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Medical Expense Deductions Under Section 213 of the Internal Revenue Code of 1954: The Definition of "Medical Care"

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MEDICAL EXPENSE DEDUCTIONS UNDER SECTION 213 OF THE INTERNAL REVENUE CODE OF 1954: THE DEFINITION OF "MEDICAL CARE"

INTRODUCTION

The medical expense deduction became part of our tax laws in 1942 when the revenue needs of World War II made the payment of income tax the obligation of nearly every citizen, rather than a mark of unusual prosperity.[1] The late Randolf Paul, acting in his capacity as Tax Advisor to the Secretary of the Treasury, suggested to the House Ways and Means Committee that a deduction be allowed for "extraordinary medical expenses."[2] The purpose of such a deduction was to provide relief for taxpayers who incurred substantial medical costs during the tax year.[3] The "Paul Proposal" emerged as section 23(x) of the Internal Revenue Code of 1939 and is currently codified at section 213 of the Internal Revenue Code of 1954.[4]

1. *See* Sierk, *The Medical Expense Deduction—Past, Present and Future*, 17 MERCER L. REV. 381, 382 (1966).

2. *See* R. PAUL, TAXATION IN THE UNITED STATES 298-99, 319 (1954); Heckerling, *Medical Expenses: How to Determine Deductibility of Non-Routine Items*, 20 J. TAX. 234 (1964).

3. By providing tax deductions to those who incur medical costs, Congress imposes a greater tax burden upon other taxpayers. These types of deductions allow the costs of illness to be distributed throughout society, since those persons incurring medical expenses pay a smaller tax on their income for the year than do those taxpayers not incurring medical expenses during the same year. The latter taxpayers are not entitled to medical expense deductions and therefore pay a larger tax. *See* Comment, *Medical Deductions: Test and Application*, 28 U. CHI. L. REV. 544 (1961). For analyses of the economic effects of this form of "socializing" medical care see D. KAHN, PERSONAL DEDUCTIONS IN THE FEDERAL INCOME TAX 126-61 (1960); Jensen, *Medical Expenditures and Medical Deduction Plans*, 60 J. POL. ECON. 503-24 (1952).

4. The medical expense deduction was enacted in 1942 as an amendment to the 1939 Code by the Revenue Act of 1942, ch. 619, § 127, 56 Stat. 825 (amending Int. Rev. Code of 1939, ch. 1, § 23, 53 Stat. 12 (now I.R.C. § 213)).

Section 213[5] allows a deduction for amounts paid during the taxable year[6] which are not compensated "by insurance or other-

5. I.R.C. § 213 provides in pertinent part:

> (a) Allowance of deduction—There shall be allowed as a deduction the following amounts, not compensated for by insurance or otherwise—
>
> (1) the amount by which the amount of the expenses paid during the taxable year (reduced by any amount deductible under paragraph (2)) for medical care of the taxpayer, his spouse, and dependents (as defined in section 152) exceeds 3 percent of the adjusted gross income, and
>
> (2) an amount (not in excess of $150) equal to one-half of the expenses paid during the taxable year for insurance which constitutes medical care for the taxpayer, his spouse, and dependents.
>
> (b) Limitation with respect to medicine and drugs—
>
> Amounts paid during the taxable year for medicine and drugs which (but for this subsection) would be taken into account in computing the deduction under subsection (a) shall be taken into account only to the extent that the aggregate of such amounts exceeds 1 percent of the adjusted gross income. . . .
>
> (e) Definitions—For purposes of this section—
>
> (1) The term "medical care" means amounts paid—
>
> (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,
>
> (B) for transportation primarily for and essential to medical care referred to in subparagraph (A), or
>
> (C) for insurance (including amounts paid as premiums under part B of title XVIII of the Social Security Act [sections 1395j-1395w of Title 42], relating to supplementary medical insurance for the aged) covering medical care referred to in subparagraphs (A) and (B).

6. In general, only medical expenses which were actually "paid" during the taxable year are taken into account, regardless of the time when the illness, accident or injury occurred and of the individual's method of accounting (case receipts or accrual). *See* Bessie Doody, 32 Tax Ct. Mem. Dec. (CCH) 547 (1973); Treas. Reg. § 1.213-1(a)(1) (1957). Thus, depreciation, a "decrease in value," is nondeductible since it is neither an "expense paid" nor an "amount paid" for medical care within the meaning of section 213. *See* Weary v. United States, 510 F.2d 435 (10th Cir. 1975); Stanley G. Calafut, 23 Tax Ct. Mem. Dec. (CCH) 1431 (1964); Maurice S. Gordon, 37 T.C. 986 (1962). Similarly, the loss sustained on the sale of a residence pursuant to a doctor's recommendation is not deductible because it is not an "amount paid" for medical care. *See* Mark R. Harding, 46 T.C. 502 (1966), Rev. Rul. 319, 1968-1 C.B. 92.

Only that part of the expenses that is in excess of three percent of the adjusted gross income is deductible. *See* note 5 *supra*. The taxpayer may defer actual payment of such expenses until a later year, when such expenses may exceed three percent of the adjusted gross income. The taxpayer may thereby avail him or herself of a deduction in the following year. For example, a taxpayer may incur certain medical expenses in year X. However, the amount of such expenses may not exceed the statutorily required three percent of adjusted gross income. If the taxpayer defers the actual payment of the expenses incurred until the following year, when he or she will presumably have other

wise"[7] for: (1) the medical care of the taxpayer, his spouse[8] and dependents[9] (to the extent that such amounts exceed three percent of the adjusted gross income);[10] (2) one-half of the cost of insurance which constitutes medical care to the taxpayer (not in excess of $150);[11] and (3) medicine and drugs (to the extent that

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medical expenses, and combines the medical expenses of both years by paying in the latter year, the total of his or her medical expenses may then exceed three percent of the adjusted gross income, thereby entitling the taxpayer to a deduction. Thus, the ability of a taxpayer to shift the medical expense into one year or another by timing the payment may be an important tax-saving device. However, the Tax Court, in Robert S. Basset, 26 T.C. 619 (1956), held that the shifting permitted by the statute does not encompass the "prepayment" of medical expenses to be rendered in a subsequent year. *Id.* at 621.

7. Reimbursements received during the taxable year through insurance payments or other means reduce the amount of allowable deductions. Reimbursements received in a subsequent year are included in income to the extent of the previous deduction. I.R.C. § 213(a); Treas. Reg. § 1.213-1(g)(1) (1963).

8. The deduction under section 213 is allowable if the status of such person as "spouse" of the taxpayer exists either at the time that the medical services were rendered or at the time the expenses were paid. Treas. Reg. § 1.23-(e)(3) (1957). An individual who is legally separated from his or her spouse under a decree of divorce or of separate maintenance will not be considered married for the purposes of section 213. Treas. Reg. § 1.213-1(e)(3) (1957).

9. A taxpayer's total medical expenses may include qualifying payments made for an individual who is a dependent and who receives more than one-half of his or her support from the taxpayer. The fact that a taxpayer cannot claim a personal exemption for a dependent because the dependent has gross income equal to or exceeding the amount allowable for a personal exemption does not preclude the taxpayer from including the dependent's medical expenses with his or her own medical expenses for the purpose of receiving a medical expense deduction. *See, e.g.*, Kathleen Marie Emmons, 20 Tax Ct. Mem. Dec. (CCH) 1513 (1961); Doris v. Clark, 29 T.C. 196 (1957); Treas. Reg. § 1.213-1(a)(3)(i) (1957).

10. Adjusted gross income means gross income as defined in section 61 of the Code minus the deductions allowed under section 62 of the Code.

11. One hundred fifty dollars is deductible without regard to the three percent minimum requirement. I.R.C. § 213(a)(2). The balance of insurance costs over $150 is included in total medical bills, subject to the three percent minimum. *Id.* § 213; Treas. Reg. § 1.213-1(a)(5) (1968). For taxable years beginning January 1, 1967, premiums for medical care insurance under combined policies (accident and health) are deductible only if the premium attributable to medical care is stated separately from the other portions, either in the policy itself, or in a separate statement furnished by the insurer. Treas. Reg. § 1.213-1(e)(4) (1968). However, for taxable years prior to January 1, 1967, the Internal Revenue Service (IRS) announced that it would not contest the deductibility of medical insurance premiums that include payment for accident benefits (*e.g.*, loss of life, limb or earnings). Rev. Rul. 212 (TIR-904), 1968-1 C.B. 91, *modifying* Rev. Rul. 393, 1959-2 C.B. 457; Rev. Rul. 602, 1958-2 C.B. 109; Rev. Rul. 331, 1955-1 C.B. 271; Rev. Rul. 19, 1953-1 C.B. 59; I.T. 3970, 1949-2 C.B. 28; I.T. 3967, 1941-2 C.B. 33. I.T. 3967, 1941-2 C.B. 33. Additionally, section 213 disallows a deduction for medical care insurance in combined policy cases if the portion of the premium allocated to it is unreasonably large in relation to the total amount of the premium. Treas. Reg. § 1.213-1(e)(4) (1968).

such amounts do not exceed one percent of adjusted gross income).[12] Under the present law, expenses paid for the medical care of a decedent may be treated as paid by the decedent at the time incurred if the expenses are paid out of the estate within one year after the decedent's death and are not deducted in computing the taxable estate for federal estate tax purposes.[13]

An area often litigated under section 213 of the Code is the scope of expenses which may be deducted from annual income as payments for "medical care." The deduction for medical expenses, by its very nature, involves making distinctions between items which qualify as "medical care" and those which do not qualify because they are primarily personal in nature.[14] Often, such distinctions are difficult to make.[15] The term "medical care" is defined broadly in the Code[16] and more comprehensively in the regulations.[17] It includes expenses for doctors, nurses and other medical services, as well as payments for operations, hospitals, institutional care and transportation necessary to obtain medical care. Thus, section 213 is an exception to the general rule of section 262 which denies deductions for personal, living or family expenses.[18]

12. For a discussion on medicine and drugs see notes 158-59 *infra* and accompanying text.

13. Expenses incurred for the medical care of a decedent taxpayer, paid out of the estate during the one-year period beginning the day after his or her death, may be treated as paid by the taxpayer at the time the medical services were rendered. Treas. Reg. § 1.213-1(d)(1) (1957). This allows the expenses incurred by a dying taxpayer to be deducted from his or her income in the year such expenses are incurred, thus preventing the loss of a deduction because actual payment of the expenses occurs in the following year when the decedent taxpayer, by definition, could not possibly earn an income. *See id*. However, when such expenses are deducted for federal income tax purposes, they may not be deducted in computing the taxable estate of the decedent. A statement must be filed by the executors indicating that such amounts were not allowed as deductions under I.R.C. § 2053 (relating to deductions for claims against the estate) and must be accompanied by a waiver of the right to have such amounts allowed as a deduction for federal estate tax purposes. Treas. Reg. § 1.213-1(d)(2) (1957).

Under prior law, medical expenses of a decedent were not allowed to the extent that they were paid after the date of the decedent's death. Estate of I. C. Triplett, Sr., 9 Tax Ct. Mem. Dec. (CCH) 684 (1950); Edwin F. Borden Estate, 9 Tax Ct. Mem. Dec. (CCH) 630 (1950).

14. I.R.C. § 262 provides: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." In a comprehensive ruling, the IRS indicated that the deduction will generally be denied where "the personal or other benefits realized are greater than the medical benefits realized." Rev. Rul. 261, 1955-1 C.B. 307, 308, *modified*, Rev. Rul. 91, 1963-1 C.B. 54.

15. *See* Skilling, *Limitations to the Medical Deduction, Problems on Reimbursement*, 29 N.Y.U. TWENTIETH INST. ON FED. TAX 1359 (1971).

16. I.R.C. § 213(e). For the text of this section see note 5 *supra*.

17. *See* Treas. Reg. § 1.213-1(e) (1968).

18. For the text of section 262 see note 14 *supra*.

The basic test for the allowance of medical deductions is whether the expense was incurred and paid primarily for the prevention or alleviation of a physical or mental defect or illness.[19] In the case of *Edward A. Havey*,[20] an often cited opinion, five factors were considered by the Tax Court in resolving whether a deduction claimed by the taxpayer was primarily medical or primarily personal:[21] (1) what was the taxpayer's motive in making the expenditure; (2) would the expenditure have been made but for the advice of a physician;[22] (3) did the expenditure have a direct relationship to the treatment of a specific disease; (4) was the treatment reasonably designed to affect the disease, cure, mitigation, treatment or prevention of a specific disease or to affect any structure or function of the body; and (5) was the treatment proximate in time to the onset or recurrence of the disease or condition?[23] No one factor is determinative of whether a specific expenditure qualifies for a deduction under section 213. The outcome generally depends on a balancing of all the factors. Indeed, one factor may be irrelevant for some expenditures,[24] yet crucial to the determination of others.[25]

I. MEDICAL OR PERSONAL EXPENSES: THE DEFINING PARAMETERS

It is frequently difficult to distinguish personal expenses from those which are incurred primarily for the prevention or mitigation of a particular physical or mental defect or illness. Showing

19. Treas. Reg. § 1.213-1(e) (1968).

20. 12 T.C. 409 (1949).

21. *Id.* at 412. In the *Havey* case, the taxpayer's wife was hospitalized due to a coronary occlusion. After leaving the hospital, the taxpayer's wife was completely restricted in her activities. The attending cardiologist advised the taxpayer to take his wife to the seashore during the humid months of July and August and to Arizona during the winters. Applying the factors listed in text, the Tax Court resolved that the travel and hotel expenses incurred on the trips were not primarily for medical care and hence were nondeductible personal expenditures. *Id.* at 413.

For other cases considering the factors mentioned in *Havey* see Gerstacker v. Commissioner, 414 F.2d 448 (6th Cir. 1969); Frank M. Rabb, 31 Tax Ct. Mem. Dec. (CCH) 476 (1972); David K. Carlisle, 37 T.C. 424 (1961).

22. The advice of a physician is not a prerequisite in every case. *See* Snellings v. United States, 149 F. Supp. 825, 826 (E.D. Va. 1956).

23. For cases considering this factor see Robert M. Bilder, 33 T.C. 155 (1959), *aff'd on other grounds*, 289 F.2d 291 (3d Cir. 1961), *rev'd*, 369 U.S. 499 (1962); L. Keever Stringham, 12 T.C. 580 (1949), *aff'd per curiam*, 183 F.2d 579 (6th Cir. 1950).

24. *See* note 22 *supra*.

