3-1978

Abortion to Aging: Problems of Definition in the Medical Expense Tax Deduction

Alan L. Feld
Boston Univeristy School of Law

ABORTION TO AGING: PROBLEMS OF DEFINITION IN THE MEDICAL EXPENSE TAX DEDUCTION†

ALAN L. FELD*

I. INTRODUCTION

In 1976, expenditures for health care in the United States came to almost $140 billion.[1] A substantial part of this cost was paid by direct government aid, but most of it was paid from private sources. Some of the people who paid their share of that expense enjoyed a mild comfort: they could deduct part of their cost in computing their federal income tax. Generally, a person who pays for health care can readily determine the extent of this deduction. In a few instances, however, expenses incurred by reason of medical need do not qualify for deduction; and in some others, expenses incurred absent medical need may be covered by the deduction. This article discusses the definitional problems in the deduction for medical care.

Under Internal Revenue Code section 213,[2] a taxpayer may deduct extraordinary medical expenses paid in the taxable year. The section itself is relatively uncomplicated and its structure can be briefly outlined. The provision measures the amount a taxpayer may deduct by aggregating all expenses for medical care and subtracting three percent of adjusted gross income (AGI). The taxpayer also may include expenses for drugs, after first deducting an additional one percent of AGI. Medical expenses may not be deducted if reimbursed by insurance, but medical insurance premiums themselves constitute a medical expense subject to a slightly different computation. The taxpayer may deduct half of his medical insurance premiums in any year, up to $150, without regard to the usual three percent of AGI floor; the balance is included as part of the medical deduction computation.[3]

---

* Professor of Law, Boston University School of Law; Visiting Professor, University of Pennsylvania Law School. A.B., Columbia College, 1960; LL.B., Harvard Law School, 1963. This article is based in part on research for a portion of a forthcoming treatise.

[1] Gibson & Mueller, National Health Expenditures, Fiscal Year 1976, Soc. Sec. Bull. 3, 4 (Apr. 1977).

[2] I.R.C. § 213. Unless otherwise indicated, section references are to the Internal Revenue Code of 1954.

[3] President Carter recently proposed changes in the medical expense deduction. In a message to Congress, he said:

> I recommend substantial simplification of these [the medical and casualty expense] provisions. The deductions for medical and casualty expenses will be combined, and a new "extraordinary expense" deduction will be available for medical and casualty expenses in excess of 10 percent of adjusted gross income. In the case of casualty losses, the excess over $100 will be included in this computation. Medical insurance premiums and medicines will be treated the same as other medical expenses.
>
> Medical and casualty expenditures should properly be deductible only when they are unusually large and have a significant impact on the taxpayer's ability to pay. The medical expense deduction originally met that standard. But, as a result of the changing relationship between medical costs and income, that standard is no longer satisfied.

The medical expense deduction entered the income tax scheme in 1942, in the course of the transition of the federal income tax from essentially a levy on the wealthy to a popular-based tax. The limited comment in the committee report states that the deduction was designed to mitigate the heavy burden of wartime taxation when income was used for health care and to maintain a "high level of public health and morale."[4] In other words, Congress found it inappropriate to tax at high rates income applied by the taxpayer to medical expenses.

Some commentators see the medical expense deduction as an appropriate adjustment in determining the taxpayer's ability to pay income tax.[5] In this view, medical expenditures differ radically from a taxpayer's other personal consumption choices and should not be taxed similarly:

> What distinguishes medical expenses from other personal expenses at bottom is a sense that large differences in their magnitude between people in otherwise similar circumstances are apt to reflect differences in need rather than choices among gratifications.[6]

Others, however, criticize the medical expense deduction as a poorly framed tax subsidy which, like any deduction or other tax expenditure, is far more valuable to high-bracket than low-bracket taxpayers and carries no benefit for those too poor to fall within the tax system.[7] The revenue cost of the deduction was estimated to be in excess of $2 billion in 1977.[8]

Under both views, questions of line drawing arise. We might suppose that so fundamental a question as whether the deduction is regarded as an adjustment to income reflecting actual ability to pay or as a subsidy should affect resolution of definitional problems. But these divergences in view are directed to the wisdom of including the deduction in the statute. Once the legislative decision has been made, it becomes necessary under

---

Substantial recordkeeping burdens and administrative problems can be eliminated through the proposed simplification of the deduction and the redefinition of "extraordinary" in the light of current experience among taxpayers.

President's Tax Message, Stand. Fed. Tax Rep. (CCH) 8 (special ed. No. 6 Jan. 23, 1978).

President Carter's tax proposals were introduced as the Revenue Act of 1978, H.R. 12078, 95th Cong., 2d Sess. (1978). The proposed combined deduction for abnormal medical expenses and casualty losses appears as section 221.

[4] S. Rep. No. 1631, 77th Cong., 2d Sess. 6 (1942). *See also* Sierk, The Medical-Expense Deduction—Past, Present and Future, 17 Mercer L. Rev. 381, 382 (1966).

[5] *See* Andrews, Personal Deductions in an Ideal Income Tax, 86 Harv. L. Rev. 309 (1972).

[6] *Id.* at 336.

[7] *See* Surrey, Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 Harv. L. Rev. 705, 720 (1970). In noting the inequities inherent in a deduction as opposed to a direct subsidy, Professor Surrey remarked:

> What HEW Secretary would propose a medical assistance program for the aged that cost $200 million, and under which $90 million would go to persons with incomes over $50,000, and only $8 million to persons with incomes under $5,000? The tax proposal to remove the 3% floor under the medical expense deductions of persons over 65 [Tax Reform Bill of 1969, H.R. 13,270, 91st Cong., 1st Sess. § 914] would have had just that effect.

