

Filing status during divorce

We have been asked me how you should file—single, joint, or married filing separately—for federal income tax purposes during the pendency of your divorce/separation proceedings. In general, your filing status depends on your marital status, and your marital status depends upon your status under state law.

If, as of the end of the tax year, there has been issued a “final” decree of divorce or you are legally separated under a “final” decree of separate maintenance, then you are no longer married and must file as a single person (except that if you live with one or more children and pay more than half the cost of running the household, you may qualify for head of household filing status). It's not always clear whether a particular court action is final or not. I would be happy to review any court order directed at you to determine how it affects your filing status.

If, as of the end of the tax year, there has been no “final” decree of divorce, annulment or separate maintenance, then you are still considered as married even if you are separated from your spouse under a separation agreement or a non-final court decree. You therefore must file either a joint return or as a married individual filing separately. However, a special rule permits you to be treated as unmarried for filing status if:

- you don't file a joint return for the year;
- you maintain as your home a household which, for more than half the year, is the principal residence of a child;
- you furnish more than half of the cost of maintaining that household; and
- during the last six months of the year, your spouse isn't a member of that household.

Be aware that if you are treated as married under the above rules (that is, there has been no final court decree and you don't qualify under the special rule discussed above) you still may want to file separately. For one thing, if you made deductible alimony payments, you must file a separate return in order to claim the deduction. The deduction can't be taken on a joint return.

Also, both spouses are generally liable for the tax if a joint return is filed. This means that if IRS audits the return and determines a deficiency, you could be liable for all the additional tax, interest and penalties even if the problems with the return related to your ex-spouse. In that event, however, you may be relieved of liability for a tax understatement that is attributable to erroneous items of your spouse if you didn't know or have reason to know about them, meet some other requirements, and elect relief within two years after IRS first tries to collect the tax from you. Once you are divorced or legally separated (or you and your spouse have not resided in the same household for a full year) you also may elect to limit your liability for joint returns you have already filed to the portion of the tax deficiency that is allocable to you. To qualify, you must not have actually known of the deficiency when you signed the joint return, and elect this relief no later than two years after IRS begins collection activities. I usually recommend that divorcing spouses make this election as soon as they are eligible to if there has been an understatement of tax on a joint return.