25. *See, e.g.*, Marshall J. Hammons, 12 Tax Ct. Mem. Dec. (CCH) 1318 (1953) (cost of vitamins deductible if prescribed by a physician); Rev. Rul. 189, 1962-2 C.B. 88 (cost of wig deductible where prescribed by a physician for the mental health of taxpayer's daughter).

the present existence or the imminent probability of a disease, physical or mental defect or illness is the initial step in qualifying an expenditure as a medical expense.[26] Thus, the cost of building a fallout shelter is not deductible owing to the remote possibility of illness due to radiation fallout.[27] However, some items which appear to be purely personal have been held deductible where the items were specifically prescribed by a physician and served no other purpose than the prevention or mitigation of a physical or mental condition.[28]

A. Special Diets

The deductibility of special diets has been subject to considerable scrutiny due to the inherently personal nature of the expenditure. Generally, the cost of special food or beverages taken as a substitute for ordinary food and beverages is a nondeductible personal expense.[29] However, the Internal Revenue Service (IRS)

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26. L. Keever Stringham, 12 T.C. 580, 584 (1949), *aff'd per curiam*, 183 F.2d 579 (6th Cir. 1950).

27. *See* Fred H. Daniels, 41 T.C. 324 (1963). The costs were treated as nondeductible personal expenses "related to factors and equations of personal life and situation that leave them without the persuading certainty and undubious objectivity necessary to a tax deduction." *Id.* at 329, *quoting* Rodgers v. Commissioner, 241 F.2d 552, 555 (8th Cir. 1957), *aff'g* 25 T.C. 254 (1955).

28. *See* Mason v. United States, 52 Am. Fed. Tax R. 1593 (D. Hawaii 1957) (installation cost of a swimming pool for the hydrotherapeutic treatment of taxpayer); Rev. Rul. 189, 1962-2 C.B. 88 (cost of a wig essential to the mental health of taxpayer's daughter); Rev. Rul. 155, 1958-1 C.B. 156 (cost of a reclining chair acquired to provide optimum rest for a taxpayer with a cardiac condition). *Contra*, Disney v. United States, 267 F. Supp. 1 (1967) (exercising device, mechanical horse, not deductible because not "specifically" recommended by physician); Morris C. Montgomery, 51 T.C. 410 (1968) (cost of pajamas to be worn during therapy treatment not deductible because adaptable to other uses).

The IRS has taken the position that amounts paid on the advice of a dentist for the installation of a device which adds fluoride to a home water supply are deductible because the primary purpose of the device is to prevent tooth decay. Rev. Rul. 267, 1964-2 C.B. 69. However, where a taxpayer, without the advice of a physician, spends money for bottled, distilled water merely to avoid drinking fluorinated water supplied by a city, the amounts expended are not deductible. Rev. Rul. 19, 1956-1 C.B. 135. It may be argued that if the bottled water had been purchased on the advice of a physician for the purpose of avoiding the contaminating effects of the fluorinated city water, a taxpayer might be able to obtain a medical expense deduction by contending that the expenditure was incurred for the prevention of a disease.

29. *See* Doris v. Clark, 29 T.C. 196 (1957) (special foods, such as baby food or tender beef, were merely substitutes for dependents' nutritional needs); *accord*, Estate of Eugene Merrick Webb, 30 T.C. 1202 (1958). *See also* J. Willard Harris, 46 T.C. 672 (1966) (diabetic foods satisfied normal nutritional needs); George H. Collins, 24 Tax Ct. Mem. Dec. (CCH) 1190 (1965) (high protein, moderate fat and low carbohydrate diet clearly served as a substitute for taxpayer's normal diet); Evelyn R. Marks, 22 Tax Ct. Mem. Dec. (CCH) 1128 (1963) ("reducing treatments" for obese people nondeductible).

has ruled that where the diet is prescribed by a physician for medical purposes rather than to meet the nutritional needs of a patient, the expenditure may be allowed as a medical expense.[30] A high burden of proof is placed on the taxpayer to demonstrate that the diet is not for the purpose of meeting the patient's normal nutritional needs.[31] Until recently, despite the IRS's ruling allowing such deductions, no court has allowed a deduction for the cost of special diets taken pursuant to a physician's recommendation.[32] In *Newman v. United States*,[33] a federal district court held that the cost of dietetic food prescribed by a doctor was not deductible as a medical expense.[34] The court stated that the dietetic food was a partial substitute for the taxpayer's normal nutritional needs or requirements. The fact that the taxpayer's doctor prescribed the diet and that it aided in controlling his diabetes was not sufficient to allow a deduction.[35] The reluctance of the courts to allow a medical expense deduction for special diets can impose a substantial hardship on the taxpayer. If the need for a special diet continues over a long period of time, the extra cost to the taxpayer for the special foods or beverages may be very high.[36]

30. Rev. Rul. 261, 1955-1 C.B. 307, 312 *modified*, Rev. Rul. 8, 1958-1 C.B. 154, *modified*, Rev. Rul. 280, 1958-1 C.B. 157, *modified*, Rev. Rul. 91, 1963-1 C.B. 54, *modified*, Rev. Rul. 212, 1968-1 C.B. 91 *and* Rev. Rul. 80, 1971-1 C.B. 71.

31. *See, e.g.*, Theron G. Randolph, No. 2964-74, slip op. at 16 (67 T.C. No. 35 Dec. 16, 1976); Willard Harris, 46 T.C. 672, 674 (1966); George H. Collins, 24 Tax Ct. Mem. Dec. (CCH) 1190, 1192 (1965).

32. For cases denying deductions for the cost of special diets see note 29 *supra*. *But see* Leo R. Cohn, 38 T.C. 387 (1962), where the Tax Court held that the taxpayers were entitled to deduct the additional charges made by restaurants to prepare salt-free meals. *Id.* at 391. The court emphasized that the item sought to be deducted was not the cost of the food taken to satisfy ordinary nutritional needs, but rather the additional charge for special preparation of the salt-free food. *Id.*

33. 23 Am. Fed. Tax R.2d 69-584 (W.D. Ark. 1968).

34. *Id.*, at 69-587. The court stated that

> there is a difference between a nutritional "need" and a nutritional "purpose." Practically any food and most beverages serve some nutritional "purpose" in that they are utilized by the body. But not all food and drink consumed by a person serves a nutritional "need"; in fact, a vast number of people have a food and drink intake far in excess of their bodies' nutritional "needs."

Id.

35. *Id.* at 69-586 to 587. The court construed Rev. Rul. 261, 1955-1 C.B. 307, to deny a deduction unless: (1) the diet was prescribed by a physician; (2) the purpose of the prescription was to alleviate or treat a disease; (3) the food or beverage was to be consumed in addition to and not as a substitute for a normal diet; and (4) the food or beverage was not to supply a "nutritional" need of the taxpayer. The court in *Newman* disallowed the deduction for the cost of dietetic food because the taxpayer's expenditures did not meet requirements (3) and (4). 23 Am. Fed. Tax R.2d at 69-586 to 587.

36. At first glance, the extra cost of the taxpayer's well-balanced, special diet would not seem to be a hardship. Nevertheless, if a special diet costs the taxpayer an extra

Recognizing that the extra costs incurred by taxpayers for special diets may be a true medical expense, the Tax Court, in the recent decision of *Theron G. Randolph*,[37] allowed the taxpayers a deduction for the additional cost of obtaining chemically uncontaminated foods. In *Randolph*, the taxpayers, a physician specializing in the treatment of allergies and his wife, were both highly allergic to chemical contaminants found in the modern environment. The wife's symptoms were nausea, bronchitis, headaches, difficulty in breathing, hives and periods of unconsciousness. The husband experienced loginess, headache, malaise and an inability to concentrate. The wife's condition was diagnosed by her husband prior to their marriage as an allergic reaction. The husband diagnosed his own allergies in conjunction with another specialist. The taxpayer-husband conferred with three other allergy specialists to confirm his diagnosis of his own condition and his wife's condition. To control their allergic reactions, the taxpayers were put on a strict diet which was limited to organic foods. In order to maintain their special diets, the taxpayers had to shop at various health food stores. The retail cost of the organic foods was approximately twice as much as that of similar, allergy-producing foods. Therefore, the taxpayers deducted one-half of their food expenditures as a medical expense.

The Tax Court upheld the claimed deduction because the allergic reactions were extreme and the special diet was the only method of effectively treating their allergies.[38] Since the taxpayers had purchased over eighty percent of their food at the same store and had maintained careful records of their expenses, the court had no problem in calculating the amount of the food bill properly allocable to additional expenses incurred in the purchase of food for the special diet. The court noted that where an item is used for personal living and family purposes, but must be purchased in a

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dollar a day over that which he or she would otherwise spend, then, over a period of twenty years, he or she would incur medical expenses of more than $7,000. Surely, this substantial medical expense should not be disregarded. *See* Sierk, *supra* note 1, at 385. The economic hardship can be alleviated by allowing a deduction analogous to that allowed for capital expenditures. The taxpayer should be allowed to deduct the difference between the cost of the special diet prescribed by a physician and the cost of similar foods and beverages necessary for ordinary nutritional needs. A similar deduction formula exists for taxpayers who purchase capital assets such as air conditioners and elevators for purposes of medical care. The cost of the capital asset is deductible as an expense for medical care to the extent that it does not increase the value of the taxpayer's home. *See* notes 171-89 *infra* and accompanying text.

37. No. 2964-74, slip op. at 1 (67 T.C. No. 35 Dec. 16, 1976).

38. *Id.*, slip op. at 12.

special form to alleviate a physical defect, the taxpayers may deduct as a medical expense the excess cost of the item over the normal cost.[39]

It is too early to predict the full ramifications of this decision. The case may be limited to its unusual facts[40]—the severity of the allergic reactions involved, the effectiveness of the special diet in reducing the allergic reactions and/or the maintenance of careful records by the taxpayers. However, it is difficult to distinguish deductible medical expenses for organic foods from nondeductible medical expenses for dietetic foods. In each case, the special diet is prescribed by a physician and is required to alleviate a physical malady. The *Newman* court disallowed a deduction for dietetic food because it was consumed as a substitute for a normal dietary item supplying a nutritional "need" of the taxpayers. However, the consumption of organic foods in the *Randolph* case was also in lieu of a normal dietary item supplying a normal nutritional "need" of the taxpayers.

Thus the *Randolph* court impliedly rejected the *Newman* standard.[41] Where an item purchased in a special form primarily for the alleviation of a physical defect is one that is ordinarily used for personal, living and family purposes, the excess of the cost of the special form over the normal cost of the item is an expense for medical care within the meaning of section 213.[42] Thus, where

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39. *Id.*, slip op. at 16 n.5. The court distinguished J. Willard Harris, 46 T.C. 672 (1966), and *Newman*, both of which denied deductions for the cost of dietetic foods. In those cases, the taxpayers deducted the entire cost of special, artificially sweetened foods. "In neither case did the taxpayers argue that the foods were more expensive than their nondietetic counterparts, nor did they argue that any additional costs incurred in purchasing these foods was a deductible medical expense." No. 2964-74, slip op. at 15. Unlike the taxpayers in *Newman* and *Harris*, the Randolphs did not contend that the entire amount spent for organic food was deductible. They deducted only the added cost attributed to special handling required to grow, package and market food in a chemically free environment. *Id.*, slip op. at 15-16.

40. *See* No. 2964-74, where the court held: "[W]e conclude that *under the unusual facts of this case* the additional expense [taxpayers] incurred in restricting their diets to chemically uncontaminated food is an expense incurred for medical care . . . ." Slip op. at 9 (emphasis added).

41. It seems impossible to satisfy the *Newman* test that "the special diet, to be deductible, must not satisfy some nutritional 'need,' " 23 Am. Fed. Tax R.2d at 69-587, because a special diet is generally taken as a partial substitute for a normal diet and, therefore, must satisfy some nutritional need of the taxpayer.

42. *See* Theron G. Randolph, No. 2964-74, slip op. at 16 n.5 (67 T.C. No. 35 Dec. 16, 1976), *citing* Rev. Rul. 80, 1976-1 C.B. 71. *See also* Rev. Rul. 318, 1975-2 C.B. 88 (cost of braille books and magazine for blind children deductible to the extent that the purchase price exceeds the cost of regular printed editions); Rev. Rul. 606, 1970-2 C.B. 66 (excess

food must be purchased in a special dietetic or organic form to alleviate a physical defect such as diabetes or an allergy, the taxpayer should be able to deduct as a medical expense the excess of the cost of food in its special dietetic or organic form over the normal cost of such food.[43]

B. Legal Expenses

The deductibility of legal expenses incurred in the maintenance and termination of guardianship (to assure detention of a person at a medical institution so that proper medical treatment can be administered) has recently been at issue. In *Gerstacker v. Commissioner*,[44] the Sixth Circuit, reversing a decision of the Tax Court, held that legal expenses incurred in establishing, conducting and terminating a guardianship were deductible as medical expenses.[45] The facts of the case indicate that the taxpayer's wife had a long history of emotional instability necessitating frequent hospitalization and the care of physicians and psychiatrists.[46] Physicians advised Mr. Gerstacker that his wife could be treated successfully only if she were to be placed under continuing supervision to prevent the disruption of her therapy. To that end, the physicians recommended the appointment of a guardian and hospitalization. It was established at the guardianship proceedings that Mrs. Gerstacker could not manage her own financial affairs; that she was mentally disturbed; and that she was violent toward persons other than those with whom she lived. Appropriate guardianship orders were subsequently entered. The expenditures for the services of the attorney and the guardian were necessary to legitimate the compulsory confinement proceedings. The Tax Court declared that legal expenses for establishing, conducting and terminating guardianships were an indirect medical expense and that the only indirect medical expense for which the Code authorizes a deduction is transportation.[47] Further, it held

cost of auto specially designed to accommodate wheelchair passenger is a deductible medical expense).

43. *See* note 42 *supra*.

44. 414 F.2d 448 (6th Cir. 1969), *rev'g* 49 T.C. 522 (1968). The IRS, relying on the Tax Court opinion, promulgated Rev. Rul. 320, 1968-1 C.B. 93, which states that the legal expenses incurred for committing a taxpayer's son to a state mental institution were not deductible as medical expenses.

45. 414 F.2d at 453.

46. *Id.* at 448-53.

47. 49 T.C. at 525. The Tax Court relied on the Supreme Court's decision in Commissioner v. Bilder, 369 U.S. 499 (1962). For a discussion of the effects of the *Bilder* case and the 1954 Code changes see notes 112-24 *infra* and accompanying text. *See also* Comment, *Taxation—Medical Expenses—Deductibility of Lodging Expenses*, 17 Sw. L.J. 186

that the legal services did not have a direct or proximate therapeutic effect on her mental disorders.[48] The Sixth Circuit reversed the Tax Court decision, holding that the legal expenses were deductible under section 213(a) as expenses for medical care because they were essential to effective medical treatment of Mrs. Gerstacker's mental illness.[49] The *Gerstacker* court relied on the fact that the commitment proceedings were an essential[50] prerequisite to the treatment recommended by the physician.[51] The Sixth Circuit, relying primarily on the factors considered in *Edward A. Havey*,[52] found that all five of the conditions were satisfied. The court stated that it was difficult to conceive of a situation where the relationship between the guardianship expenses and the treatment of Mrs. Gerstacker's illness could be more direct or proximate.[53] In light of the *Gerstacker* decision, the IRS has announced that it will not contest the deductibility of legal fees necessary to authorize medical treatment for mental illness.[54] Thus, the Sixth Circuit decision in *Gerstacker* and the IRS ruling have broadened the definition of medical care, continuing the current trend of construing section 213 liberally.[55]

The *Gerstacker* decision should not be construed as a blanket allowance of deductions for legal fees connected with medical care. In the case of *Joel H. Jacobs*,[56] the taxpayer, exhibiting

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(1963); Comment, *Federal Income Taxation—Deductibility of Living Expenses as Medical Expenses*, 3 WM. & MARY L. REV. 511 (1962).