Id. at 722.

[8] Staff of Joint Comm. on Internal Revenue Taxation, 95th Cong., 1st Sess., Estimates of Federal Tax Expenditures 9 (Comm. Print 1977).

both views to reconcile the deduction with the general prohibition against the deduction of personal expenditures.[9] All agree that it would be wrong to extend the medical deduction to expenditures that enhance the taxpayer's well-being rather than restore it after a mishap. If the deduction serves as a subsidy, the statute should be construed to address medical emergencies, not personal frolics. If, on the other hand, the deduction is viewed as an adjustment necessary to assess an individual's true income—that amount available for consumption and accumulation—then the statute should be narrowly construed to cover only those expenditures dictated by medical need.

Administration of the medical expense deduction has generated its share of litigation and rulings. The major areas of dispute center on two questions. By far the more important question is how to distinguish deductible medical expenses from other expenses that should be characterized as personal, living, or family expenses. The statutory definition of medical care is a broad one, encompassing amounts paid for "diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."[10] It also includes transportation to obtain medical care.[11] Because normal expenses of a personal nature, such as nourishing food, fall literally within this language, an overbroad construction of the deduction would swallow up many otherwise nondeductible living expenses. The need to distinguish medical from personal expenses arises in two contexts. First, some expenditures provide a measure of medical improvement to the recipient but also may be sought by other individuals in the ordinary course without health care motives. Thus, the regulations have long provided that a relaxing vacation, although beneficial for one's general well-being, is not a deductible medical expense.[12] Second, a taxpayer may pay for services or procedures outside the ordinary course of medical treatment but which provide little amusement, pleasure, or personal gratification as generally understood. As to the latter payments, the Internal Revenue Service tends to allow deductions liberally; it does not require the taxpayer to follow orthodox medical procedure as a condition of deductibility.[13] For example, acupuncture treatment is deductible even though the practice may not be sanctioned by practitioner licensing or long prior usage.[14]

A second issue is whose medical expenses a taxpayer may deduct. The statute permits a taxpayer to deduct his own medical care expenses as well as those of his spouse and dependents. Dependency is determined in accordance with the rules for personal exemptions.[15] Because the cost of medical care easily can exceed the $750 deduction for an additional

[9] *See* I.R.C. § 262.
[10] I.R.C. § 213(e)(1)(A).
[11] I.R.C. § 213(e)(1)(B).
[12] Treas. Reg. § 1.213-1(e)(1)(ii) (1957).
[13] *See, e.g.*, text accompanying notes 135 & 136 *infra*.
[14] Rev. Rul. 72-593, 1972-2 C.B. 180.
[15] *See* I.R.C. § 152.

exemption, the importance to the taxpayer of determining dependency status may be far greater for this purpose than for personal exemptions.

A third issue—when to deduct an expenditure for medical care which will benefit the taxpayer over several years—has not been a major source of dispute. The regulations[16] depart from the usual capitalization rules applicable to trade or business property. For the latter, deductions for capital expenditures generally must be spread over the useful life of the asset through depreciation rather than deducted at the time of expenditure.[17] Capital items purchased for health care, however, entitle the taxpayer to a current deduction of the full amount of the expenditure, reduced only by the enhancement in value to other property by reason of the expenditure. The regulations use as an example a taxpayer who installs an elevator in his home on the advice of a physician so that his wife, who has heart disease, will not have to climb stairs.[18] If the installation cost is $1000, and the residence increases in value by $700, the taxpayer may deduct the difference of $300 when the expenditure is made. In following a current deduction rule, the regulations eliminate a host of depreciation-related issues such as questions of useful life and salvage value. In addition, they implicitly foreclose inquiry into whether the taxpayer makes some nonmedical use of the improvement and obviate the need to allocate between medical and other uses. The taxpayer is also spared the recordkeeping necessary to keep track of the deductions over time. Presumably, the initial requirements—that the capital expenditure be directly related to medical care and that enhancement to other property be subtracted—are deemed under the regulations to provide adequate safeguards against abuse.

This paper explores the resolution of these definitional problems in a number of factual settings, arranged in order of the individual's life cycle. The problem of personal expenditures appears in each section, dependency in sections II and VII, and capital expenditures in section VI.

II. Birth and Prevention of Birth

The proud parents of a newborn child may deduct the expenses related to birth to the extent those expenses are not reimbursed by insurance—including doctor's bills and hospital expenses, as well as the cost of the taxicab in the mad dash to the hospital. The determination of what is medical care depends on the nature of the services rendered, not the title or qualifications of the person rendering them.[19] Accordingly, women who deliver their children at home, rather than in a hospital or other

---

[16] Treas. Reg. § 1.213-1(e)(1)(iii) (1974).

[17] *See* I.R.C. §§ 263(a), 167(a). *But see* Treas. Reg. §§ 1.162-6, -12(a) (1960) (excepting from the general rule tools and equipment of professionals and farmers if the equipment has a short life).

[18] Treas. Reg. § 1.213-1(e)(1)(iii) (1974).

