1040.

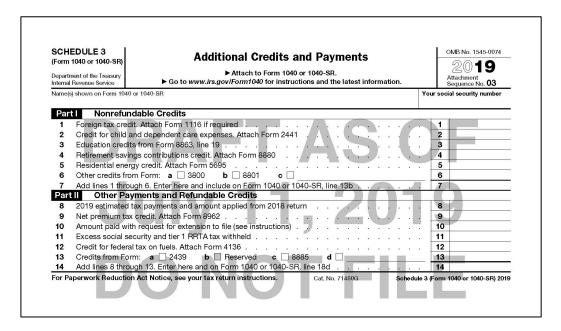
Draft Schedule 1, *Additional Income and Adjustments to Income* has the following information:



Draft Schedule 2, Additional Taxes, contains the following information:



Draft Schedule 3, Additional Credits and Payments, contains the following information:



2018 Schedule 4, *Other Taxes*, is now essentially found on 2019 Schedule 2. The old Schedule 2 tax computation moved to page 2 of Form 1040. 2018 Schedule 5, *Other Payments and Refundable Credits*, now mainly exists on Schedule 3. 2018 Schedule 3, *Nonrefundable Credits*, is now found on page 2 of Form 1040.

Schedule 6, *Foreign Address and Third Party Designee*, was moved onto page 1 of Form 1040 (for the address) and page 2 (for the third party designee).