48. 49 T.C. at 527. The Tax Court refused to establish a nonstatutory exception for indirect expenses, fearing that it would "open the floodgates" for the deduction of innumerable expenses having only an indirect relation to medical care. *Id.* at 526. The court's reasoning is commendable—"an income tax deduction is a matter of legislative grace and . . . the burden of clearly showing the right to the claimed deduction is on the taxpayer." Interstate Transit Lines v. Commissioner, 319 U.S. 590, 593 (1943). *See also* Oliver v. Commissioner, 364 F.2d 575 (8th Cir. 1966); Treas. Reg. § 1.213-1(h) (1957). *But see* Note, *An Argument Against the Doctrine that Deductions Should Be Narrowly Construed as a Matter of Legislative Grace*, 56 HARV. L. REV. 1142 (1943).

49. 414 F.2d at 453.

50. *Id.* at 452. The court also used the words "direct," "proximate" and "necessary" to emphasize that the medical expenses were "essential."

51. *Id.* at 451. The taxpayers analogized the legal expenses to the cost of anesthesia, which is deductible under section 213. Like an anesthetic, the legal expenses were not for the cure or treatment of a specific disease or ailments, but were essential to the effective treatment of a disease or ailment. *See* 45 N.Y.U.L. REV. 609, 612 n.18 (1970).

52. 12 T.C. 409 (1949). *See* notes 21-23 *supra* and accompanying text for the five major factors considered by the *Havey* court.

53. 414 F.2d at 451.

54. Rev. Rul. 281, 1971-2 C.B. 166, *revoking* Rev. Rul. 320, 1968-1 C.B. 93.

55. *See Liberal Medical Deduction Trend Now Includes Committee Fees*, 31 J. TAX. 302 (1969).

56. 62 T.C. 813 (1974).

symptoms of mental illness shortly after his marriage, consulted a psychiatrist. After determining that the cause of the illness was the taxpayer's marital relationship, the psychiatrist recommended a divorce. Following this advice, the taxpayer submitted to his wife's settlement demands in order to obtain a quick divorce. The Tax Court held that none of the divorce-related payments made by the taxpayer to his attorney, his ex-wife's attorney and his ex-wife were deductible as expenses for medical care under section 213.[57] The court stated that although the taxpayer had made a sufficient showing that the mental disorder was a "disease" under section 213, the payments for which deductions could be claimed were limited to those goods or services directly or proximately related to the diagnosis, cure, mitigation, treatment or prevention of disease or illness.[58] The Tax Court introduced a "but for" test, requiring the taxpayer to show that the expenditure "would not have been made but for the illness"[59] before his claim for a deduction would be allowed. To satisfy this test, the taxpayer must prove both that the expenditures were an essential element of the treatment and that they would not have otherwise been incurred for nonmedical reasons.[60] The Tax Court determined that under the circumstances, it was inevitable that the taxpayer would have made the expenditures required for the divorce regardless of his psychiatric problems because the marriage was troubled at its inception; thus, the court held that the expenditures were nondeductible personal expenses.[61]

C. Therapeutic Treatment

Courts have recognized that the determination of whether an expenditure may be allowed as a medical expense depends on the nature of the services rendered, not on the experience, qualifica-

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57. *Id.* at 820.

58. *Id.* at 818, *citing* Gerstacker v. Commissioner, 414 F.2d 448, 450 (6th Cir. 1969).

59. 62 T.C. at 819.

60. *Id.*, *citing* Gerstacker v. Commissioner, 414 F.2d at 450; Max Carasso, 34 T.C. 1139, 1141 (1960), *aff'd*, 292 F.2d 367 (2d Cir. 1961); Stanley D. Winderman, 32 T.C. 1197, 1199 (1959); L. Keever Stringham, 12 T.C. 580, 585 (1949), *aff'd per curiam*, 183 F.2d 579 (6th Cir. 1950).

61. 62 T.C. at 820. Attorney's fees and other divorce costs are generally nondeductible personal expenditures. *See* United States v. Gilmore, 372 U.S. 39, 50 n.19 (1963); Treas. Reg. § 1.262-1(b)(7) (1958). The fact that a psychiatrist "prescribes" a divorce is not determinative. *Cf.* H. Grant Atkinson, Jr., 44 T.C. 39, 54 (1965). Nor is it determinative that the taxpayer can show a marked improvement in his mental condition following the divorce. *Id.*

tions or title of the person rendering such services.[62] Thus, amounts paid for medical services rendered by practitioners, such as chiropractors, psychotherapists and others rendering similar services, may be deductible medical expenses even though the practitioners who perform the services may not be licensed, certified or otherwise qualified to perform such services. If the taxpayer can show that the expenditure was for medical care, the medical expenses will be deductible without regard to the practitioner's qualifications under state law or otherwise.[63]

Not all expenditures incurred in a therapeutic program are deductible. In *Frank M. Rabb*,[64] the taxpayer's wife Betty Rabb had been under psychiatric treatment from 1963 until the time of the Tax Court trial in 1971. Psychiatrists diagnosed her condition as chronic anxiety neurosis with depressive and phobic symptoms, and, at times, a psychotic illness similar to pseudoneurotic schizophrenia. To help Mrs. Rabb cope with her turmoil, her psychiatrist designed a therapeutic program known as "milieu therapy" for the purpose of encouraging and reinforcing her existing emotional resources. The program provided for increased socialization and participation in appropriate recreational, social and other activities. Responding to the physician's encouragement of shopping excursions, Mrs. Rabb made purchases of miscellaneous goods, clothing and services totaling over twenty-three thousand dollars. The Tax Court stated that for the purchases to be deductible as medical expenses "there must be a direct or proximate relation between the expense and the diagnosis, cure, mitigation, treatment or prevention of disease."[65] In the instant

62. Estate of Murtle P. Dodge, 20 Tax Ct. Mem. Dec. (CCH) 1811, 1813 (1961); Estate of Jacob Hentz, Jr., 12 Tax Ct. Mem. Dec. (CCH) 368 (1953); George B. Wendell, 12 T.C. 161, 163 (1949). It can be argued that the services provided by witch doctors or faith healers qualify under this rule as long as the nature of the services rendered come within the definition of medical care.

63. Rev. Rul. 91, 1963-1 C.B. 54, *modifying* Rev. Rul. 261, 1955-1 C.B. 307, *modifying* Rev. Rul. 143, 1953-2 C.B. 129. This includes payments for services by physicians, surgeons, psychiatrists, dentists, optometrists, podiatrists, osteopaths, psychologists and Christian Science practitioners. *See* Rev. Rul. 261, 1955-1 C.B. 307. The Code and the regulations do not require a taxpayer to ascertain whether a practitioner is qualified, is authorized under state law or is licensed to practice before obtaining his or her services in order to claim a medical expense deduction. Where it can be shown that an individual paid an amount for a purpose defined in the Code as medical care, such amount qualifies as a medical expense. Rev. Rul. 91, 1963-1 C.B. 54.

64. 31 Tax Ct. Mem. Dec. (CCH) 476 (1972).

65. *Id.* at 478; *accord*, Edward A. Havey. 12 T.C. 409 (1949). "It is clear that in determining whether such a relationship exists we do not merely view the labels of purchased goods or services or look for accepted medical titles and descriptions, but rather

case, although the physician encouraged shopping excursions, he did not assert that the excursions were an essential element of the treatment. Moreover, there was no evidence in the record that such shopping excursions would not have occurred "but for" the specific encouragement of the psychiatrist.[66] The court declared that the testimony of the taxpayer, a layperson, that the expenditures were the result of psychiatric advice was unconvincing, absent further details.[67] Since the taxpayer had failed to establish either the necessity or the "direct relationship" of the expenditures to Mrs. Rabb's illness, the court held that the purchases made during the shopping excursions while undergoing "milieu therapy" were nondeductible personal expenses of the patient.[68]

Whether a taxpayer, who is a psychiatrist or a student in a psychoanalytic training institution, may deduct the cost of psychoanalytic treatment depends on his or her reason or purpose for seeking such treatment. Generally, psychoanalytic treatment is deductible as a medical expense.[69] Where the taxpayer has a "dual purpose" for obtaining treatment (*e.g.*, treatment for a specific disease and treatment to meet educational requirements at a training institution), the expenditure may qualify for a deduction as medical care under section 213.[70] Thus, where psychoanalysis is obtained for the purpose of diagnosis, cure, mitigation, treatment or prevention of disease, the amount

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we must consider, no matter how mundane the services or product, its effect on the specific illness or defect of the patient." 31 Tax Ct. Mem. Dec. (CCH) at 478-79. *See* C. Fink Fishcer, 50 T.C. 164 (1968).

66. 31 Tax Ct. Mem. Dec. (CCH) at 479.

67. *Id.*; *accord*, Oliver v. Commissioner, 364 F.2d 575, 578 (8th Cir. 1966).

68. 31 Tax Ct. Mem. Dec. (CCH) at 480. Although the *Frank M. Rabb* court decided that the purchases were personal expenditures, courts in other cases have held items more personal in nature to be deductible on the theory that they were necessary for proper therapeutic treatment. For example, in Mason v. United States, 57 U.S. Tax Cas. ¶ 10,012 (D. Hawaii 1957), the jury found that the taxpayer could deduct as a medical expense the cost of installing a specially designed swimming pool. *Id.* at 58, 541. The jury allowed the deduction because the purpose of the pool was to provide therapeutic treatment to the taxpayer's wife who was suffering from an attack of paralytic poliomyelitis.

It should be noted that, to date, few taxpayers have first paid the amount in issue and then contested the IRS rejection of a refund claim by filing a refund suit in the district court, where a jury trial can be obtained. It seems that a jury would take a more liberal approach in determining whether an expenditure qualifies for a deduction as being necessary to therapeutic treatment. Block, *Is climate* [*sic* in title] *improving for medical deductions for special school tuition?*, 32 J. Tax. 116, 118 (1970).

69. *See* Rev. Rul. 91, 1962-1 C.B. 54; note 64 *supra* and accompanying text.

70. *See* David E. Starrett, 41 T.C. 877 (1964), *distinguishing* Namrow v. Commissioner, 288 F.2d 648 (4th Cir. 1961), *cert. denied*, 368 U.S. 914 (1961).

spent is deemed to be for medical care despite the additional benefit obtained in qualifying for admission to a school of psychoanalytic training.[71] However, expenditures made solely for the purpose of qualifying to practice psychoanalysis are not deductible, either as medical expenses or as necessary business expenses.[72]

Expenditures for the therapeutic treatment of self-inflicted diseases may also be deductible. The IRS has ruled that amounts expended by a taxpayer for treatment of the taxpayer or his or her dependents at therapeutic centers for alcoholism[73] and drug addiction[74] qualify for deductions under section 213 of the Code. Additionally, the cost of meals and lodging at the center that are furnished as a necessary incident of treatment, as well as the cost of transportation to Alcoholics Anonymous Club meetings, may constitute expenses for the medical care of the taxpayer or his dependents.[75]

Diverse positions have been taken on the deductibility of therapeutic treatments which are of a personal nature. Recently, the IRS ruled that amounts paid to psychiatrists for the treatment of sexual inadequacy and incompatibility are deductible under

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71. David E. Starrett, 41 T.C. 87 (1964). The taxpayer underwent psychoanalytic treatment for two purposes: (1) to obtain a cure for a specific disease from which the taxpayer suffered; and (2) to qualify for admission to the training curriculum of the Chicago Institute of Psychoanalysis. The court stated that the "[Commissioner's] use of the word 'primarily' in his regulation cannot be extended to the point where an expense, [which] clearly [qualifies as an expenditure] for medical care, [becomes] nondeductible merely because the end result . . . might include an advantage or benefit to the taxpayer in addition to [the] cure or mitigation of a disease . . . ." *Id.* at 88.

72. Namrow v. Commissioner, 288 F.2d 648 (4th Cir. 1961), *cert. denied*, 368 U.S. 914 (1961). The services were not rendered for the treatment of an illness as required by the Code, but rather for the sole purpose of providing professional training to the taxpayers. *Id.* at 653.

73. Rev. Rul. 325, 1973-2 C.B. 75. It has been reported that IRS officials privately indicated to a tax service that expenses incurred in attending smokers' clinics for the purpose of terminating the habit may qualify as deductible medical expenses. Such a deduction would be similar to those allowed for therapeutic treatments of alcoholics and drug addicts. Heckerling, *Medical Expenses: How to determine the deductibility of non-routine items*, 20 J. TAX. 234, 238 (1964). If the IRS determines that the cost of attending a smoker's clinic is deductible, it follows that the transportation costs incident to attendance may also be deductible. *See* note 75 *infra* and accompanying text.

74. Rev. Rul. 226, 1972-1 C.B. 96. In the case of Linder v. United States, 268 U.S. 5 (1925), the Supreme Court held that persons addicted to narcotics "are diseased and proper subjects for [medical] treatment . . . ." *Id.* at 18.

75. *See* Rev. Rul. 226, 1972-1 C.B. 96; Rev. Rul. 273, 1963-2 C.B. 112. For further discussion on the deductibility of transportation, lodging and meals incident to medical care see notes 112-44 *infra* and accompanying text.

section 213(e)(1)(A) of the Internal Revenue Code.[76] This ruling, when considered along with the ruling that the practitioner's qualifications are not determinative regarding allowable medical deductions,[77] may have negative consequences. Numerous deductions may be available to taxpayers who use the services of unqualified sex therapists.[78]

However, in a situation involving similar personal therapeutic treatments, the IRS denied a deduction under section 213, ruling that the fees paid by a husband and wife for marriage counseling were not for the prevention or alleviation of a physical or mental defect or illness, but rather to help improve the taxpayer's marriage.[79] If the taxpayers and the practitioner had characterized the purposes of the treatment differently, they might have received a favorable ruling. Instead of claiming that the treatment was for family counseling, the taxpayer should have claimed that the purpose of the treatment was to alleviate a mental disorder.[80]

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76. Rev. Rul. 187, 1975-1 C.B. 92, 93. Although the amounts expended for treating sexual inadequacy and incompatibility were deductible, the amounts expended for meals and lodging at a hotel at which the taxpayers stayed on the recommendation of a psychiatrist were not deductible. *Id. See also* Wade Volwiler, 57 T.C. 367 (1971).