[19] *See* Rev. Rul. 70-170, 1970-1 C.B. 51, 52; C. Fink Fischer, 50 T.C. 164, 174 (1968), *acq.* 1969-2 C.B. xxiv.

medical facility, may deduct expenses attributable to the birth, such as the midwife's fee or rental of standby equipment. Postnatal medical costs, including the expense of circumcision, similarly qualify for deduction as amounts paid to affect a structure of the child's body, whether or not performed by a physician.[20] But the taxpayer may not deduct all the expense associated with a new child. If a practical nurse assists with child care and household chores in the first days after birth, the costs are nondeductible personal expenses: these services promote the general well-being of mother and child and do not constitute particular medical treatment.[21] Additionally, they serve as replacements for services normally performed by the mother or another member of the household. Nor may the mother deduct the cost of maternity clothes or the child's diaper service.[22] Similar rules apply to prenatal examinations and pre-pregnancy care; for example, the cost of treatment for sterility or of artificial insemination is deductible, but not the cost of the legendary pickles and ice cream. As noted earlier, the regulations distinguish between deductible medical care, which is specific to a particular condition, and nondeductible care, which promotes the individual's general well-being, in order to accommodate the general rule that bars deduction of personal expenses. Unfortunately, good medical care as prescribed by a physician does not follow so clear a line. By requiring specificity in medical treatment as a condition of deductibility, the Service disfavors certain kinds of preventative care. General prenatal health of the mother, for example, may correlate with a low incidence of birth defects; yet the costs of maintaining that health are nondeductible in the usual case.

More controversial have been expenses incurred to prevent birth or conception. Such expenses literally satisfy the statutory definition of medical care in that they affect a function of the body. But formerly they often violated a provision of the regulations barring deduction of amounts expended for illegal operations or treatments.[23] Prior to the Supreme Court's landmark decision in *Roe v. Wade*,[24] most states prohibited elective abortions. *Roe v. Wade* invalidated such state criminal statutes as they affect most abortions, and to that extent removed any barrier to

---

[20] Hospital bills incurred for the newborn child are deductible even though the services received, in a sense, may address only the child's general well-being. This exception to the rule may be justified by a newborn child's extreme vulnerability.

[21] *See* Rev. Rul. 58-339, 1958-2 C.B. 106; *cf.* George B. Wendell, 12 T.C. 161 (1949) (expense of hiring nurse for baby whose mother died in childbirth held not deductible). *But cf.* George M. Womack, 34 T.C.M. (CCH) 1009 (1975) (total salary paid to nurse deductible even though she also performed housework).

[22] Rev. Rul. 55-261, 1955-1 C.B. 307.

[23] Treas. Reg. § 1.213-1(e)(1)(ii) (1957). The regulation is phrased in terms of illegality and does not itemize illegal operations or treatments. A similar provision bars expenses for illegally procured drugs. Treas. Reg. § 1.213-1(e)(2) (1957). These disallowances operate administratively and have not been applied in any case or published ruling. *Cf.* Rev. Rul. 63-91, 1963-1 C.B. 54 (no disallowance when illegality consists solely of practitioner's failure to obtain a license).

[24] 410 U.S. 113 (1973).

their deductibility.[25] Abortions that remain illegal after *Roe v. Wade* continue to fall outside the scope of the deduction.

Some question may be raised as to whether a regulation imposing a legality requirement should be regarded as surviving the 1969 Tax Reform Act.[26] Although the regulation and its history contain no explicit authority for the legality provision, it apparently flowed from a judicially developed doctrine denying deductions that are contrary to well-defined state or federal public policies.[27] The doctrine, of indefinite contours, created uncertainty, especially in the business deduction area. In response, Congress amended Code section 162 in the Tax Reform Act of 1969 by adding subsections (c), (f) and (g). These provisions prohibit deduction under section 162 of certain expenditures deemed contrary to public policy, such as bribes, or payments the deduction of which would defeat a well-established public policy, such as the payment of fines. The accompanying committee reports state that these provisions represent the full extent of the illegality doctrine: Congress intended to call a stop to judicial creativity in defining the parameters of public policy for deduction purposes.[28] Legislative history for the limited amendments added in 1971[29] echoes this view.[30] It appeared then that the general contrary-to-public-policy doctrine had been laid to rest; and presumably, the illegality provision of section 213's regulations died with it. But this appearance was only illusion. Recent cases and rulings have applied the doctrine in all its ancient vitality under Code sections other than section 162.[31] Congressional disapproval of the doctrine has thus been limited to ordinary and necessary business expenses and certain related areas.

The Service's attitude toward expenses of contraception also reflects the

[25] *See* Rev. Rul. 73-201, 1973-1 C.B. 140. This ruling, however, affirms that Treas. Reg. § 1.213-1(e)(1)(ii) (1957) continues to bar deduction of expenses of an abortion performed contrary to law. The same ruling approved deduction of the cost of legal vasectomies. Revenue Ruling 73-603, 1973-2 C.B. 76, similarly approved deduction of amounts paid for procedures such as tubal ligations to render women incapable of having children.

[26] Pub. L. No. 91-172, § 902, 83 Stat. 710 (1969).

[27] *See* Commissioner v. Tellier, 383 U.S. 687 (1966); Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958).

[28] S. Rep. No. 552, 91st Cong., 1st Sess. 274, *reprinted in* [1969] U.S. Code Cong. & Ad. News 2311 ("the provision for the denial of the deduction . . . is intended to be all inclusive").

[29] Revenue Act of 1970, Pub. L. No. 92-178, § 310, 85 Stat. 525 (1971).

