

- Childbirth expenses for the surrogate
- Surrogate medical insurance related to the pregnancy
- Legal and agency fees for the surrogacy
- Any other medical expenses arising from the surrogacy.

We held the conference of right on _____ and advised Taxpayers' authorized representative that we were partially adverse to the ruling request. Taxpayers' representative advised us that Taxpayers would like an adverse ruling.

LAW AND ANALYSIS

Section 213(a) allows a taxpayer to deduct expenses paid for medical care of the taxpayer to the extent the expenses exceed 7.5 percent of the taxpayer's adjusted gross income.

Section 213(d)(1)(A) provides that medical care includes 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.

Rev. Rul. 73-201, 1973-1 C.B. 140 and Rev. Rul. 73-603, 1973 C.B. 76 hold that vasectomies and operations that render a woman incapable of having children affect a structure or function of the body; therefore, costs associated with these procedures qualify as a deductible medical expense within the limitations of I.R.C. § 213.

The medical expense deduction has historically been construed narrowly. See Atkinson v. Commissioner, 44 T.C. 39 (1965); See also Magdalin v. Commissioner, T.C. Memo 2008-293, *aff'd without published opinion*, 105 A.F.T.R.2d (RIA) 2010-442 (1st Cir. 2009). Deductions for medical care have been confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. See Treas. Reg. § 1.213-1(e)(1)(ii). Generally, for an expense to be deductible, there must be a causal relationship between a medical condition and the expenditures incurred in treating the condition. See Jacobs v. Commissioner, 62 T.C. 813 (1974); Havey v. Commissioner, 12 T.C. 409 (1949). The current facts do not identify a medical condition nor do taxpayers allege that expenses are incurred to treat a medical condition. Rather the request relies on the second portion of I.R.C § 213(d)(1)(A) in claiming IVF, surrogacy, and related costs are for the purpose of affecting any structure or function of the body.

The Tax Court considered surrogacy and egg donor expenses claimed by a single, heterosexual male, and held costs incurred in fathering children through unrelated egg donors and gestational carriers are not deductible medical expenses under I.R.C. § 213. See Magdalin v. Commissioner, T.C. Memo 2008-293, *aff'd without published opinion*, 105 A.F.T.R.2d (RIA) 2010-442 (1st Cir.2009). The taxpayer in Magdalin obtained donated eggs to be fertilized with his sperm and transferred to a gestational carrier using the IVF process. He deducted legal fees related to the donor and surrogacy

agreements, fees and expenses of the donor and surrogate, fees to the IVF clinic, and prescription costs. The Tax Court disallowed these costs as medical expense deductions holding there was no causal relationship between an underlying medical condition or defect and the taxpayer's expenses, nor were the costs incurred for the purpose of affecting a structure or function of taxpayer's body. *Id.*

In Longino v. Commissioner, the Tax Court considered the validity of various deductions claimed by the taxpayer, including the medical expense deduction for IVF costs. T.C. Memo 2013-90, aff'd 593 Fed. Appx. 965 (11th Cir. 2014). Longino, a taxpayer with multiple children from prior marriages, could not deduct fees associated with IVF procedures undergone by his former fiancé. The court held a taxpayer cannot deduct IVF costs of an unrelated person if the taxpayer does not have a defect which prevents him from naturally conceiving children.

In Morrissey v. United States, the taxpayer, a male in a same sex union, sought to deduct costs he incurred to retain, compensate, and care for the women serving as an egg donor and gestational surrogate to bear a child. 871 F.3d 1260 (11th Cir. 2017). The Eleventh Circuit considered whether these expenses were incurred for the purpose of affecting Morrissey's body's reproductive function within the meaning of I.R.C. § 213(d). Morrissey conceded he was not medically infertile, but characterized himself as "effectively" infertile because he is homosexual. The court applied the ordinary meaning of the statutory terms "affect" and "function" in ultimately finding the IVF costs were not deductible under I.R.C. § 213(d) because the costs were not for purposes of materially influencing or altering an action for which taxpayer's own body was specifically fitted, used, or responsible. *Id.* at 1265. The IVF and surrogacy costs were not deductible under this statutory language because taxpayer's own function in the reproductive process was to produce healthy sperm and he remained able to do so without the IVF and surrogacy procedures.

Only costs and fees directly attributable to medical care for diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body of the taxpayer, the taxpayer's spouse, or taxpayer's dependent qualify as eligible medical expenses. Expenses involving egg donation, IVF procedures, and gestational surrogacy incurred for third parties are not incurred for treatment of disease nor are they for the purpose of affecting any structure or function of taxpayers' bodies. As such, payments related to the following products and services are not deductible under I.R.C. § 213: egg retrieval, IVF medical costs, childbirth costs and fees for the surrogate, surrogate medical insurance related to the pregnancy, legal and agency fees for the surrogacy, and other medical costs and fees arising from the surrogacy. In contrast, however, there are a comparatively smaller number of medical costs or fees paid for medical care directly attributable to taxpayers, examples in this case being sperm donation and sperm freezing, that are deductible medical expenses under I.R.C. § 213, subject to the adjusted gross income limitation of the section.

CONCLUSION

Based on the facts and representations submitted, we conclude that the costs and fees related to egg donation, IVF procedures, and gestational surrogacy do not qualify as deductible medical expenses under I.R.C. § 213. Medical costs and fees directly attributable to the taxpayers are deductible within the limitations of I.R.C. § 213, including sperm donation and sperm freezing.

The ruling contained in this letter is based on information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the provisions of the power of attorney currently on file with this office, copies of this letter are being sent to your authorized representative. We are also sending a copy of this letter to the appropriate operating division director.

Sincerely,

BRINTON T. WARREN
Chief, Branch 3
Office of Associate Chief Counsel
(Income Tax and Accounting)

Enclosure: Copy for § 6110 purposes

cc: