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

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The Honorable Charles E. Schumer  
United States Senator  
757 Third Avenue, Suite 17-02  
New York, NY 10017

Attention:

Dear Senator Schumer:

I am responding to your letter, dated March 3, 2010, on behalf of your constituent, . asked whether the cost of an herb prescribed by her doctor to treat migraine headaches qualifies as a medical care expense for purposes of her health care flexible spending account.

In general, individuals must use funds from a flexible spending account for medical care. Medical care is for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting a structure or function of the body (section 213(d) of the Internal Revenue Code).

Deductions for medical care are limited to expenses paid primarily for the alleviation or prevention of a physical or mental defect or illness (section 1.213-1(e)(1)(ii) of the Income Tax Regulations).

A taxpayer claiming a deduction must establish that the expense is primarily for medical care. Among the objective factors indicating that an otherwise personal expense is for medical care are the taxpayer's motive or purpose, recommendation by a physician, 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 must also establish that the expenses would not have been incurred "but for" the disease or illness. *Commissioner v. Jacobs*, 62 T.C. 813, 818 (1974); *Altman v. Commissioner*, 53 T.C. 487 (1969).

Naturopathic care, including herbs, can qualify as medical care. *Dickie v. Commissioner*, T.C. Memo. 1999-138; *Crain v. Commissioner*, T.C. Memo. 1986-138; *Tso v. Commissioner*, T.C. Memo. 1980-399.

The cost of an herb may be an expense for medical care if the taxpayer can substantiate that he or she:

- Has a medical condition (disease, illness or injury);
- Is purchasing the herb to treat or alleviate the medical condition;
- And would not have purchased the herb “but for” the medical condition;

may wish to review the letter of medical necessity form that her doctor filled out to determine if it clearly and fully describes her circumstances.

I hope this information is helpful. If you have additional questions, please contact me or  
or at .

Sincerely,

George J. Blaine  
Associate Chief Counsel  
(Income Tax and Accounting)