[30] S. Rep. No. 437, 92d Cong., 1st Sess. 72-73, *reprinted in* [1971] U.S. Code Cong. & Ad. News 1980 ("the Committee continues to believe that the determination of when a deduction should be denied should remain under the control of Congress").

[31] *See* Rev. Rul. 77-126, 1977-17 I.R.B. 10 (taxpayer may not claim loss for seizure by federal government of coin-operated gaming devices for nonpayment of tax under I.R.C. § 4461; to permit the loss would be contrary to an established public policy). *See also* Rev. Rul. 77-244, 1977-29 I.R.B. 8; Max Sobel Wholesale Liquors, 69 T.C. 36 (1977). The Tax Court has taken a similar view under section 165. *See* Raymond Mazzei, 61 T.C. 497, 501-02 (1974). Dictum in Rev. Rul. 73-201, 1973-1 C.B. 140, the post-*Roe v. Wade* abortion ruling, assumes the continued vitality of the illegality regulation relating to medical expense deductions.

The illegality provisions may affect expenses other than those of obtaining an abortion. Suppose a physician prescribes smoking marijuana to mitigate his patient's glaucoma condition. Although the cost would be deductible if the taxpayer obtained the marijuana legally, is the deduction lost upon an illegal purchase? The question has not yet been raised in litigation.

decriminalization of a birth control method.[32] The Service's most recent ruling approving deduction of the cost of contraceptive pills involved pills prescribed by a physician.[33] Whether the ruling conditioned deductibility on the fact that the pills were prescribed is unclear. If so, such a requirement may be of doubtful validity, because prescriptions normally are unnecessary to deduct the costs of drugs or medicines.[34]

Birth control pills probably should be classified as drugs or medicines for purposes of subjecting their cost to the extra one percent of AGI floor. This separate treatment for drugs and medicines entered the statute in 1954.[35] The House report linked the one percent rule to a concern that many taxpayers deducted amounts spent for "ordinary household remedies, which do not represent extraordinary medical expense items,"[36] while the Senate report spoke of amounts spent for "pharmaceuticals" which in many cases "are not properly classified" as medical expense items.[37] Although contraceptive pills do not easily fit either interdicted class—they are neither ordinary household remedies nor pharmaceuticals not properly classified as a medical expense—they do meet the common understanding of drugs and medicines.

The statute does not define drugs and medicines, and little definitional enlightenment has been forthcoming in regulations, rulings, or cases. Regulations under section 213 describe drugs and medicines as items that are "generally accepted" as such, expressly excluding only toiletries and cosmetics.[38] Although contraceptive pills and foam appear to meet this general acceptance test, other items serving the same purpose—diaphragms, condoms and intrauterine devices—do not and are therefore not subject to the additional one percent statutory screen. Distinguishing different birth control methods in this way seems arbitrary. The extra one percent of AGI limitation makes sense as a solution to the problem mentioned in the reports only as a rough de minimis criterion, filtering out relatively small payments for consumables under a separate statutory provision. Yet, if this limitation is intended to cut off deductions for small amounts, it operates unfairly when the expenses are repeated and are of the same magnitude as amounts paid for other medical care services.[39]

---

[32] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[33] Rev. Rul. 73-200, 1973-1 C.B. 140. This ruling superseded Rev. Rul. 67-339, 1967-2 C.B. 126, which allowed a deduction for oral contraceptives when the possibility of childbirth raised a serious threat to the life of the mother.

The cost of other contraceptive methods, if legally performed, also are deductible medical expenses. Rev. Rul. 73-603, 1973-2 C.B. 76 (operation to prevent woman from having children); Rev. Rul. 73-201, 1973-1 C.B. 140 (vasectomy).

[34] Treas. Reg. § 1.213-1(e)(2) (1957).

[35] I.R.C. § 213(b).

[36] H.R. Rep. No. 1337, 83d Cong., 2d Sess. 30, *reprinted in* [1954] U.S. Code Cong. & Ad. News 4017, 4055.

[37] S. Rep. No. 1622, 83d Cong., 2d Sess. 35 *reprinted in* [1954] U.S. Code Cong. & Ad. News 4621, 4666.

[38] Treas. Reg. § 1.213-1(e)(2) (1957).

[39] President Carter's proposal to eliminate the separate one percent test presumably is conditioned upon increasing the general AGI percentage. *See* note 3 *supra*.

The expenses of adopting a child ordinarily are not deductible under section 213.[40] After adoption, the Code treats the adopted child as a child by blood.[41] Thus, the child will be a dependent if his parents provide over half of his support in that taxable year;[42] if so, medical expenses for the child after the adoption are deductible as for any other dependent. Problems may arise, however, when a child is adopted late in the year: if the adoptive parents provide less than half the support for the year, the support test will not be met and the child will not be a dependent in that year. A related problem arises when medical expenses incurred prior to the adoption are paid in the first instance by the adoption agency or some other party and then reimbursed by the new parents. The Service allows parents to deduct such expenses if the child is a dependent when the expenses are paid; however, they may not deduct payments to reimburse the agency for expenses incurred before negotiations for adoption began.[43] This may stretch notions of dependency a bit, particularly in light of the need to establish the indicated chronology. Presumably, the agency's allocation of expenses as medical or nonmedical will be respected when the amounts involved are reasonable.[44] Reimbursed medical expenses of the natural mother ordinarily are not deductible, even though the unborn child's general health may have been advanced by prenatal care.[45] If the expenditure can be directly related to treatment or care of the fetus, or if the health of the fetus can be shown to have been promoted in a specific fashion, the result would be otherwise.[46]

