

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: **200603025**

Release Date: 1/20/2006
CC:ITA:B02:DACassano
POSTS-105042-05

UILC: 213.05-00

date: October 14, 2005

to:
(Small Business/Self-Employed)
Attn: Mary P. Hamilton

from: Thomas D. Moffitt
Branch Chief, Branch 2
(Income Tax & Accounting)

subject: Request for Chief Counsel Advice
Medical expense deduction

This Chief Counsel Advice responds to your request for assistance dated February 4, 2005. This advice may not be used or cited as precedent.

LEGEND

Taxpayer name 1
Social worker A
Taxpayer name 2
Doctor B
Year 1
Year 2
Year 5
Year 6
Year 8

ISSUE

Whether the taxpayer's costs for male-to-female gender reassignment surgery (and related medications, treatments, and transportation) paid during Year 6 may be deducted as medical expenses under I.R.C. § 213.

CONCLUSION

Without an unequivocal expression of Congressional intent that expenses of this type qualify under section 213, allowing the medical expense deduction is not justified in this case.

FACTS

The subject non-docketed case is currently under consideration by the Office of Appeals. On the taxpayer's Year 6 return, the taxpayer reported medical and dental expenses for an amount exceeding \$. After applying the 7.5% limitation to adjusted gross income, the taxpayer claimed a deduction for medical and dental expenses in the amount of \$. The expenses included payments for various doctors, prescriptions, health insurance, transportation and lodging in connection with the taxpayer's gender reassignment surgery (GRS).

In a report dated July 2, Year 8, the Revenue Agent disallowed the expenses on the ground that they were for cosmetic surgery and nondeductible pursuant to I.R.C. section 213(d)(9).

The taxpayer is the . The taxpayer

. Based on documents provided by the taxpayer's representative to the Appeals Officer, including letters prepared by medical professionals who treated the taxpayer, the following is a synopsis of the taxpayer's medical condition and treatments:

1. The taxpayer grew up with a condition known as Gender Identity Disorder (GID).
2. It is not clear from the records when the taxpayer first realized that he had some type of disorder, but it was suggested that the taxpayer had gender issues dating back to childhood.
3. Beginning in Year 1, the taxpayer sought psychotherapy from a licensed social worker, Social Worker A.
4. During the course of treatment, Social Worker A formally diagnosed the taxpayer as meeting the criteria for Gender Identity Disorder.

5. In September, Year 2, subsequent to the diagnosis, the taxpayer began hormone treatment under the care of an endocrinologist.
6. In March, Year 5, the taxpayer began living as a full-time female.
7. In March, Year 5, the taxpayer legally changed his name from Taxpayer Name 2 to Taxpayer Name 1.
8. In July, Year 6, Social Worker A, in accordance with medical standards that were followed for treatment of Gender Identity Disorder, recommended the taxpayer for Gender Reassignment Surgery (GRS).
9. In July, Year 6, the taxpayer met with Doctor B to be evaluated as to whether GRS was an appropriate treatment for his diagnosed GID.
10. Doctor B considered the taxpayer's GID to be profound. Several alternative treatments were considered and dismissed. Doctor B ultimately opined that the taxpayer was in need of GRS.
11. Prior to surgery, the taxpayer complied with the preparatory requirements for sex reassignment surgery. These standards are known as the Harry Benjamin Standards. See Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders (6th Ed.)
12. In October Year 6, the taxpayer underwent GRS.

LAW AND ANALYSIS

I.R.C. § 213(d)(1)(A) defines the term "medical care" as amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. See also Treas. Reg. § 1.213-1(e)(1)(i). Although not amended to take into account tax law changes since 1981, (including the cosmetic surgery limitation discussed below), Treas. Reg. § 1.213-1(e)(1)(ii) provides that amounts paid for legal operations or treatments affecting any portion of the body are deemed to be for the purpose of affecting any structure or function of the body and are therefore paid for medical care. Treas. Reg. § 1.213-1(e)(1)(ii) also provides that deductions for expenditures for medical care will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. Finally, Treas. Reg. § 1.213-1(e)(1)(ii) provides that an expenditure which is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care.

