



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

CHIEF COUNSEL

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Dear _____ :

This is in response to your email, dated _____. In your email, you asked why infant formula is not a covered expenditure for a mother who is unable to breast feed due to a double mastectomy. You were advised that you may not use your employer sponsored Flexible Spending Account to purchase this formula. All employer provided health coverage is subject to the same exclusion rules.

Section 213(a) of the Internal Revenue Code provides a deduction for expenses paid for medical care of the taxpayer, his spouse or a dependant, to the extent such expenses exceed 7.5 percent of adjusted gross income. Section 213(d)(1) 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.

Section 1.213-1(e)(1)(ii) states that an expenditure that is merely beneficial to the general health of an individual is not an expenditure for medical care and that expenditures for "medicines and drugs" are expenditures for medical care. Section 1.213-1(e)(2) states that the term "medicine and drugs" includes only items that are legally procured and generally accepted as falling within the category of medicine and drugs. It further provides that toiletries, cosmetics and sundry items are not "medicine and drugs" and that amounts expended for these items are not expenditures for "medical care".

Section 262 of the Code provides that no deduction shall be allowed for personal, living, or family expenses.

Flexible spending arrangements are controlled by section 105 of the Code. Section 105(a) provides that amounts received by an employee through accident or health insurance for personal injuries or sickness are included in gross income to the extent that such amounts are attributable to contributions by the employer that were not includible in the gross income of the employee or are paid by the employer.

Section 105(b) provides that, except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 for any prior taxable year, gross income does not include amounts paid, directly or indirectly, to the taxpayer to reimburse the taxpayer for expenses incurred by the taxpayer for medical care (as defined under section 213(d)) of the taxpayer, spouse or dependants. Rev. Rul. 2003-102, 2003-22 I.R.B. 959, holds that while amounts paid for over-the-counter medicines are not deductible under section 213, the amount spent by the employee to purchase these medicines and the subsequent reimbursement by the employer are in fact excludible from income under section 105(b). However, reimbursements for dietary supplement expenditures are still includible in income.

In Rev. Rul. 55-261, 1955-1 C.B. 307, the Service held that the cost of special foods and beverages qualify as a deductible medical expense if the foods or beverages are prescribed by a physician for the alleviation or treatment of a specific disease, are in addition to the taxpayer's normal diet and in no way completely satisfy the nutritional needs of a patient. Further, if the special food or beverage is taken as a substitute for food or beverage normally consumed by a person and satisfies his nutritional requirements, then the expense is personal and nondeductible as a medical expense.

Food, including infant formula, that satisfies your nutritional requirements is a personal expenditure under section 262 and thus, is not deductible as a medical expense under section 213 or excludible from income under section 105(b). Expenditures for over the counter medicines, such as Tylenol and antacids, which are reimbursed by your flexible spending arrangement are excludible from income as they qualify as medical care under section 105(b).

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2008-1, 2008-1 I.R.B. 1. I hope this information is helpful. If you need further assistance, please contact me at () .

Sincerely,

Christopher F. Kane
Branch Chief, Branch 3
(Income Tax & Accounting)