77. *See* notes 62-63 *supra* and accompanying text.

78. There has been a recent increase in the number of sexual therapy clinics. "Today there are some 3,500 to 5,000 organizations describing themselves as sex clinics or family counseling services specializing in sexual problems." N.Y. Times, May 5, 1974, at 71, col. 1. Some of these clinics are designed to benefit the practitioner financially, hence "the opportunities for charlatanism is [*sic*] abundant." *Id.* Furthermore, taxpayers may conceivably participate in these clinics for purely sybaritic reasons. They may then seek to have the government pay part of the costs in the form of a deduction, arguing that the purpose of the clinic was the treatment of sexual inadequacy, incompatibility or other sexual problems.

Although the IRS' ruling, *see* note 76 *supra*, could arguably include the above deduction, there is little doubt that the IRS would challenge any deductions claimed where the treatment is personal in nature and not directly related to the cure, mitigation or treatment of a specific disease. *See, e.g.*, C. Fink Fischer, 50 T.C. 164 (1968); Estate of Jacob Hentz, Jr., 12 Tax Ct. Mem. Dec. (CCH) 368 (1953).

79. Rev. Rul. 319, 1975-2 C.B. 88. The taxpayer did not qualify for a deduction under the ruling because the counseling was sought to help improve the taxpayer's marriage rather than for the prevention or alleviation of a physical or mental defect or illness. It should be noted that the practitioner was a clergyman. It can be argued that the ruling was based on the fact that the counseling was religious in nature and that future marriage counseling cases should be decided differently, at least where the practitioner is a qualified psychiatrist or psychoanalyst.

80. *But see* Donald H. Brown, 62 T.C. 551 (1974), where the Tax Court held that amounts paid by the taxpayers for Scientology processing, auditing and related travel expenses for the purpose of receiving counseling for psychological problems were not properly deductible as medical expenses under section 213. *Id.* at 556. The fact that an indirect medical benefit may result from a personal expense does not make that per-

In a novel case, *Vincent P. Ring*,[81] the taxpayer attempted to deduct as a medical expense the transportation costs of taking his daughter, who was recovering from surgery, to the Shrine of Our Lady of Lourdes, France. The trip was neither suggested nor recommended by a physician, nor did the taxpayer seek medical advice on behalf of his daughter during the trip. The taxpayer contended that the trip improved his daughter's postoperative physical condition in that it provided treatment supplementary to surgical recuperation at home and therefore qualified as medical care. The Tax Court disallowed the deduction, stating that no deduction is permitted under section 213 for travel to seek spiritual aid for the prevention or cure of a disease or illness.[82] Nevertheless, at least one commentator believes that if the taxpayer had in good faith taken his daughter to the shrine to seek spiritual aid to alleviate or cure her physical illness, the deduction should have been allowed.[83]

The cost of dancing lessons taken as therapeutic treatment has been held nondeductible in a series of cases, even though the lessons were recommended by the taxpayers' physician.[84] Courts have denied such deductions on the ground that dance lessons are inherently personal in nature, as well as on the ground that the taxpayers failed to show that the lessons were medically

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sonal expense deductible. Deductible medical expenses are limited to those primarily incurred for medical care. *See* Donnelly v. Commissioner, 262 F.2d 411, 413 (2d Cir. 1959); John J. Thoene, 33 T.C. 62, 64-65 (1959).

In a special ruling, the IRS announced that the definition of a medical case is broad enough to include amounts paid to Christian Science practitioners, nurses and sanitariums. Special Ruling, [1943] 3 STAND. FED. TAX REP. (CCH) ¶ 6175, at 8072. It could be contended that this special ruling authorizes deductions for medical care where the treatment is performed by a religious organization. *See* note 83 *infra*.

81. 23 T.C. 950 (1955).

82. *Id.* at 953-54.

83. Eulenberg, *Miracles and the Medical Expense Deduction*, 11 TAX COUN. Q. 1 (1967). The author noted that the Treasury Department has ruled that the definition of medical care is broad enough to include amounts paid to Christian Science practitioners and nurses. *See* note 80 *supra*. He stated that a Christian Scientist would be the first to agree that the therapy provided through the church is purely spiritual. Since the Catholic Church has officially verified the performance of miracles at the shrine, the author reasoned that if a Christian Scientist is allowed a deduction for spiritual treatment, a Catholic should also be allowed such a deduction as a consequence of his or her belief in the effectiveness of the shrine as curative treatment. *Id.* at 5.

84. Adler v. Commissioner, 330 F.2d 91, 92 (9th Cir. 1964) (not recommended by a doctor); Norman Ende, 34 Tax Ct. Mem. Dec. (CCH) 1096, 1101 (1975) (taxpayer failed to show that the dance lessons would not have otherwise been taken for nonmedical reasons); John J. Thoene, 33 T.C. 62, 65 (1959) (psychiatrist merely recommended that the taxpayer participate in social activities).

necessary.[85] Nevertheless, the IRS has ruled that a taxpayer could deduct the cost of a clarinet recommended by an orthodontist.[86] The taxpayer's son played the clarinet for the purpose of correcting a severe malocclusion of his teeth caused by a congenital defect. The IRS allowed the deduction because the clarinet was used for therapeutic purposes.

D. Special Education and Training

The determination of whether the services rendered by a particular institution constitute medical care has largely been a factual matter left to the courts. In addition to the considerations set out in *Edward A. Havey*,[87] other relevant factors include the medical facilities of the school,[88] the extent of the special services offered by the school for the alleviation or treatment of a physical or mental defect,[89] the recommendation of the school by a doctor[90] and the proximity of the relationship between the medical deficiency of the individual and the services rendered in an attempt to alleviate the condition.[91] A study of the cases involving special education makes it clear that there are no set rules for the determination of this issue; rather, the courts balance all the relevant

85. *See* note 84 *supra*.

86. Rev. Rul. 210, 1962-2 C.B. 89. The taxpayer could deduct the minimum cost of a clarinet of sufficient quality to give effect to the therapeutic treatment recommended by the orthodontist, as well as the cost of the lessons necessary to obtain the benefits of the orthodontic treatment.

Arguably, under this ruling and Rev. Rul. 187, 1975-1 C.B. 92, *see* notes 76-78 *supra*, if the purpose of the treatment is for "medical care" as required by the Code, a taxpayer could deduct the cost of sexual aids prescribed by a physician.

87. 12 T.C. 409, 412. *See* notes 21-23 *supra*; *see also* Everett F. Glaze, 20 Tax Ct. Mem. Dec. (CCH) 1276 (1961).

88. In Jack W. Reiff, 33 Tax Ct. Mem. Dec. (CCH) 91 (1974), the court declared that "in our view, [the institution] had neither the medical facilities nor the therapeutic orientation in its curriculum to characterize it as a 'special school.' " *Id.* at 94. Thus, the expenses incurred for tuition and transportation to the private school for an emotionally disturbed child were not deductible as medical expenses. *Id.* at 95. *See also* Maurice Feinberg, 25 Tax Ct. Mem. Dec. (CCH) 777, 780 (1966); Martin J. Lichterman, 37 T.C. 586, 596-99 (1961).

89. Edward S. Enck, 26 Tax Ct. Mem. Dec. (CCH) 314 (1967). The court denied a medical expense deduction; although the school and camp were advertised as "willing to take children with emotional problems," there was no evidence that the school or camp offered any special program or had any special resource designed to treat mentally handicapped individuals. *Id.* at 316.

90. *See, e.g.*, Israel J. Weinberg, 28 Tax Ct. Mem. Dec. (CCH) 10, 12 (1969); Arnold P. Grunwald, 51 T.C. 108, 115 (1968). It is not enough for the taxpayer to contend that attendance at a school is helpful in the alleviation of a child's condition.

91. Paul H. Ripple, 54 T.C. 1442, 1447 (1970). It must be established that the tuition is paid for services provided by the school which, with respect to the taxpayer or his or her dependent, are primarily medical in nature, rather than educational. *Id.*

factors.[92] Although determinations based on these factors are difficult to make, at least one judge has stated:

> Line-drawing may be difficult here as elsewhere, but that is what the courts are for. . . . [C]ourts of justice ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. [The courts] are obliged to say, this is a horse's tail at sometime.[93]

In order to be considered a qualifying institution, a private organization must regularly engage in providing the types of care or services referred to in the regulations.[94] Generally, an institution will be considered a special school only if education is "incidental" to medical care.[95] If an individual is in an institution for the "principal reason" that his or her condition requires constant medical treatment, then the entire cost of such medical treatment, including meals and lodging, constitutes an expense for medical care.[96] However, if an individual is in an institution, but medical care is not a principal reason for his or her presence there, then only that part of the cost of the treatment which is actually attributable to medical care is allowed a deduction.[97]

Expenditures for the care of the blind and deaf may also come within the scope of section 213. Taxpayers claiming a deduction

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92. *See, e.g.*, H. Grant Atkinson, Jr., 44 T.C. 39 (1965); Rolland T. Olson, 23 Tax Ct. Mem. Dec. (CCH) 2008 (1964); notes 88-91 *supra*.

93. Ochs v. Commissioner, 195 F.2d 692, 698 (2d Cir. 1952) (Frank, J., dissenting).

94. Martin J. Lichterman, 37 T.C. 586, 595 (1961). *See also* Treas. Reg. § 1.213-1(e)(1)(i)-(ii) (968). This section of the regulations was held to be a reasonable interpretation of I.R.C. § 213. 37 T.C. at 596. The Supreme Court has usually held that Treasury regulations must be sustained unless they are unreasonable and plainly inconsistent with revenue statutes. *See, e.g.*, Commissioner v. South Tex. Lumber Co., 333 U.S. 496, 501 (1948); Fawcus Mach. Co. v. United States, 282 U.S. 375, 378 (1931).

95. *See, e.g.*, Devora R. Shidler, 30 Tax Ct. Mem. Dec. (CCH) 529 (1971); Lawrence D. Greisdorf, 54 T.C. 1684 (1970); Israel J. Weinberg, 28 Tax Ct. Mem. Dec. (CCH) 10 (1969). Financial assistance provided by a state toward room, board and tuition for a child in a school for the mentally retarded is not considered in determining support of a dependent; only the supplemental amounts paid by the taxpayer are deductible medical expenses. Rev. Rul. 347, 1971-2 C.B. 114.

96. Martin J. Lichterman, 37 T.C. 586, 595 (1961).

97. *Id.* at 596. There is nothing in the statute, the regulations or the rulings to indicate that amounts paid to an institution for medical expenses are nondeductible merely because the "principal reason" for attendance at the institution is other than the alleviation of a mental or physical handicap. Hobart J. Hendrick, 35 T.C. 1223, 1237 (1961). The failure of an institution to qualify as a special school does not mean that the taxpayer is denied a deduction. It merely signifies that the taxpayer can deduct only the

for the cost of the special education of a blind dependent, including the cost of meals and lodging, may only deduct the portion of the cost attributable to medical care unless the institution qualifies as a special school.[98] Where items are purchased in a special form "primarily for the alleviation of a physical defect" (*e.g.*, braille editions of books and magazines) and are generally used for personal, living and family purposes, the excess of the cost of the special form over the cost of the standard item is an expense for medical care within the meaning of section 213.[99] The same principles applicable to the deductibility of expenditures for the blind apply to expenditures for the deaf.[100]

Arguably, another factor that may be considered in determining the deductibility of special education or training is the hardship to families with limited financial resources who incur such

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cost of those items shown to be for the "medical care" of the mentally or emotionally disturbed child. *See id.*; Treas. Reg. § 1.213-(1)(e)(1)(v)(b) (1968).

Applying the principal that the qualifications of a practitioner are not determinative, *see* note 62 *supra* and accompanying text, the IRS has ruled that amounts paid to nonprofessional individuals administering "patterning" exercises to a mentally retarded child qualify as deductible medical expenses under section 213. Rev. Rul. 170, 1970-1 C.B. 51.

98. Arnold P. Grunwald, 51 T.C. 108 (1968). The Tax Court decided that because the school did not maintain doctors or teachers who specialized in teaching the blind and the expense incurred by the taxpayer was not at the direction of a physician, the institution did not qualify as a "special school". *Id.* at 113-14. *See also* notes 87-97 *supra* and accompanying text.

It is settled law that expenses beneficial to a person's general health and well-being, but permeated with special considerations, do not constitute "medical care" as defined in section 213(e)(1). *Id.* at 115. *See also* H. Grant Atkinson, Jr., 44 T.C. 39, 49-50 (1965); Edward A. Havey, 12 T.C. 409, 411-412 (1949); Treas. Reg. § 1.213-1(e)(1)(ii) (1968).

99. Rev. Rul. 318, 1975-2 C.B. 88. Amounts paid by a taxpayer to have a person accompany his or her blind child during the school day are expenses for medical care because the purpose of the guide is to alleviate the problems caused by the blind child's physical defect. Rev. Rul. 173, 1964-1 C.B. 121. A similar deduction is allowed for the cost of maintaining a "seeing-eye" dog. Rev. Rul. 461, 1957-2 C.B. 116.

Similarly, amounts paid by a taxpayer for language training have been held deductible as medical expenses when recommended by a physician to correct a congenital learning disability. Rev. Rul. 607, 1969-2 C.B. 40. The costs of special aids (such as a tape recorder, special typewriter, projection lamp and special lenses) to assist in the education of a child suffering from progressive blindness are deductible medical expenses. Rev. Rul. 223, 1958-1 C.B. 156.

100. *See* Donovan v. Campbell, 7 Am. Fed. Tax R.2d 1236 (N.D. Tex. 1961), where the court held that the cost of tuition for a school providing individual attention and the opportunity to learn "lip reading" was deductible as payment to compensate, mitigate and alleviate the problems of deafness suffered by the taxpayer's son. *Id.* at 1237.

Amounts for the acquisition, training and maintenance of a dog for the purpose of assisting a deaf dependent also qualify as medical expenses. Rev. Rul. 295, 1968-1 C.B. 92.

expenses. Today, more than a half million children in the United States require special education and training because they suffer from various forms of mental disease.[101] However, the facilities providing the special training are expensive, as well as limited in number.[102] Thus, parents with emotionally disturbed or mentally retarded children, in contrast to those fortunate enough to have "normal" children, are burdened with excessive medical expenses in the form of special education.[103] Although the humane or equitable considerations of the revenue laws rarely manifest themselves,[104] it can be argued that the congressional intent in proposing changes to section 213 was to liberalize and extend relief to financially burdened taxpayers in hardship situations caused by extraordinary medical expenses.[105] Recent federal

101. *See* Block, *supra* note 68, at 116.

102. *Id.*

103. *See* Muchin, *Private Schooling for Emotionally Disturbed Children: Is it a Medical Expense?*, 44 TAXES 699 (1966). Despite this hardship, the Tax Court in H. Grant Atkinson, Jr., 44 T.C. 39 (1966), held that the cost of sending an emotionally disturbed child to a private school that did not have medical facilities was not a deductible expense, even on the advice of a doctor. *Id.* at 53. Muchin, although he was counsel for the Commissioner in the *Atkinson* case, believed that the case could and should have been decided for the taxpayer. Muchin, *supra* at 699. Muchin believed that the expenses should be deductible because such expenses can be burdensome to a person with a small or medium income. *Id.* at 700. He also believed that the expenses could be deductible under the rationale of L. Keever Stringham, 12 T.C. 580 (1949), *aff'd per curiam*, 183 F.2d 579 (6th Cir. 1950), and Rolland T. Olson, 23 Tax Ct. Mem. Dec. (CCH) 2008 (1964). Muchin, *supra* at 701-02. In *Stringham*, an asthmatic child attended a boarding school in Arizona because her doctor advised that the Arizona climate would be beneficial to her respiratory condition. The school did not provide medical treatment per se. The court permitted the girl's parents to deduct all costs (such as transportation expenses to and from Arizona, room and board and medical care), except normal educational expenses, incurred while she attended the boarding school. 12 T.C. at 586. By analogy, this case would seem to support a deduction for a portion of the payments made to a private school by parents with an emotionally disturbed child. The taxpayer's greatest obstacle is to convince a court that an emotional or mental disease is as serious as a respiratory disease and that a change in environment can be just as beneficial as a change in climate. Muchin, *supra* at 701.

In the *Olson* case, Judge Pierce allowed a full deduction for the cost of sending a mentally retarded child to a military school. 23 Tax Ct. Mem. Dec. (CCH) at 2010. The judge reasoned that the military training was not primarily for standard educational purposes, but for medical training and therapy to alleviate the handicap and to stimulate the child's ability to learn so that he could live and be educated in a normal manner. One can argue on the basis of *Olson* that the taxpayers in *Atkinson* should have received a deduction. In *Olson*, as in *Atkinson*, there was no showing of a relationship between the child's attendance at the school and the mitigation, cure or alleviation of his disease or illness. Nevertheless, a full deduction was allowed to the taxpayer in *Olson*.

104. *See* Ochs v. Commissioner, 195 F.2d 692, 695 (2d Cir. 1952) (Frank, J., dissenting).

105. *Hearings on the Internal Revenue Code of 1954 Before the Senate Comm. on Finance*, 83d Cong., 2d Sess. 103 (1954) [hereinafter cited as *1954 Finance Hearings*].

budgetary provisions for mental health indicate that the nation is currently more aware of the needs of these individuals.[106] However, "[u]ntil the time is reached when the tax laws clearly encompass and recognize the implications of our new medical horizons, physicians will have to support all testimonies satisfactorily, in detail, by clearly demonstrating the medical basis for the prescribed treatments of emotionally and mentally handicapped patients."[107]

Closely related to deductions for special education and training are deductions for institutional and domestic nursing care. The costs of room and board, as well as amounts expended for medical care, constitute deductible medical expenses under section 213 when the "principal reason" for a person's presence at an institution is to receive medical care.[108] However, before considering the "principal reason" for a person's presence at an institution, courts examine the sufficiency of the services rendered by the nursing home.[109]

Domestic services provided to an ill member of the household which enable that person to remain sedentary are not medical care under section 213. Nevertheless, services rendered directly to such a household which would normally be performed in a hospital do qualify as medical care.[110] Thus, to the extent the

106. Nathan, *Is Attendance at a Private School Medical Treatment?—A Doctor's Viewpoint*, 44 TAXES 704, 704 (1966).

107. *Id.* at 705. A physician's clinical impression often lacks the overt measurable objectivity required by a court of law; hence, it is frequently misunderstood or misinterpreted. *Id.* at 704. Nevertheless, a physician's recommendation should indicate that the school has been selected because it offers special medical services for the alleviation of a specific problem. Similarly, where the fee paid to a private school covers both the cost of tuition and medical services, the school should provide a breakdown of the amount allocable to medical care and the nature of the services provided. Block, *supra* note 68, at 118.

108. James J. Matles, 23 Tax Ct. Mem. Dec. (CCH) 1489 (1964). In *Matles*, the court determined that under the circumstances, there was an insufficient showing that the principal reason for the defendant's presence at a nursing home was to receive medical care. *Id.* at 1497. *See also* Treas. Reg. § 1.213-1(e)(1)(v) (1968).

109. *See, e.g.*, John Robinson, 51 T.C. 520 (1968), *aff'd*, 422 F.2d 874 (9th Cir. 1970); W. B. Counts, 42 T.C. 755 (1964). Courts consider the sufficiency of the services provided and not the qualifications of the person rendering them. *See, e.g.*, C. Fink Fischer, 50 T.C. 164, 174 (1968), George B. Wendell, 12 T.C. 161, 163 (1949). *See also* J. D. Lane, 26 Tax Ct. Mem. Dec. (CCH) 240 (1967) (salary of nurse trained in Ireland but not registered in United States deductible because the nurse rendered medical care). For a discussion of the sufficiency of the services rendered and the qualifications of the person rendering them see note 62 *supra* and accompanying text.

110. Walter D. Bye, 31 Tax Ct. Mem. Dec. (CCH) 238 (1972); *accord*, John Frier, 30 Tax Ct. Mem. Dec. (CCH) 345 (1971).

payments are for nursing care, rather than for domestic functions such as general housekeeping, the expenditures qualify as expenses for medical care within the purview of section 213.[111]

E. Transportation, Lodging and Meals

Section 213 of the Code also allows deductions for "transportation primarily for and essential to medical care."[112] This includes taxi, bus, train and airplane fares to and from the location of treatment.[113] In addition to these fares, taxpayers have attempted to include food and lodging as part of their medical expense deduction.

When the 1939 Code was revised in 1954, both the Senate Committee reports[114] and the House of Representatives Committee reports[115] indicate that Congress intended to eliminate as medical deductions incidental food and lodging expenses incurred by the taxpayer and his or her family while obtaining medical care. The Senate report stated: "A new definition of 'medical

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111. *See* George M. Womack, 34 Tax Ct. Mem. Dec. (CCH) 1009 (1975) (although nurse did some household work, her "primary" functions were nursing; thus the total payments were deductible); Demor Inc., 27 Tax Ct. Mem. Dec. (CCH) 1496 (1968) (Commissioner's determination of amount properly allocable to medical care upheld); Maurice C. Levy, Jr., 20 Tax Ct. Mem. Dec. (CCH) 1534 (1964) (only expenditure attributable to medical care allowed).

In a recent revenue ruling, a taxpayer incurred expenses in taking a physician-recommended cruise. The taxpayer embarked on a cruise with a group of physicians who provided clinical medical services, dietary supervision and seminars relevant to the taxpayer's condition. The IRS ruled that only the amounts attributable to reviewing the individual's medical records, performing medical tests and reporting the result to the taxpayer's personal physician were expenditures deductible for medical care. Since the cruise was not primarily for and essential to the taxpayer's medical care, the transportation expense of the cruise, the food and lodging expenses and the instructional seminars relevant to the taxpayer's general mental health were not deductible medical expenses under section 213. Rev. Rul. 79, 1976- C.B. 70.

112. I.R.C. § 213(e)(1)(B) provides in pertinent part: "(1) The term "medical care" means amounts paid—(B) for transportation primarily for and essential to medical care . . . ."

113. *See* [1977] 2 Stand. Fed. Tax Rep. (CCH) ¶ 2019.7957.

114. A letter presented by Marion B. Folsom, Undersecretary of the Treasury, at the opening of the Senate Finance Committee hearing stated: "[The] overall effect of [the] proposed changes is to liberalize and extend relief in real hardship situations due to heavy medical expenses but [to] curb deduction of ordinary or luxury living expenses in guise of medical costs." *1954 Finance Hearings, supra* note 105, at 103.

115. "A new definition of 'medical expenses' is provided which incorporates regulations under present law and also provides for the deduction of transportation expenses for travel prescribed for health, but not the ordinary living expenses incurred during such a trip." H.R. Rep. No. 1337, 83d Cong., 2d Sess. 4055 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 4666 (1954).

expense' is provided which allows the deduction of only transportation expenses for travel prescribed for health, and not the ordinary living expenses incurred during such trip."[116] Despite this manifestation of congressional intent, taxpayers attempted to deduct as medical care the incidental meals and lodging expenses incurred while receiving medical treatment away from home.[117]

In *Commissioner v. Bilder*,[118] the taxpayer, who suffered from a heart disease, took a trip to Florida for the winter months on the advice of his physician. Following this advice, the taxpayer, his wife and their three-year-old daughter went to Florida for the winter. His expenditures included transportation costs and apartment rental fees. The taxpayer deducted the full amount of these expenditures. The Commissioner assessed a deficiency for all the expenditures; the Tax Court reversed. The Tax Court allowed a deduction for all the transportation costs but allowed for only one-third of the total apartment rentals[119] on the ground that the taxpayer failed to prove that the presence of his family on the trip was part of the medical treatment. The Court of Appeals for the Third Circuit vacated the judgment of the Tax Court and remanded, ordering the Tax Court to allow a deduction for the full expenditures, including the costs incurred for the meals and lodging of the taxpayer's family.[120] The Supreme Court granted

116. S. REP. No. 1622, 83d Cong., 2d Sess. 35 (1954); *accord*, H.R. REP. No. 1337, 83d Cong., 2d Sess. 30 (1954).

117. *See* Commissioner v. Bilder, 369 U.S. 499 (1962), *rev'g* 289 F.2d 291 (3d Cir. 1961), *aff'g in part and rev'g in part* 33 T.C. 155 (1959); Carrasso v. Commissioner, 292 F.2d 367 (2d Cir. 1961), *aff'g* 34 T.C. 1139 (1960).

118. 369 U.S. 499 (1962), *rev'g* 289 F.2d 291 (3d Cir. 1961), *aff'g in part and rev'g in part* 33 T.C. 155 (1959).

119. 33 T.C. at 160.

120. 289 F.2d at 305-06. The Third Circuit took judicial notice of the fact that one who has had four heart attacks should not live alone and was of the opinion that it was a necessary part of the "medical care" of the taxpayer that his wife and child should accompany him to Florida. *Id.*

In response to the Commissioner's contention that the legislative history precludes deductibility of the expenditures for meals and lodging, the court stated that "[w]here a general policy of government has been well established by statutes and recognized in court decision, 'a clear expression of the intention of congress' is required to justify a reversal." *Id.* at 303, *citing Ex parte* Crow Dog, 109 U.S. 556, 572 (1883); Commissioner v. Rivera's Estate, 214 F.2d 60, 62-63 (2d Cir. 1954); Fawcett v. Commissioner, 49 F.2d 433, 435 (2d Cir. 1945). When the courts are called upon to interpret statutes, the language of the statute is construed "so as to give effect to the intent of Congress." United States v. American Trucking Ass'ns, 310 U.S. 534, 542 (1939). "The Court's task is to construe not English but Congressional English. Our problem is not what do ordinary English words mean, but what did Congress mean them to mean." Commissioner v. Acker, 361 U.S. 87, 95 (1959) (Frankfurter, J., dissenting).

In *Bilder*, the Third Circuit stated that "[i]n our view the most that can be said of

certiorari in the *Bilder* case.[121] Agreeing with the Second Circuit in *Carrasso v. Commissioner*,[122] the Supreme Court stated: "Congress' purpose to exclude such expenses as medical deductions under the new bill is unmistakeable . . . . The Committee Reports foreclose any reading of that provision which would permit this taxpayer to take the rental payments for his Florida apartment as 'medical care' deductions."[123] In view of the congressional reports,[124] it may be concluded that the Supreme Court in *Bilder* correctly interpreted congressional intent to mean that deductions permitted for "transportation primarily for and essential to medical care" do not include deductions for meals and lodging incurred incidental to medical treatment received while away from home.[125]

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the legislative history here is that it creates an ambiguity with respect to the statutory provisions and that being so it cannot be availed of under the teaching that the use of legislative history is to 'solve, but not to create, an ambiguity.' " 289 F.2d at 302-03 (original emphasis deleted), *citing* United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932). The court reasoned that "[i]f Congress had wanted to effect the limitation urged by the Commissioner 'it would have been easy to have said so in express terms; and because it did not do so, we are led irresistibly to the conclusion that it did not intend . . . ' to do so." 289 F.2d at 304, *citing* Tillson v. United States, 100 U.S. 43 (1879).

121. *See* 368 U.S. 912 (1961).

122. 292 F.2d 367 (2d Cir. 1961), *aff'g* 34 T.C. 1139 (1960). In *Carrasso*, the taxpayer's physician advised him to take a trip to Bermuda following major abdominal surgery. The Second Circuit denied the taxpayer's claim for a deduction of lodging expenses for himself and his wife incurred while convalescing in Bermuda. 292 F.2d at 369. The Second Circuit stated that "[i]t is abundantly clear that Congress intended, by changing section 213 of the 1954 Code, to prohibit deductions of the kind now at issue before us." *Id.*

123. 369 U.S. at 503, 505, *citing* H.R. REP. No. 1337, 83d Cong., 2d Sess. A60 (1954), *and* S. REP. No. 1622, 83d Cong., 2d Sess. 219-20 (1954).

124. *See* notes 115-16 *supra* and accompanying text.

125. For decisions following the rule announced in *Bilder* see Rose v. Commissioner, 487 F.2d 581 (5th Cir. 1973), *cert. denied*, 419 U.S. 833 (1974) (meals and lodging nondeductible because they were not incurred in a hospital or similar institution); Leon S. Alman, 53 T.C. 487 (1969) (transportation expense to and from golf course nondeductible although taxpayer was advised by his physician that golf would alleviate his pulmonary emphysema); Loren Wilks, 27 Tax Ct. Mem. Dec. (CCH) 1086 (1968) (living expenses incurred while obtaining medical treatment for terminal cancer were not deductible); Rev. Rul. 187, 1975-1 C.B. 92 (cost of meals and lodging at a hotel incurred pursuant to sexual therapy denied although recommended by psychiatrist).

For decisions distinguishing the holding in *Bilder* because the hardship to the taxpayer was substantial see Kelley v. Commissioner, 440 F.2d 307 (7th Cir. 1971); Montgomery v. Commissioner, 428 F.2d 243 (6th Cir. 1970). *See also* Rev. Rul. 110, 1958-1 C.B. 155, where the IRS allowed a deduction for transportation costs paid by the taxpayer for third parties which were necessary to the effective medical care of the taxpayer. *See id. But see* Rose v. Commissioner, 435 F.2d 149 (5th Cir. 1970); W. B. Hunt, 31 Tax Ct. Mem. Dec. (CCH) 1119 (1972), where the transportation costs of third persons were nondeductible because they were not necessary to the medical care of the taxpayer.

Although the Supreme Court in *Bilder* considered whether the costs of meals and lodging incurred at the place of medical treatment are deductible, it left unanswered the question of whether expenses for meals and lodging incurred "en route" to the place of treatment may be deducted as "transportation primarily for and essential to medical care." In *Montgomery v. Commissioner*,[126] the Sixth Circuit dealt with that issue. Affirming a Tax Court decision, the court held that food and lodging expenses incurred while traveling to the place of medical treatment are deductible expenses.[127] The Sixth Circuit reasoned that the use of the term "transportation", rather than "travel," in section 213 was an indication of Congress' intent to limit deductions for food and lodging expenses to those which are incurred at the place of treatment.[128] This decision seems questionable, because congressional use of the term "transportation"[129] has historically included only the costs of transporting an individual and his baggage; use of the term "travel" has included meals and lodging.[130] The court of appeals, refusing to follow the rationale of the dissent in the Tax Court opinion,[131] reasoned that the abuses Congress sought to eliminate (the allowance of medical deductions for ordinary living expenses incurred at the place of treatment) occured during the patient's residence at the place of care, not while "en route" to the facility.[132] Thus, taxpayers in the Sixth Circuit

126. 428 F.2d 243 (6th Cir. 1970), *aff'g* 51 T.C. 410 (1968).

127. 428 F.2d at 246.

128. *Id.*

129. *See* I.R.C. § 213(e)(1)(B).

130. The four dissenting judges on the Tax Court correctly indicated that the word "transportation" has historically been given a more narrow meaning than "travel." "Transportation" has generally been applied to cover the costs of transporting the person and his baggage. "Travel" has been applied to cover the costs of amenities such as food and lodging. Montgomery v. Commissioner, 428 F.2d at 246 (6th Cir. 1970). *See* I.R.C. §§ 62(2)(B)-(C), 162(a)(2), 217(b)(1)(B), 274(d)(1).

> Further, it is clear that in passing the 1954 Code, Congress intended to retreat somewhat from its prior liberal attitude towards medical expenses. This is indicated by the inclusion of section 262 requiring that "personal, living or family expenses" shall not be deductible "except as otherwise expressly provided," and the present regulations which state "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."

428 F.2d at 246 (emphasis added). *See also* Treas. Reg. § 1.213-1(3)(1)(ii) (1968).

131. *See* note 130 *supra*.

132. 428 F.2d at 246. The court continued: "[I]f Congress had wished to exclude the costs for food and lodgings incurred in traveling to the place of medication, it could have so provided. The legislative history nowhere indicates an intention to exclude 'all

are currently allowed a deduction for meals and lodging "en route" to the place of medical treatment.

In *Kelley v. Commissioner*,[133] the Seventh Circuit, agreeing with the Sixth Circuit, held that there is no absolute prohibition against medical deductions for expenditures for meals and lodging which arise while the taxpayer is away from home receiving medical treatment.[134] In *Kelley*, the taxpayer underwent surgery after an attack of appendicitis. He surrendered his hospital room because the hospital was in need of the room for another patient. At the request of his surgeon, the taxpayer stayed in a hotel until advised that he could go home. The Seventh Circuit held that the payments for food and lodging, incurred during the period that the taxpayer stayed in a hotel on the advice of his surgeon, were deductible payments for "medical care."[135] The court granted the deduction because it felt that "[a]different interpretation would deny relief in a real hardship situation by clothing a true medical cost in the guise of a luxury living expense."[136]

Taxpayers have unsuccessfully attempted to deduct the purchase price, or a portion thereof, of automobiles acquired to pro-

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ordinary food and lodging expenses,' nor does it limit transportation expenses 'to the cost of transporting the patient and his baggage.' " *Id.*

The reasoning of the court of appeals is hardly persuasive, because, in ascribing its own meaning to the word "transportation," the court ignored a basic principle of statutory construction, namely, that identical words appearing in different sections of a statute are presumed to be used in the same sense and with the same meaning. *See* Halvering v. Stockholms Enskilada Bank, 293 U.S. 84 (1934); Noteman v. Welch, 108 F.2d 206 (1st Cir. 1939); Homer H. Marshman, 31 T.C. 269 (1958), *rev'd on other grounds*, 279 F.2d 27 (6th Cir. 1960). The IRS regulations indicate that "transportation" is a more narrow concept than "travel." Transportation does not include meals and lodging. Treas. Reg. § 1.62-1(g) (1957). The word clearly has the same meaning in section 213(e)(1)(B) as it has in section 62(2)(C). Furthermore, "it is legally unsound and illogical to make a distinction . . . between meals and lodging at the place where medical treatment is received and meals and lodging while 'in transit' to such place." Morris C. Montgomery, 51 T.C. 413, 419 (1968) (dissenting opinion) (original emphasis deleted). Based on the Sixth Circuit decision in *Montgomery v. Commissioner*, a deduction would be denied to a taxpayer who stops to eat lunch on the way to receive medical treatment at a hospital in his or her city of residence, yet a deduction would be allowed a taxpayer who stops to eat lunch in a city midway between his or her home and the city in which he or she is to receive medical treatment. Such a result seems illogical.

133. Kelley v. Commissioner, 440 F.2d 307 (7th Cir. 1971).

134. *Id.* at 310.

135. *Id.*

136. *Id.* at 311. *See* notes 114-16 *supra*. Although the committee reports "preclude deduction of any meals and lodging while away from home receiving medical treatment," *see* H.R. REP. No. 1337, 83d Cong., 2d Sess. A60 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 219 (1954), the statute itself contains no such broad exclusion. The statute is applicable only to living expenses attendant to a trip prescribed by a doctor.

vide transportation to and from the place where medical treatment is to be received. The purchase of an automobile is generally considered to be a nondeductible personal expense.[137] If the car is to be deductible as a medical expense, the taxpayer must establish that he or she purchased the auto "primarily" for medical purposes.[138] To date, no taxpayer has established to the satisfaction of a court that he or she purchased the automobile primarily for medical care.[139] The automobiles were usually nondeductible because the taxpayers often used them for personal nonmedical purposes.[140] However, if the sole purpose for acquiring an automobile were to provide transportation to and from the place where medical treatment is to be received, the taxpayer should be able to deduct its purchase price on the ground that it was pur-

137. *See* Donnelly v. Commissioner, 262 F.2d 411 (2d Cir. 1959); D. H. Willey Lumber Co. v. Commissioner, 177 F.2d 200 (6th Cir. 1949); Wade Volwiler, 57 T.C. 367 (1971); Michael R. Bordas, 29 Tax Ct. Mem. Dec. (CCH) 458 (1970). Similarly, depreciation deductions for automobiles used to transport a taxpayer or a dependent to a place of medical treatment have been denied. Depreciation is merely a "decrease in value;" it is not an "amount paid" within the meaning of section 213. *See* Stanley G. Calafut, 23 Tax Ct. Mem. Dec. (CCH) 1431, 1433 (1964); Maurice S. Gordon, 37 T.C. 986, 987 (1962). For further discussion on the nondeductibility of depreciation concerning other medically related expenses see note 6 *supra* and accompanying text. *But see* Sanford H. Weinzimer, 17 Tax Ct. Mem. Dec. (CCH) 712 (1958), wherein the court found that 5/7 of the cost of operating an automobile was properly deductible as medical expenses by a handicapped taxpayer because the automobile was used primarily for medical care. *Id.* at 73. Approximately $400 of the almost $1,000 allowed as a deduction represented depreciation. The court allowed the deduction for the portion representing depreciation because the government stipulated to its allowance. *Id.* at 741 n.1. This decision has not been explicitly overruled, although the government has since successfully contended that depreciation is not allowable under section 213 because it is not an "amount paid." *See* note 6 *supra*.

138. Wade Volwiler, 57 T.C. 367, 370 (1971). *See also* Wallace v. United States, 439 F.2d 757, 759 (8th Cir. 1971); Oliver v. Commissioner, 364 F.2d 575, 577 (8th Cir. 1966).

139. However, the cost of special hand controls and other equipment designed to enable handicapped individuals to operate an automobile is deductible because it is a "capital expenditure which is related only to the handicapped person." *See* Rev. Rul. 607, 1970-2 C.B. 66 (the excess cost of an automobile designed to accommodate wheelchair passengers is deductible); Rev. Rul. 80, 1966-1 C.B. 57 (the cost of a mechanical device used to lift the taxpayer into the automobile, hand controls and other equipment especially adapted to permit use of the automobile by the taxpayer are deductible).

140. *See* Donnelly v. Commissioner, 262 F.2d 411 (2d Cir. 1959) (automobile expenses were commuter's expenses which are personal in nature); Ginsberg v. United States, 237 F. Supp. 968 (S.D.N.Y. 1964) (automobile was used for pleasure and commuting to work); Wade Volwiler, 57 T.C. 367, 370 (1971) (use of the auto for therapeutic purposes would be limited to only seven months of its useful life; therefore, the expenditure was not deductible because the primary purpose for which the taxpayer purchased the auto

chased primarily for and essential to medical care.[141] Similarly, if a taxpayer purchased an automobile primarily for medical care, he or she should be able to deduct the proportion of the expenditure attributable to the use of the automobile for medical purposes.[142]

Even if the purchase price of an automobile is not deductible, the "operating" costs of driving an automobile for medical purposes are.[143] For taxable years after 1973, seven cents per mile are allowed as the reasonable rate for computing the deductible cost of operating an automobile used for transportation to obtain medical care.[144]

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was not for medical care); Michael R. Bordas, 29 Tax Ct. Mem. Dec. (CCH) 458 (1970) (a minimal part of the driving was for medical reasons).

141. "For purposes of section 213 . . . a capital expenditure made by the taxpayer may qualify as a medical expense, if it has as its primary purpose the medical care . . . of the taxpayer, his spouse, or his dependent . . . ." Treas. Reg. § 1.213-1(e)(1)(ii) (1968). *See* Wade Volwiler, 57 T.C. 367 (1971), where the Tax Court stated that "[i]f the only use of the item is to provide medical care, the expenditure therefore is a medical expense under section 213. However, if the expenditure is for an item which serves some medical purpose but which also serves some nonmedical purposes, we must decide whether the primary purpose for the expenditure was to provide medical care, and to be entitled to deduct such expenditure, the [taxpayers] have the burden of proving that it was primarily for medical care." *Id.* at 370, *citing* Wallace v. United States, 439 F.2d 757, 759 (8th Cir. 1971), *and* Oliver v. Commissioner, 364 F.2d 575, 577 (8th Cir. 1966).

However, the *Volwiler* court found that the automobile was not purchased primarily for medical care. 57 T.C. at 370. The therapeutic value of the car would last no more than seven months, but the useful life of the auto would be substantially longer than the seven months. The court reasoned that even if the taxpayer used the automobile for medical purposes during the seven months, only a small portion of the time could be attributable to medical care. Therefore, the automobile could not be considered as having been purchased primarily for medical care. *Id.*

142. For a discussion on the apportionment of capital expenditures see notes 175-81 *infra* and accompanying text.

143. *See* Michael R. Bordas, 29 Tax Ct. Mem. Dec. (CCH) 458 (1970); Maurice S. Gordon, 37 T.C. 986 (1962); Sanford H. Weinzimer, 17 Tax Ct. Mem. Dec. (CCH) 712 (1958). The court in *Bordas* used its "best judgment" to determine that the taxpayers were entitled to deduct $450 as the cost of driving the automobile for medical purposes. 29 Tax Ct. Mem. Dec. (CCH) at 459. *But see* Morris C. Montgomery, 51 T.C. 410 (1968), *aff'd on other grounds*, 428 F.2d 243 (6th Cir. 1970); Ann Cooper-Smith, 30 Tax Ct. Mem. Dec. (CCH) 1203 (1971); Rev. Rul. 80, 1966-1 C.B. 57. These cases all denied deductions for the operating expenses of an automobile because the taxpayers did not establish that the use of the automobiles was primarily for medical care.

144. Rev. Proc. 24, 1974-2 C.B. 477, *superseding* Rev. Proc. 24, 1970-2 C.B. 505, *superseding* Rev. Proc. 15, 1964-1 C.B. 676, *and* Rev. Proc. 12, 1970-1 C.B. 438. For taxable years after 1969 and before 1974, the rate was six cents per mile. Rev. Proc. 24, 1970-72 C.B. 50. Parking fees and tolls are additional allowable deductions. Rev. Proc. 24, 1974-2 C.B. 477.

F. Application of the *Cohan* Rule to Section 213

The burden of proving[145] the relation of an expenditure to medical care has resulted in the denial of many deductions claimed by taxpayers.[146] Thus, for example, when an expenditure represents an amount paid for babysitting, absent special circumstances,[147] the child-care expenditure is generally not deductible as a medical expense.[148]

A taxpayer is required to present detailed evidence regarding the amount and nature of an expenditure claimed as a medical deduction.[149] Nevertheless, if a taxpayer has not adequately substantiated the amount of a claimed deduction, the courts often apply the *Cohan* rule[150] to mitigate the effects of a failure to comply with the substantiation requirements. Under the *Cohan* rule, the court may allow a portion of a claimed deduction when it appears "in their best judgment" that a portion of the expenditure

145. *See generally* George B. Wendell, 12 T.C. 161 (1949). "It is axiomatic that deductions from income are a matter of legislative grace and that, to qualify, a taxpayer must demonstrate that his claimed deduction clearly comes within the legislative intent." *Id.* at 162.

146. *See, e.g.*, Raymond F. Borgman, 438 F.2d 1211 (9th Cir. 1971); Schuyler Von Vechten, Jr., 32 Tax Ct. Mem. Dec. (CCH) 1363 (1973). Pursuant to the rule that expenses are deductible only to the extent that there is no reimbursement, I.R.C. § 213(a), any amount received by a taxpayer from a dependent's pension income is treated as an expenditure for medical care, thus reducing the amount deductible by the taxpayer for such expenditures. Harold G. McDermik, 54 T.C. 1727 (1970); *accord*, Robert W. Hodge, 44 T.C. 186 (1965); Loring P. Litchfield, 40 T.C. 967 (1963), *aff'd* 330 F.2d 502 (1st Cir. 1964). However, a taxpayer may deduct the social security taxes on wages he or she pays to a nurse for wages because the amounts paid are an integral part of the required medical care. Rev. Rul. 489, 1957-2 C.B. 207.

147. *See* George B. Wendell, 12 T.C. 161 (1949), wherein the court stated: "Absent special circumstances of illness, accident, or physical or mental defects, the care of a child is a normal, personal, and parental duty." *Id.* at 163. *See also* Walter D. Bye, 31 Tax Ct. Mem. Dec. (CCH) 238 (1972) (farmer's cost in providing care for his wife were medical rather than domestic; expenses and lodging as well as household chores were found to be necessary, although unusual); William S. Grimeldi, 22 Tax Ct. Mem. Dec. (CCH) 39 (1963); Mildred A. O'Conner, 6 T.C. 323 (1946).

148. *See* Cleophus L. Kennedy, 32 Tax Ct. Mem. Dec. (CCH) 52 (1973); Samuel Grobart, 20 Tax Ct. Mem. Dec. (CCH) 629 (1961); Benjamin Phillip Martin, 19 Tax Ct. Mem. Dec. (CCH) 724 (1960). *But see* I.R.C. § 214, which allows a nonmedical deduction for child care expenditures necessary to obtain gainful employment.

149. *See* Treas. Reg. § 1.213-1(h) (1957); *see generally* Interstate Transit Lines v. Commissioner, 319 U.S. 590, 593 (1943); Burnet v. Houstin, 283 U.S. 223, 227-29 (1931); Investors Diversified Servs. Inc. v. Commissioner, 325 F.2d 341, 353 (8th Cir. 1963); Bennett v. Commissioner, 139 F.2d 961, 963 (8th Cir. 1944).

150. Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930). The court declared that "absolute certainty in . . . these matters is usually impossible and is not necessary; the [court] should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. But to allow nothing at all appears to us inconsistent with saying that something was spent." *Id.* at 543-44.

is clearly attributable to medical care.[151] The *Cohan* rule is often applied where the taxpayer does not establish which portion of an expenditure is a medical, rather than a personal, expense. Thus, its effect is to allow deductions which would ordinarily be non-deductible due to the insufficiency of the evidence if it is clear that some portion of the expenditure is for medical care.[152]

However, application of the *Cohan* rule may be criticized on the grounds that it leaves too much discretion to the courts.[153] Indeed, section 274(d) of the Code was specifically designed to overturn the *Cohan* rule with respect to entertainment, amusement, recreation or gift expenses,[154] as well as business expenses under section 162 and expenses for the production of income under section 212. Section 274(d) requires substantiation of these expenditures by adequate records, or by other sufficient evidence corroborating the taxpayer's own statement.[155] The policy behind the enactment of section 274, assurance that no deduction would be allowed on the basis of a taxpayer's unsupported, self-serving testimony, can arguably lead to the conclusion that the *Cohan* rule

151. *See* L. W. Pickett, 34 Tax Ct. Mem. Dec. (CCH) 213 (1975); Jay R. Gill, 34 Tax Ct. Mem. Dec. (CCH) 10 (1975); Peter Vaira, 52 T.C. 986 (1969); John P. Condakes, 27 Tax Ct. Mem. Dec. (CCH) 690 (1968); Dixco Co., 27 Tax Ct. Mem. Dec. (CCH) 644 (1968); William A. Clemenston, 27 Tax Ct. Mem. Dec. (CCH) 559 (1968); Martha E. Henderson, 27 Tax Ct. Mem. Dec. (CCH) 109 (1968).

152. Use of the *Cohan* rule has benefited many taxpayers. *See* John Frier, 30 Tax Ct. Mem. Dec. (CCH) 345 (1971) (the court allowed a 75% deduction for medical care); Maurice Levy, Jr., 20 Tax Ct. Mem. Dec. (CCH) 1534 (1961) (since the taxpayer failed to prove the amount allocable to medical care, the court used its best judgment and found that $150 was deductible as medical care); Jacob Hentz Jr., 12 Tax Ct. Mem. Dec. (CCH) 368 (1953) (the court allowed a partial deduction of $1,250 for medical care).

153. It can be argued that too much discretion is left to the court to decide whether to apply the *Cohan* Rule and, if it is applied, to determine the extent of the deduction allowable. Nevertheless, the IRS supports the court's use of an apportionment formula. Rev. Rul. 106, 1976-1 C.B. 71.

154. The House and Senate Committee reports on section 274 made this intention quite clear:

> This provision [section 274] is intended to overrule, with respect to such expenses the so-called *Cohan* rule. In the case of *Cohan v. Commissioner*, it was held that where the evidence indicated that a taxpayer had incurred deductible expenses but their exact amount could not be determined, the court must make "as close an approximation as it can" rather than disallow the deduction entirely. *Under [the] committee's bill, the entertainment, etc., expenses in such a case would be disallowed entirely.*

(emphasis added) (citations omitted). H.R. REP. No. 1447, 87th Cong., 2d Sess. 23 (1962), *reprinted in* 1962-3 C.B. 405, 427; S. REP. No. 1881, 87th Cong., 2d Sess. 35 (1962), *reprinted in* 1962-3 C.B. 704, 741.

155. I.R.C. § 274(d)(1)-(3). *See also* Treas. Reg. § 1.274-5 (1962).

should no longer be applicable to medical expense deductions under section 213.

G. Miscellaneous Expenses

To administer the medical relief provision of section 213, it is necessary to distinguish expenditures for which the deduction is allowed from those personal, nondeductible expenses which have a beneficial effect upon the health of an individual, but which are incurred as normal costs by a significant sector of the population.[156] Thus, if the expenditures are incurred for personal hygiene and general health improvement, they will be disallowed.[157] The deductions allowed for medicine and drugs include only items which are legally procured and which are generally accepted as falling within the category of medicine and drugs, regardless of whether a prescription is required.[158] However, vitamins and iron supplements are considered medicines and drugs only if prescribed by a physician.[159]

Section 213 also allows a deduction "for the purpose of affecting any structure or function of the body."[160] This broad statutory language has been interpreted in a liberal fashion. Deductions have been allowed for operations performed with or without the advice of a physician,[161] for purely personal rea-

156. *See* B. Bittker & L. Stone, Federal Income Estate and Gift Taxation 184-90 (4th Ed. 1972); 1 S. Surrey, W. Warren, P. McDaniel & H. Ault, Federal Income Taxation 622-32 (1972).

157. Treas. Reg. § 1.213-1(e)(1)(ii) (1968). This includes items such as toothpaste, cosmetics, shaving lotions and other sundry items. *See* Donald W. Fausner, 30 Tax Ct. Mem. Dec. (CCH) 1187 (1971), *aff'd*, 472 F.2d 561 (5th Cir.), *aff'd*, 413 U.S. 838 (1973); O. G. Russell, 12 Tax Ct. Mem. Dec. (CCH) (1953). *See also* S. Rep. No. 1622, 83d Cong., 2d Sess. 219 (1954).

158. Treas. Reg. § 1.213-1(e)(2) (1968). Since the phrase "medicine and drugs" is not defined in the Code, the definition in section 15(c) of the Federal Trade Commission Act, 15 U.S.C. § 55 (1970), may be of help. That definition of medical care includes articles recognized by the United States Pharmacopoeia, Homeopathic Pharmacopoeia of the United States, or official National Formulary; or any supplement to any of them. *Cf.* Estate of Myrtle P. Dodge, 20 Tax Ct. Mem. Dec. (CCH) 1811 (1961).

159. *See* Marshall J. Hammons, 12 Tax Ct. Mem. Dec. (CCH) 1318, 1320 (1953). It follows that sleeping pills and tranquilizers should be subject to the same rules as vitamins. Household remedies such as aspirin, laxatives, cold tablets, cough syrups, etc. may be deductible even without a doctor's prescription or advice. Nevertheless, it is likely that some proof of the taxpayer's need for the remedies may be requested if an abnormally large deduction is claimed. [1976] 4 Tax. Coordinator (RIA) ¶ 4-2108, at 32,068.

160. For the statutory language see note 5 *supra*.

161. The cost of a vasectomy or abortion, voluntary or otherwise, qualifies as a medical expense as long as the operation is legally performed. Rev. Rul. 201, 1973-1 C.B.

sons[162] and even when the operation is performed for the benefit of persons other than the taxpayer or his or her dependents.[163]

Where expenditures sought to be deducted are medical as well as personal in nature, such claimed deductions have been vigorously challenged by the IRS. To illustrate, taxpayers have

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140. The legal requirement may impose a hardship on taxpayers living in a state where abortion laws are strict. For example, a taxpayer living in state X may not be allowed a legal abortion after four months of pregnancy. Any operation performed after four months would be illegal, and therefore, the cost of that abortion would not be deductible. Alternatively, a taxpayer living in state Y may obtain a legal abortion during the first six months of pregnancy. Since an abortion would have been legal in that state, the cost of the abortion would have been deductible. The taxpayer in state X may avoid the denial of a deduction for the illegal operation by having the operation performed in state Y and then deducting the transportation costs to that state. *See* notes 112-44 *supra* and accompanying text. However, avoidance through deduction of transportation costs is not available to the taxpayers in state X who cannot afford the initial transportation costs to state Y.

Rev. Rul. 201, 1973-1 C.B. 140, has been extended to allow a medical deduction for the cost of a legal operation performed on a taxpayer at her request for the purpose of rendering her incapable of having children. Rev. Rul. 603, 1973-2 C.B. 76. Similarly, amounts expended for birth control pills prescribed by a physician are deductible as amounts paid for medical care. Rev. Rul. 200, 1973-1 C.B. 140, *superseding* Rev. Rul. 339, 1967-2 C.B. 126, which provided that the cost of oral contraceptives prescribed by a physician was deductible but only where the possibility of childbirth raised a serious threat to the life of taxpayer's wife. It can be argued that these rulings should be extended to allow a deduction for prophylactics, at least where they are recommended by a physician for the prevention of childbirth.

Amounts paid for acupuncture services rendered in connection with the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body, are expenses paid for medical care within the meaning of I.R.C. § 213(e). They may be deducted as medical expenses in the year paid, subject to the limitation of section 213(a)(1). Rev. Rul. 593, 1972-2 C.B. 180.

162. *See* Rev. Rul. 76-332, 1976-36 I.R.B. 6, where the taxpayer, who was not suffering from a mental disorder, paid surgeon fees in connection with plastic surgery performed to improve his personal appearance. The IRS ruled that even though the operation was not recommended by a physician, the fees paid to a plastic surgeon for the operation qualified as amounts paid for medical care. *See* Treas. Reg. § 1.213-(e)(1)(ii) (1968). Alternatively, the IRS might have held that this was a purely personal nondeductible expense, similar to expenses for cosmetics or toothpaste. This ruling indicates the willingness of the IRS to allow deductions for expenses incurred for any structural change of the body. To extend the scope of this ruling, a taxpayer seeking a deduction for the hospital and surgical expenses incurred in a sex change operation might maintain that they are deductible, regardless of whether the operation was recommended by a physician, on the ground that the operation was performed for the purpose of affecting a structure or function of the body.

163. Generally, surgical, hospital and transportation expenses incurred by a donor in connection with donating a kidney to the donee taxpayer are deductible medical expenses for the year in which they are paid by the taxpayer. Rev. Rul. 542, 1968-2 C.B. 111. Such expenses, when paid by the donor taxpayer, are also deductible regardless of the donor's relationship to the donee. Rev. Rul. 189, 973-1 C.B. 139. This result is justifiable on the ground that the donation of human organs will save lives.

attempted to obtain deductions under section 213 for the cost of installing special telephones,[164] the salary of a chauffeur,[165] the monetary loss on the sale of a home,[166] the cost of a reclining chair,[167] a garage,[168] gifts to physicians[169] and funeral and burial costs.[170] Most of these claimed deductions have been denied because the medical reason for the expenditure is generally outweighed by the "personal" nature of the item. As evidenced by these cases, however, the nature of the expenses that have been claimed as deductions under Section 213 are limited only by the imagination and ingenuity of the taxpayers.

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164. Wade Volwiler, 57 T.C. 367 (1971) (telephone nondeductible because it was not used primarily for medical purposes); *accord*, George M. Womack, 34 Tax Ct. Mem. Dec. (CCH) 1009 (1975); C. Earle Phares, 21 Tax. Ct. Mem. Dec. (CCH) 1446 (1962); David K. Carlisle, 37 T.C. 424 (1961).

165. In Walter E. Buck, 47 T.C. 113 (1966), the Tax Court stated: "In our opinion the employment of [a chauffeur] to drive [the taxpayer] to and from his place of business was a matter of [the taxpayer's] own personal choice, comfort, and convenience and was not 'primarily for or essential to medical care.' The salary . . . was in the nature of commuting expenses and is not deductible." *Id.* at 119. *See* James Donnelly, 28 T.C. 1278, 1280 (1957), *aff'd*, 262 F.2d 411, 412 (2d Cir. 1959); John C. Bruton, 9 T.C. 882 (1947); Commissioner v. Flowers, 326 J-U.S. 465 (1946); I.R.C. § 262; Treas. Reg. § 1.262-1(b)(5) (1968).

166. Mark R. Harding, 46 T.C. 502 (1966). The court denied the taxpayer a deduction for the loss on the sale of his house. The sale of the house was precipitated by a psychiatrist's advice to move out of the locality where the taxpayer's child suffered mental and physical abuse. Although the abuse resulted from the community's knowledge of a disfiguring disease of the taxpayer's family, the losses were held not deductible under the medical expense provision. *Id.* at 504-05. Moreover, the Tax Court had no power to allow the deduction on equitable grounds. *Id.*

167. Rev. Rul. 155, 1958-1 C.B. 156. The IRS ruled that the cost of a reclining chair acquired to obtain optimum rest for a taxpayer suffering from a cardiac condition would be a medical expense if it could be substantiated that the chair was prescribed by a cardiac specialist, served no other purpose than to mitigate the physical condition of the patient and was not used generally as an article of furniture.

168. Karlis A. Pols, 24 Tax Ct. Mem. Dec. (CCH) 1140 (1965). The taxpayer, who was seriously disabled and required the use of a leg brace or crutch, deducted as a medical expense the difference between the cost of a new garage attached to the house and the increase in the value of his residence. The deduction was allowed because the court found that the primary purpose of the attached garage was the mitigation of the effects of the taxpayer's disability. *Id.* at 1141.

169. Where the taxpayer is not billed and is not expected or obligated to pay for any of the services rendered by a physician to the taxpayer or to his or her family and where the payments are significantly less than the value of such services, it has been held that such payments are nondeductible personal expenses which merely satisfy the personal desire of the taxpayer to make a gift. James M. O'Hare, 54 T.C. 874, 876 (1970).

170. Funeral and burial expenses are not includable as medical deductions because their primary purpose is not for medical care. Estate of Carolyn W. Libby, 14 Tax Ct. Mem. Dec. (CCH) 699 (1955), Charles Mednikow, 12 Tax Ct. Mem. Dec. (CCH) 973 (1953); John O. Maxwell, 8 Tax Ct. Mem. Dec. (CCH) 151 (1949).