I.R.C. § 213(d)(9)(A) provides that the term "medical care" does not include cosmetic surgery or other similar procedures, unless the surgery or procedure is necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or a disfiguring disease. I.R.C. §

213 (d)(9)(B) defines “cosmetic surgery” as any procedure that is directed at improving the patient’s appearance and does not meaningfully promote the proper function of the body or treat illness or disease.

Legislative History

A detailed analysis of the legislative history is instructive on Congressional intent regarding the cosmetic surgery limitation.

The legislative history to the Omnibus Budget Reconciliation Act of 1990, P.L. 101-508, 104 Stat. 1388, section 11342, indicates that, by 1990, Congress was aware that the Internal Revenue Service was interpreting the term “medical care” to include procedures that permanently alter any structure of the body, even if the procedure generally was considered to be an elective, purely cosmetic treatment (such as removal of hair by electrolysis and face-lift operations). H.R. Rep. No. 101-964, at 1031. Therefore, Congress enacted I.R.C. § 213(d)(9), with the Omnibus Budget Reconciliation Act of 1990.

The Omnibus Budget Reconciliation Act of 1990 was initiated in the House of Representatives (101st Cong., 2d Sess.) as H.R. 5835. However, H.R. 5835 as initially passed by the House contained no provision restricting cosmetic surgery from the definition of medical care in section 213.

The bill was considered by the Senate as S. 3209. Section 7463(b)(2) of S. 3209 was the genesis of the cosmetic surgery limitation. Section 7463(b)(2)(A) provided the general rule (ultimately enacted as I.R.C. § 213(d)(9)(A)) eliminating a deduction for “cosmetic surgery or other similar procedures.” Section 7463(b)(2)(B) specifically defined cosmetic surgery as “any procedure which is directed at improving the patient’s appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.” Because this exact language was ultimately enacted as I.R.C. § 213(d)(9)(B), it is important to analyze the Senate Report regarding this provision.

As printed in the Congressional Record of October 18, 1990 at p. S 15711, the Senate Budget Committee determined that expenses for cosmetic surgery should not be eligible for the medical expense deduction absent certain circumstances clearly not present in the case of GRS (i.e., a congenital abnormality, an accident or trauma, or a disfiguring disease). The Senate Report states that expenses for purely cosmetic procedures that are not medically necessary are, in essence, voluntary personal expenditures, which like other personal expenditures (e.g., food and clothing) generally should not be deductible in computing taxable income. *Id.* In discussing the types of surgery which are deemed to be medically necessary, the Senate Report lists only: (1) procedures that are medically necessary to promote the proper function of the body and which only incidentally affect the patient’s appearance; and (2) procedures for treatment of a disfiguring condition arising from a congenital abnormality, personal injury, trauma, or disease (such as reconstructive surgery following the removal of a malignancy). *Id.*

From the material submitted the taxpayer has not satisfactorily demonstrated that the expenses incurred for the taxpayer's GRS fit within the strict boundaries discussed above. There is nothing to substantiate that these expenses were incurred to promote the proper function of the taxpayer's body and only incidentally affect the taxpayer's appearance. The expenses also were not incurred for treatment of a disfiguring condition arising from a congenital abnormality, personal injury, trauma, or disease (such as reconstructive surgery following the removal of a malignancy).

Whether gender reassignment surgery is a treatment for an illness or disease is controversial. For instance, Johns Hopkins Hospital has closed its gender reassignment clinic and ceased performing these operations. See, *Surgical Sex*, Dr. Paul McHugh, 2004 *First Things* 147 (November 2004) 34-38. To our knowledge, there is no case law, regulation, or revenue ruling that specifically addresses medical expense deductions for GRS or similar procedures. In light of the Congressional emphasis on denying a deduction for procedures relating to appearance in all but a few circumstances and the controversy surrounding whether GRS is a treatment for an illness or disease, the materials submitted do not support a deduction. Only an unequivocal expression of Congressional intent that expenses of this type qualify under section 213 would justify the allowance of the deduction in this case. Otherwise, it would seem we would be moving beyond the generally accepted boundaries that define this type of deduction.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

If you have any questions, please call Dan Cassano at 202-622-7900.