III. Education and Other Expenses of Parenthood

Although ordinary school expenses for children normally are not deductible under section 213, services received from a particular institution may be both educational and medical in character. The tax system then is faced with the task of separating and allocating expenses incurred for these mixed purposes. The response of the Service and of the courts to this recurring problem of allocation adds to the personal-medical balance

---

[40] Nor are they deductible as charitable contributions under section 170 even if paid to a charity, because they are not gratuitous payments. Edward A. Murphy, 54 T.C. 249 (1970); Henry L. Arceneaux, Jr., 36 T.C.M. (CCH) 1461 (1977). *But see* Wegner v. Lethert, 67-1 U.S. Tax Cas. ¶ 9229 (D. Minn. 1967) (state law barred agency from charging fee; adoptive parents' payment was charitable contribution). Compare the treatment of lump-sum payments to old-age homes operated by charitable organizations. *See* text accompanying note 185 *infra*.

[41] I.R.C. § 152(b)(2).

[42] I.R.C. § 152(a). For further discussion of dependency, see notes 166-74 and accompanying text *infra*.

[43] Rev. Rul. 60-255, 1960-2 C.B. 105, *modifying* Rev. Rul. 56-401, 1956-2 C.B. 169. Any such qualifying reimbursement would count as part of the adoptive parents' contribution to the child's support.

[44] *Cf.* Rev. Rul. 72-545, 1972-2 C.B. 179 (portion of legal fees identified by law firm as allocated to tax matters held deductible under I.R.C. § 212(3) as an expense incurred in connection with determination of a tax).

[45] Benny L. Kilpatrick, 68 T.C. 469 (1977).

[46] *See id.* at 473.

a strong deference to considerations of administrative efficiency. The costs of tuition, room and board, or a portion of these costs, may be deducted in two limited situations. If the school qualifies as a "special" school, the taxpayer may deduct the entire amount of school expenses under certain conditions. Even if the school is not "special," the taxpayer may still be able to deduct that portion of school expenses specifically allocable to medical treatment.

If a parent places a child who has a specific physical or mental disorder in a special school for the principal reason that it provides treatment, psychiatric services, or special programming, the school cost is a medical expense; the parent may deduct the entire cost of tuition, room and board.[47] The regulations offer as examples of special schools those that teach braille or lip-reading.[48] In Revenue Ruling 70-285,[49] the taxpayer resided in a public school district that had no special education program to meet the needs of his retarded son. The parent enrolled the son in a neighboring school district having a special curriculum for the educable mentally handicapped, for which the parent paid tuition. This program occupied a separate classroom in a regular elementary school, using specially trained teachers and special methods and materials. The ruling allowed the taxpayer to deduct both the tuition and the cost of transportation to and from the school. The ruling construed the regulation as including the special curriculum in this case because it was specifically designed for treatment of the disability and was operated apart from the regular activities of the school system.

When the school is not a "special" one, the taxpayer nonetheless may deduct the amounts allocated specifically to conventional medical care. For example, a physical examination is deductible whether performed at a school or elsewhere.[50] Inclusion of the expense for such medical attention in the fee for tuition, room and board, however, will present questions of allocation as to which the taxpayer probably would have the burden of proof.[51] Although one ruling holds entirely nondeductible a lump sum tuition payment which included access to university health services,[52] the Tax Court has adopted a more reasonable view permitting some allocated amount to be deducted.[53]

The program outlined in Revenue Ruling 70-285 typifies the require-

---

[47] Treas. Reg. § 1.213-1(e)(1)(v)(*a*) (1957); Rev. Rul. 58-280, 1958-1 C.B. 157.

[48] Treas. Reg. § 1.213-1(e)(1)(v)(*a*) (1957).

[49] 1970-1 C.B. 52. *See also* Rev. Rul. 69-607, 1969-2 C.B. 40.

[50] H. Grant Atkinson, Jr., 44 T.C. 39, 54-55 (1965), *acq.* 1965-2 C.B. 4.

[51] The taxpayer would be assisted in such allocation by Cohan v. Commissioner, 39 F.2d 540, 543-44 (2d Cir. 1930), under which the taxpayer may approximate or estimate the amount attributable to medical care. Although the *Cohan* rule has been abrogated in the entertainment expense area in which it originated—I.R.C. section 274—it survives elsewhere and has been applied to medical expenses. Walter D. Bye, 31 T.C.M. (CCH) 238, 240-41 (1972).

[52] Rev. Rul. 54-457, 1954-2 C.B. 100.

[53] C. Fink Fischer, 50 T.C. 164, 176 (1968), *acq.* 1969-2 C.B. xxiv. *See also* text accompanying notes 61 & 62 *infra.*

ments for a special school. The school must treat its rehabilitative or health treatment function as primary and the usual learning process as secondary; additionally, medical services must be the principal reason for the child's attendance.[54] Moreover, the special treatment given must have a direct relationship to a specific medical condition; and, in the particular case, the services must reasonably be expected to have some beneficial effect.[55] That the program was entered upon the recommendation of a physician may be a factor but will not be dispositive.[56]

It is sometimes difficult, however, to distinguish a school's regular education function from its therapeutic qualities, particularly when the disability to be treated is of a mental or emotional nature.[57] Two cases decided by the Tax Court at about the same time illustrate the problem. In *Lawrence D. Greisdorf*,[58] the taxpayer's stepdaughter had severe emotional difficulties, which were aggravated by the suicide of the girl's natural father when she was nine years old. On the advice of a psychiatrist, the taxpayers enrolled her in the Mills School, a private school specifically established to provide an environment in which students with psychological learning disabilities could adjust and function normally in a competitive classroom situation. Classes were small, two psychiatrists served the school as consultants, and psychologists were employed on the staff. As part of the services provided by the school, the girl was tested extensively and spent an hour each day in either private therapy or group therapy. The Tax Court perceived the relevant question as framed by the regulations to be whether the school was a "special school"—one in which the resources for alleviating the mental and emotional handicap were a principal reason for the girl's presence. The Tax Court held that the Mills School met this criterion and the educational program was only incidental to its medical function. Therefore, the full cost of the school to the taxpayers was deductible.

By contrast, *Paul H. Ripple*[59] involved a boy who had problems in

---

[54] *See* Martin J. Lichterman, 37 T.C. 586, 595 (1961).

[55] *See, e.g.*, Everett F. Glaze, 20 T.C.M. (CCH) 1276, 1278 (1961); Maurice Feinberg, 25 T.C.M. (CCH) 777 (1966).

[56] *See* Kaufman v. United States, 76-1 U.S. Tax Cas. ¶ 9182 (S.D.N.Y. 1975). Once the school qualifies as "special," parents may deduct the costs of transporting the child to a distant school. The costs of one parent to accompany the child on the trip are also deductible if the child cannot travel alone by reason of his age, physical condition, or need for care en route. I.T. 3786, 1946-1 C.B. 75, *declared obsolete*, Rev. Rul. 69-43, 1969-1 C.B. 310, 312. *See also* Robert M. Rose, 52 T.C. 521 (1969), *aff'd per curiam*, Rose v. Commissioner, 435 F.2d 149 (5th Cir. 1970), *cert. denied*, 402 U.S. 907 (1971) (expenses of accompanying parent deductible, but expenses of second parent, who followed later, disallowed); *cf.* Bertha M. Rodgers, 25 T.C. 254, 262 (1955), *aff'd*, 241 F.2d 552 (8th Cir. 1957). But the parent may not deduct the cost of establishing a new home near the child's school so that the parent could take the child to school each day and care for him when he was not in class. Bercovitz v. United States, 70-2 U.S. Tax Cas. ¶ 9591 (C.D. Cal. 1970).

[57] *See generally* Muchin, Private Schooling for Emotionally Disturbed Children: Is It a Medical Expense?, 44 Taxes 699 (1966); Nathan, Is Attendance at a Private School Medical Treatment?—A Doctor's Viewpoint, 44 Taxes 704 (1966).

[58] 54 T.C. 1684 (1970), *acq.* 1970-2 C.B. xix.

[59] 54 T.C. 1442 (1970).

reading and emotional adjustment. His psychiatric report recommended a full-time school program of reading help in an institution like the Matthews School, where the taxpayers, his parents, then enrolled him. Teachers in the Matthews School had special training to teach reading, and some held degrees in psychology. The school provided an academic program with emphasis on corrective and remedial reading, and it focused on the educational problems of children who had both emotional and educational difficulties. The school's license did not mention treatment of emotionally disturbed children, nor did it maintain a staff psychiatrist. However, a clinical psychologist, associated with the school as a consultant, gave the boy regularly scheduled psychotherapy. The Tax Court, again looking to the character of the school, held that it provided primarily an educational program rather than a medical service. Most of the expenses—meals, lodging and tuition paid to the school—could not be deducted without a showing that part of the tuition could be allocated to a special component in the classroom work designed to deal with emotional problems. The psychologist's fee, separately stated, concededly was deductible.

Asking whether a school is primarily "special" seems to be an artificial and inexact means of determining the specific character of the services rendered. Both cases above involved a mix of therapeutic and educational motives. The virtues of the special school test lie in its administrability. Classifying the institution is easier than trying to disentangle each parent's motives inasmuch as it provides a more objective set of factors to evaluate. Once made, the determination can apply to many taxpayer-parents. Advance planning by both producers and consumers of the service is facilitated. The test may nonetheless have unfortunate consequences. If deductibility turns on the separate, distinct identity of the institution or the program, it follows that the cost of classroom treatment integrating the child with normal or well children may not be deducted, notwithstanding that a physician or other medical expert may prescribe such an environment as more conducive to the child's good health than a separate facility. Several cases have so held.[60] In this respect, the tax system, in the interests of administrative ease, favors more drastic types of therapy because they are more easily identified.

---

[60] *See* Newkirk v. United States, 77-1 U.S. Tax Cas. ¶ 9452 (S.D. Ohio 1977); Kaufman v. United States, 76-1 U.S. Tax Cas. ¶ 9182 (S.D.N.Y. 1976); H. Grant Atkinson, Jr., 44 T.C. 39 (1965), *acq.* 1965-2 C.B. 4 (deduction limited to cost of physical examination and related services); Israel J. Weinberg, 28 T.C.M. (CCH) 10 (1969); Edward S. Enck, 26 T.C.M. (CCH) 314 (1967); Gordon Pascal, 15 T.C.M. (CCH) 434 (1956); Private Rul. 77-28,011 (1977) (autistic child placed in regular nursery). *See also* Martin v. Commissioner, 548 F.2d 633 (6th Cir. 1977) (per curiam); Arnold P. Grunwald, 51 T.C. 108 (1968). In Rev. Rul. 65-255, 1965-2 C.B. 76, the Service allowed deduction of the cost of transporting a polio victim to a regular school when the primary purpose of having the child in school was therapeutic. Doctors had advised that, if the illness advanced as expected, the education would be of no value to the child. On these peculiar facts, there was no allocation problem. Absent any possible educational benefit, the motive for attendance cannot be questioned and the special school test is unnecessary.

In at least one case, however, the Tax Court took a less Draconian view, allowing a substantial deduction even when the school itself was not special. In *C. Fink Fischer,*[61] the taxpayer enrolled his child in a school primarily to deal with the child's emotional problems. Although the child's instruction was individualized, the Tax Court held that the school was not special within the meaning of the regulations. Yet the court permitted the taxpayer to deduct the excess cost of sending the child to this school over the cost of attending other private schools in the area because of the school's ability to treat the child's difficulties.[62] Although the result departs from the all-or-nothing approach to special schools, it is consistent with the "but for" test applied by the Tax Court in other factual situations.[63] Under that test, when an expenditure may be incurred for both medical and nonmedical reasons, the Tax Court will treat it as incurred for medical care if the expenditure has a therapeutic purpose and would not have been incurred but for a medical need. In *Fischer,* the extra cost due to treatment was readily ascertainable. Moreover, we can presume that any price paid in excess of the market price for private education is motivated primarily by medical need.

In the special school cases, the parent might have pursued two possible choices if the child had no unusual health needs. All children have access to free public education. But some parents pay for private school services with no health-related motive, and the taxpayer claiming a medical deduction also might have done so. To the extent that a taxpayer incurs costs that exceed private school tuition, as in *Fischer,* he plainly buys something in addition to educational services. Because he does so for medical treatment, the excess is properly deducted. In contrast, the amount equal to private school tuition presents a mixture of motives: the parent sends the child to school both to treat the emotional disturbance and to improve normal skills. To avoid the question of which intent predominated, deduction of this base amount appropriately turns on the somewhat more objective institution-by-institution examination that the "special" school inquiry affords.

Use of the special school or but-for tests requires that the expenditure have a therapeutic purpose. One index of this purpose is the proximity of the expense and the condition for which treatment is claimed. Thus, cases have denied a deduction when the cost is remote from the illness and the patient to be treated, notwithstanding that the cost undeniably was incurred by reason of medical exigency.[64] In one case,[65] the taxpayer's

---

[61] 50 T.C. 164 (1968), *acq.* 1969-2 C.B. xxiv.

[62] *Id.* at 175-76.

[63] *See, e.g.,* text accompanying note 78 *infra.*

[64] *See, e.g.,* Ochs v. Commissioner, 195 F.2d 692 (2d Cir. 1952). In *Ochs,* the taxpayer incurred school expenses for his children in order to assure that his wife, who was recovering from a cancer operation, would have the necessary quiet and absence of strain to recover. Over Judge Frank's passionate dissent, the court found the expense too remote, and analogized it to employment of a governess or cook to replace services that the wife could no longer provide because of her illness, rather than to treatment or mitigation of the disease.

daughter was ridiculed by her classmates because her family suffered from a hereditary disfiguring disease. The other children refused to touch the toys she played with or have other contact with her. On the advice of a physician, the taxpayer changed his name and moved to another community. When he sought to deduct the loss on the sale of his residence, the court held the loss nondeductible; it noted that the loss resulted from a substantial investment he had made in the property and a general decline in property values in the area.[66] In contrast, when a health motivation is the only reasonable explanation for incurring the cost, or when the nonmedical dimension of the expenditure is insignificant, the but-for test alone is enough. The cost of maintaining a seeing-eye dog for a blind person,[67] the expense of hiring someone to accompany a blind child to and from school and to classes during the day,[68] and the excess cost of books and magazines in braille over regular books and magazines[69] all may be deducted as medical expenses.

In a closer case, the Service allowed a deduction for clarinet lessons recommended by an orthodontist to remedy a malocclusion.[70] This appears to be about as far as the Service will go in characterizing as medical treatment what would ordinarily be normal personal activity. When the possibility of personal motive is large, the but-for test usually places a high, if not impossible, burden on the taxpayer to prove what would have happened had the medical need not been present. Thus, the Tax Court denied a medical expense deduction for tuition at a ballet academy even though an active exercise program had been prescribed as treatment for the taxpayer's daughter who suffered from undue curvature of the spine.[71] The girl's prior interest in ballet was perhaps dispositive, because the Tax Court ruled that the taxpayer could obtain the deduction only by showing that the child would not otherwise have been enrolled in the school.[72]

IV. Food, Drink and Travel

A taxpayer on a special diet may not deduct its cost to the extent that it merely equals usual food expenses.[73] But if a physician prescribes the

---

The services purchased in *Ochs* provided not only medical and personal benefits to the wife but also some clearly personal benefits to other members of the family. In the court's view, the medical motivation for the expense did not predominate.

[65] Mark R. Harding, 46 T.C. 502 (1966).

[66] *See also* Lawrence Prem, 21 T.C.M. (CCH) 873 (1962) (moving and travel expenses incurred by taxpayer's family in accompanying her from Maryland to a more hospitable climate in California to ameliorate a medical condition are not deductible); Rev. Rul. 68-319, 1968-1 C.B. 92.

[67] Rev. Rul. 57-461, 1957-2 C.B. 116.

[68] Rev. Rul. 64-173, 1964-1 C.B. 121.

[69] Rev. Rul. 75-318, 1975-2 C.B. 88.