II. CAPITAL EXPENDITURES

Prior to 1950, courts did not allow either full or partial deductions for the cost of home improvements or capital expenditures purchased primarily for the medical care of the taxpayer or his or her dependent,[171] stating that

> under the general concept of the income tax law capital expenditures of permanent benefit to a property are not deductible as current expenses. We are unable to find in the history of the statute any evidence of an intent by Congress to create an exception to the general rule that capital expenditures are not deductible as current expenses.[172]

The courts' rationale was based on section 263 of the Code, which prohibits a deduction for permanent improvements made to increase the value of any property.[173] However, when a capital expenditure does not increase the value of the property, courts find no difficulty in allowing a deduction for the cost of the capital expenditure.[174]

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171. *See also* Wade v. United States, 8 Am. Fed. Tax. R.2d 5622 (D.C. Ariz. 1961); Frank S. Delp, 30 T.C. 1230 (1958); Estate of C. L. Haynes, 22 T.C. 113 (1954); Jerome W. Benesch, 13 Tax Ct. Mem. Dec. (CCH) 1116 (1954); John L. Seymour, 14 T.C. 1111 (1950).

172. John L. Seymour, 14 T.C. 1111, 1118 (1950). The Tax Court denied even a partial deduction for the cost of installing an oil-heated furnace in the taxpayer's home although it was recommended by a doctor because the taxpayer was allergic to coal dust and ashes. The court reasoned that "[i]f such a radical departure from basic concepts were intended, surely it would not be left to inference or conjecture. It would have been specifically set out in the statute." *Id. See also* Estate of C. L. Hayne, 22 T.C. 113 (1954); Jerome W. Benesch, 13 Tax Ct. Mem. Dec. (CCH) 1116 (1954) (the courts denied any deduction for the cost of installing elevators in the taxpayer's home even though the taxpayer's doctor prescribed rest and little physical exertion and explicitly prohibited the use of stairs).

Items such as eyeglasses, wheel chairs, false teeth and artificial limbs having a useful life of over one year are deductible. Treas. Reg. § 1.213-1(e)(1)(iii) (1968). The lifetime of the item purchased is not determinative; rather, attachment of an item to real property which increases the value of the property is determinative. Lewis, *Medical Expense Deductions for Capital Improvements*, 53 A.B.A.J. 157 (1967).

173. I.R.C. § 263(a) reads in pertinent part: "No deduction shall be allowed for—(1) Any amount paid out . . . for permanent improvements or betterments made to increase the value of any property . . . ." *See* Frank S. Delp, 30 T.C. 1230 (1958), where the court denied a deduction for a capital expenditure for a permanent home improvement: "Such expenditures, to the extent the permanent improvement of the asset increases the value of the property, at least in a sense compensate for the expense of such improvement." *Id.* at 1235.

174. Berry v. Wiseman, 174 F. Supp. 748 (W.D. Okla. 1958). The decision in *Berry* was followed by the IRS in Rev. Rul. 411, 1959-2 C.B. 100.

Since 1950, courts have been faced with the question of whether a taxpayer could deduct the difference between the cost of the capital expenditure and the increase in value of the property to which it is attached. In *Raymond Gerard*,[175] the Tax Court decided the issue in favor of the taxpayer. In *Gerard*, the taxpayer's daughter was affected with cystic fibrosis. Her physician advised that dry air would be beneficial to her condition. Upon the advice of the physician, the taxpayer installed a central air-conditioning unit in his home at a cost of $1,300, increasing the value of the home by $800. The *Gerard* court held that where the taxpayer is able to show that the increase in the value of the home is less than the capital expenditure, the difference is a deductible medical expense.[176] Since the cost of installing the air-conditioning unit was $1,300 and the unit increased the value of the home by $800, it followed that $500 qualified for a medical deduction.[177]

In principle, allowing a deduction for the excess of the cost of a capital expenditure over the increased value of the property does not appear to violate the axiomatic prohibition that taxpayers who are given legislative relief should not be allowed to reap collateral benefits of a personal nature.[178] However, if the expenditure is shown to be a valid medical care expense, the nonmedical benefit which collaterally accrues should not be used as the basis for totally disallowing a deduction. In light of the purpose of section 213—to relieve taxpayers burdened by unusual medical costs[179]—it follows that the net financial expenditure attributable to the medical benefit should be allowed. The Treasury Department is now in agreement with the Tax Court that a capital expenditure made primarily to provide medical care for the taxpayer or his or her dependent may qualify as a medical expense to the extent that the expenditure exceeds the increase in the value of the property.[180] Moreover, expenditures made for the operation and maintenance of a capital asset intended primarily to provide

175. Raymond Gerard, 37 T.C. 826 (1962).

176. *Id.* at 829-30.

177. *Id.* at 830.

178. S. REP. No. 1631, 77th Cong., 2d Sess. 6 (1942).

179. Congress intended that the term "medical care" be broadly construed. The legislative hearings made it clear that Congress did not intend to discriminate against expenses for this class of medical assistance. *Hearings Before Committee on Finance on H. Rep. No.* 4473, 82d Cong., 1st Sess. 1476 (1951).

180. Treas. Reg. § 1.213-1(e)(1)(iii) (1968).

medical care are fully deductible even though the original cost was not wholly or partially deductible.[181]

Although capital asset expenditures necessary for proper medical care are generally deductible, capital expenditures which are not incurred and paid primarily for the prevention or alleviation of a physical or mental defect or illness are not deductible as medical expenses. Even though the *Gerard* case allowed a deduction for a portion of the cost of an air-conditioner,[182] some courts have denied medical deductions for expenses incurred in the purchase of air-conditioners,[183] as well as for vacuum cleaners[184] and special furnaces.[185] However, the cost of an elevator or inclinator, less the increase in value of the property in which it is installed, is now deductible if it is purchased on the advice of a physician and is necessary to protect against the recurrence of a serious physical defect.[186]

There is no assurance that a particular capital asset will be deductible under section 213. Nevertheless, by adhering to the

181. *Id.*

182. *See* notes 175-77 *supra* and accompanying text.

183. *See* Wallace v. United States, 439 F.2d 757 (8th Cir. 1971) (deduction denied for the cost of air–conditioning and filter units installed to alleviate a dependent's asthmatic condition because no evidence was introduced to show whether the expenditure increased the value of the property); Peter W. DeFelice, 25 Tax Ct. Mem. Dec. (CCH) 835 (1966) (deduction denied because increase in value of house exceeded cost).

184. *See* Rev. Rul. 80, 1976-1 C.B. 71, where the IRS ruled that the cost of a vacuum cleaner purchased by a taxpayer who had an allergy to household dust was not deductible as a medical expense under section 213 because there was no recommendation by a physician that the taxpayer buy the vacuum cleaner nor was there any indication that the taxpayer purchased the vacuum cleaner primarily for the medical purpose of alleviating his allergy to dust. Moreover, it was not readily apparent that the vacuum cleaner or any feature of it prevented or alleviated any disease or disability.

185. James M. Ross, 31 Tax Ct. Mem. Dec. (CCH) 488 (1972). The Tax Court declared that although the items purchased (gas furnace and laboratory on the first floor) alleviated the symptoms of cancer, the purchases were neither made pursuant to the advice of a doctor nor did they mitigate, treat or prevent the disease. *Id.* at 493.

186. *See* Riach v. Frank, 302 F.2d 374 (9th Cir. 1962) (the court rejected the Commissioner's contention that the elevator did not provide transport for essential living functions to bathroom, shower and food). Hollander v. Commissioner, 219 F.2d 934 (3d Cir. 1955) (elevator installed to alleviate strain on taxpayer's heart caused by using the stairs); Berry v. Wiseman, 174 F. Supp. 748 (W.D. Okla. 1958) (elevator installed to alleviate an acute coronary condition suffered by the taxpayer's spouse; Post v. United States, 750 F. Supp. 299 (N.D. Ala. 1956) (elevator recommended by physician to avoid recurrence of coronary occlusion); Alexander v. United States, 52 Am. Fed. Tax R. 1195 (W.D. Tenn. 1956) (elevator installed to prevent further deterioration of taxpayer's cardiac condition). *See also* Oliver v. Commissioner, 364 F.2d 575 (8th Cir. 1966), where the court allowed the cost of home improvements, such as special ramps and doors to accommodate a wheel chair, air–conditioner, an intercom system and a stereo system, as medical expenses to the extent that they did not increase the value of the property. *Id.* at 578.

following procedure, a taxpayer will greatly improve his or her chances for a favorable determination. First, the taxpayer should establish the medical necessity of the capital expenditure.[187] Second, the taxpayer should show that the capital asset was purchased on the advice of a physician.[188] Finally, the taxpayer should document his or her case through appraisals, indicating an increase or the lack thereof in the value of the property as a result of the capital expenditure.[189]

III. MEDICAL, BUSINESS OR PERSONAL EXPENSE?

Sometimes, due to the nature of a particular expenditure, a taxpayer may not know whether an expense incurred in relation to a physical defect is a deductible medical expense under section 213,[190] a deductible business expense under section 162[191] or a nondeductible business expense under section 262.[192] The problem in determining which section of the Code will ultimately apply may be illustrated by the following examples: (1) the taxpayer is a professor and an administrator. He is paralyzed from the waist down and is confined to a wheelchair. When it is necessary for the taxpayer to attend out-of-town meetings, his wife or a friend accompanies him to assist him in overcoming architectural barriers, to carry his baggage and to attend to him on airlines which will not accept an unassisted person confined to a wheelchair. The taxpayer does not require or use any of these services in his home town. The taxpayer does not pay a salary to his helpers, but he does pay all expenses for their travel, meals and lodging while on such trips; and (2) assume the same facts as in

187. A capital expenditure will qualify as a medical expense only if its primary purpose is the medical care of the taxpayer, his spouse or his dependent. Treas. Reg. § 1.213-1(e)(1)(iii) (1968).

188. Although the advice of a physician is not a mandatory prerequisite for a deduction under section 213, *see* note 22 *supra*, few such expenditures are considered medical necessities. *See generally* James M. Ross, 31 Tax Ct. Mem. Dec. (CCH) 488 (1972).

189. The burden is on the taxpayer to show that the Commissioner's determination is erroneous. *See* Welch v. Helvering, 290 U.S. 111 (1933); Northern Natural Gas Co. v. O'Malley, 277 F.2d 128 (8th Cir. 1960).

190. For the statutory language of section 213 see note 5 *supra*:

191. I.R.C. § 162(a) provides in pertinent part: 'There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . a reasonable allowance for salaries or other compensation for personal services actually rendered." *See* I.R.C. § 274(d) for the requirements of adequate records or sufficient corroborative evidence for the deductibility of traveling expenses under section 162.

192. I.R.C. § 262 states that "[e]xcept as otherwise expressly provided . . . , no deduction shall be allowed for personal living or family expenses."

example 1, except that the services are required and used by the taxpayer not only as an incident of his business activities, but also in the conduct of his personal activities at home.

Where a question arises as to whether an expense is deductible as a business expense rather than as a medical expense, such expenses may be deducted as a business expense under section 162 if: (1) the nature of the taxpayer's work clearly requires that he or she incurs a particular expense to satisfactorily perform such work; (2) the goods or services purchased by such expense are clearly not required or used, other than incidentally, in the conduct of the individual's personal activities; and (3) the Code and regulations are otherwise silent as to the treatment of such expense.[193] In example 1 above, the services rendered by the helpers are not required or used in the conduct of the taxpayer's personal or business activities except when he is away from home; thus, the amounts the taxpayer pays for travel, meals and lodging for his wife or friend who helps him on his business trips are allowable deductions under section 162(a)(1).[194]

When an expenditure is not deductible under section 162, the taxpayer may be allowed a deduction under section 213 if it is an amount paid for the diagnosis, cure, mitigation, treatment or prevention of a disease, or if it is for the purpose of affecting any structure or function of the body.[195] In example 2 above, the services rendered by the taxpayer's "friend" (other than his wife) are required and used regularly in the conduct of his personal activities. Therefore, such expenses are not ordinary and necessary expenses incurred in carrying on any trade or business and are therefore not deductible under section 162.[196] However, the amounts the taxpayer pays for travel, meals and lodging for his friend are in the nature of payments for nursing services and are thus deductible medical expenses.[197]

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193. Rev. Rul. 316, 1975-2 C.B. 54. For the statutory language of section 162(a)(1) see note 191 *supra*.

194. Rev. Rul. 317, 1975-2 C.B. 57, 58. Similarly, payments made by blind employees to readers for services performed in connection with the conduct of the blind employee's work are deductible as business expenses under section 162 of the Code. They are not deductible as medical expenses under section 213 because the reader's services are required and used solely in the conduct of the work of the blind individuals. Rev. Rul. 316, 1975-2 C.B. 54, 55.

195. I.R.C. § 213(e)(1)(A).

196. *Id.* § 162(a).

197. Treas. Reg. § 1.213-1(e)(1)(ii) (1968). *See* Rev. Rul. 317, 1975-2 C.B. 57, 58.

If an expenditure fails to meet the requirements for a business deduction under section 162 and the medical expense deduction under section 213, the expenditure is probably a nondeductible personal expense under section 262. No deductions are allowed for personal, living or family expenses unless expressly allowed under chapter one of the Internal Revenue Code.[198] In example 2, the amounts the taxpayer pays for meals and lodging for his wife during his trips are "primarily" for her support through payment of her ordinary living expenses during travel.[199] Therefore, such expenses are not deductible medical expenses under section 213 of the Code, but rather are nondeductible personal expenses under section 262.[200]

IV. CONCLUSION

The basic test for a medical expense deduction is whether the taxpayer incurred the particular expenditure "primarily" for the prevention or alleviation of a physical or mental defect or illness. Items which are deductible as medical expenses under section 213 must be distinguished from those which are nondeductible personal expenses under section 262. In all cases, an analysis of the factors articulated by the *Havey* court must be considered. The deductibility of legal expenses indirectly incurred for medical care and certain therapeutic treatments are items that border on nondeductibility due to the personal nature of such expenditures.

Since the purpose of the tax relief provision is to aid those afflicted with unusual medical costs, the "net" financial burden attributable to medical care should be an allowable deduction. Judicial decisions have reflected this policy regarding the deductibility of capital expenditures and, more recently, regarding the deductibility of specially prescribed diets. Transportation expenses incurred primarily for and essential to medical care are allowable deductions. However, lodging and meal expenses incurred at the place of medical treatment are not deductible. Such expenditures have only been deductible when they are incurred

198. I.R.C. § 262.

199. *See* Robert M. Rose, 52 T.C. 521 (1969), where the court denied a medical expense deduction to the taxpayer-husband for meals and lodging costs paid by him for his wife who accompanied their ten-year-old asthmatic daughter to Florida and Arizona for the purpose of providing her with essential medical care. *Id.* at 531.

200. *Id.* *See* Rev. Rul. 317, 1975-2 C.B. at 58. However, if there is an out-of-pocket expenditure for the wife's travel, other than for meals and lodging, it may be an amount paid for medical care of the taxpayer deductible under section 213. *Id.* at 59.

"en route" to the place of medical treatment. To increase the chances of qualifying for a deductible expense, the taxpayer must show that the expenditure was an essential element of the treatment and would not otherwise have been incurred for nonmedical reasons. Since the taxpayer has the burden of proving that he or she qualifies for a deduction, the taxpayer should have proper records to support all testimonies.

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