



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

OFFICE OF THE CHIEF COUNSEL

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Dear _____ :

This letter responds to your request for information dated May 28, 2009. In your letter, you requested guidance on whether certain over-the-counter (OTC) items qualify under § 213(d) of the Internal Revenue Code as medical care for purposes of health care flexible spending accounts and health reimbursement arrangements.

Section 213(a) provides a deduction for expenses paid for medical care of the taxpayer, spouse, or dependent, to the extent the expenses exceed 7.5 percent of adjusted gross income. Section 213(d)(1)(A) defines "medical care" as amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting a structure or function of the body.

Deductions for medical care allowable under § 213 are limited to expenses paid primarily for the prevention or alleviation of a physical or mental defect or illness. Section 1.213-1(e)(1)(ii) of the Income Tax Regulations. An expense may qualify as medical care as preventing disease only if there is a present existence or an imminent probability of developing a disease, physical or mental defect, or illness. Daniels v. Commissioner, 41 T.C. 324 (1963); Stringham v. Commissioner, 12 T.C. 580 (1949).

Taxpayers may not deduct personal, family, or living expenses as medical care if the expenses do not fall within the § 213 definition. Section 262 and § 1.213-1(e)(1)(vi). An expenditure that is merely beneficial to the general health of an individual is personal and is not for medical care. Section 1.213-1(e)(1)(ii). Whether an expenditure is "primarily for" medical care is a question of fact.

A taxpayer who claims that an expense of a peculiarly personal nature is primarily for medical care must establish that fact. Among the objective factors that indicate that an otherwise personal expense is for medical care are the taxpayer's motive or purpose for making the expenditure, whether a physician has diagnosed a medical condition and

recommended the item as treatment or mitigation, linkage between the treatment and the illness, treatment effectiveness, and proximity in time to the onset or recurrence of a disease. Havey v. Commissioner, 12 T.C. 409 (1949). The taxpayer also must establish that the expense would not have been paid “but for” the disease or illness. A personal expense is not deductible as medical care if the taxpayer would have paid the expense even in the absence of a medical condition. Commissioner v. Jacobs, 62 T.C. 813 (1974).

Section 213(b) provides that an amount paid for medicine or drugs is for medical care only if the medicine or drug is a prescribed drug or insulin. Section 213(d) defines a “prescribed drug” as a drug or biological that requires a prescription of a physician for use by an individual. However, the prescription requirement does not apply to reimbursements from a flexible spending account or similar arrangement. Rev. Rul. 2003-102, 2003-38 I.R.B. 559. Section 1.213-1(e)(2) provides that “medicines and drugs” include only items that are legally procured and are generally accepted as being medicine or drugs. The term does not include toiletries, cosmetics, or sundry items.

Many of the items you reference in your letter may qualify as medical care or may be personal items, depending on the taxpayer’s use. A taxpayer may use sunscreen, medical grade face masks, skin products, anti-bacterial hand sanitizers, fluoride rinses, petroleum jelly, fiber supplements, and probiotics to maintain general health, which is a personal use. Some of these items may be used as toiletries or cosmetics. The function of these items to prevent illness, in most cases, will not satisfy the standards of Daniels and Stringham. On the other hand, if a taxpayer can establish that the taxpayer is using an item to treat or alleviate a disease or injury, and satisfies the “but for” test, the item may qualify as medical care.

Items that have no purpose other than to treat a disease, illness, or mental or physical defect may qualify as medical care. Thus, treatments for acne, incontinence, arthritis, constipation, colds and sinus problems, dehydration, and indigestion, and support braces and shoe inserts for injured or weakened body parts, most likely will qualify as medical care under § 213(d). Products that have no purpose but to treat existing skin conditions (in contrast to preventing the development of the condition), such as eczema treatments, also should qualify as medical care. Wheelchair cushions may be considered a necessary accessory to the wheelchair.

The excess cost of an otherwise personal item that is specially designed to treat or alleviate a medical condition, over the cost of the item without the special features, may be an allowable medical expense. Rev. Rul. 70-606, 1970-2 C.B. 66. The excess cost for specially designed clothing that is used to treat a specific disease, such as diabetic socks, compression hose, or orthopedic shoes, over regular clothing, may qualify as an expense for medical care. However, while these items are probably most commonly used to treat or alleviate a medical condition, we are reluctant to conclude that they could not also have a personal or preventive use.

The cost of food is not an expense for medical care to the extent the food constitutes a substitute that an individual would normally consume to meet nutritional requirements. Rev. Rul. 55-261, 1955-1 C.B. 307; Rev. Rul. 2002-19, 2002-1 C.B. 778. Whether food thickeners are medical care is a question of fact that must be determined on a case-by-case basis.

This letter calls 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. 2009-1, section 2.04, 2009-1 I.R.B. 1. If you have any additional questions, please contact our office at

Sincerely,

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(Income Tax & Accounting)