[70] Rev. Rul. 62-210, 1962-2 C.B. 89. However, the taxpayer could deduct only the cost of a clarinet of sufficient quality to perform the medical service.

[71] Norman Ende, 34 T.C.M. (CCH) 1096 (1975).

[72] *Id.* at 1101.

[73] *See, e.g.*, Newman v. United States, 68-1 U.S. Tax Cas. ¶ 9411 (W.D. Ark. 1968); J.

special diet and the taxpayer can establish the excess cost of the special diet over a normal diet, he may deduct the excess; indeed, the taxpayer may deduct the expense of a nip of brandy prescribed by a physician to relieve angina pains.[74] Although neither the statute nor the regulations condition deduction of these expenses on a physician's supervision, this requirement, supplied by cases and rulings, serves the salutary function of distinguishing special diets dictated by medical needs from those that proceed from more idiosyncratic motives. When taxpayers who were allergists established that they suffered severe adverse physical reactions from artificial chemical additives in foods, the Tax Court allowed them to deduct the added cost of natural foods.[75] Absent medical evidence of physical reaction, however, organic foods and vitamins are nondeductible expenses even if the taxpayer believes them to be good for health.[76] If the excess cost of the special diet constitutes medical care, costs of transportation to obtain such care have been held to be deductible as well. Thus, in holding deductible the additional cost of preparing salt-free meals in restaurants, the Tax Court also allowed a deduction for the amount paid by the taxpayer for taxicabs to those restaurants.[77]

The cases apply a two-pronged test, referred to earlier as a "but for" test. Under this standard, in order for a taxpayer to justify deduction of an expense that serves both medical and other personal functions, he must establish that the expenditure was necessary to treatment and would not otherwise have been incurred.[78] Rather than requiring the trier of fact to engage in the difficult and sometimes impossible task of determining which of two motives predominated, this test identifies the marginal cost occasioned by the medical need and grants a deduction for it. In addition to providing a more administrable rule than a primary motive test, the but-for test conforms to the apparent rationale of section 213, to permit deduction for expenses that are extraordinary in nature.

Willard Harris, 46 T.C. 672 (1966); Doris V. Clark, 29 T.C. 196, 200 (1957); George H. Collins, 24 T.C.M. (CCH) 1190 (1965).

[74] Rev. Rul. 55-261, 1955-1 C.B. 307, 312 (cautioning that the alcohol cannot be "a substitute for . . . beverage normally consumed by [taxpayer]").

[75] Theron G. Randolph, 67 T.C. 481 (1976). The taxpayers had carefully documented the additional cost, so that the court did not have to contend with questions of proving the amounts expended to treat the allergy. *Id.* at 486-87.

[76] Princess E. L. Lingham, 36 T.C.M. (CCH) 649, 654 (1977) (self-imposed organic diet did not have direct or proximate relationship to the diagnosis, treatment, or prevention of disease).

[77] Leo R. Cohn, 38 T.C. 387, 391 (1962), *nonacq.* 1963-1 C.B. 5, *acq. on other issues,* 1963-1 C.B. 4. *But cf.* Cohn v. United States, 240 F. Supp. 786 (N.D. Ind. 1965) (deduction not allowed for the same taxpayer in a later year for the extra cost of an accommodation with kitchen facilities, in which his wife could prepare salt-free meals, over usual lodging). The earlier *Cohn* case exemplifies the difficulty in limiting the scope of the deduction without requiring the taxpayer to mitigate his expenses. *See* text accompanying notes 139-40 *infra.* The taxpayer may deduct the cost of taxicabs to a restaurant because he cannot obtain salt-free meals at his hotel, without any showing that this was the least expensive way to do so. This approach makes administration of the deduction easier at the expense of some claims that arguably should be denied.

[78] Joel H. Jacobs, 62 T.C. 813, 819 (1974).

One important set of distinctions between medical care and personal recreation involves expenditures for food and lodging incidental to travel for medical purposes. The 1939 Code included as medical care the cost of travel to obtain medical care.[79] As used elsewhere in the Code, travel expenses include food and lodging,[80] and such expenses were deductible as medical care. Wealthy taxpayers who traveled long distances to resort areas to recuperate from operations, or for other medically related reasons, could therefore deduct the full cost of wintering in Florida and the like. To prevent this practice, the 1954 Code substituted the narrower word "transportation" for "travel." Responding to the legislative history,[81] the regulations ruled out deduction of the cost of food and lodging incident to the travel.[82] In *Commissioner v. Bilder,*[83] the Supreme Court upheld this reading of the statute. A heart specialist had advised the taxpayer, a forty-three-year-old attorney with a history of heart ailments, to spend his winters in a warm climate. He rented an apartment in Florida, which he occupied with his family. The taxpayer deducted both the cost of transportation to Florida and the rent for the apartment. Finding that the trip was taken for treatment of a specific illness, and not to enjoy a vacation, the Tax Court allowed deduction of the plane fare and a portion of the rent attributable to the taxpayer's own living expense.[84] The Third Circuit extended deductibility to the full amount of the rent.[85] But the Supreme Court reversed and disallowed all of the claimed rent deduction, relying heavily on the legislative history to support its reading of the statute.[86]

The same legislative history was relied upon to *allow* deduction of food and lodging expenses in *Montgomery v. Commissioner.*[87] The taxpayers in *Montgomery* sought to deduct expenses for motel rooms and restaurant meals incurred in traveling between their home and the Mayo Clinic. The Sixth Circuit affirmed the Tax Court in allowing the deduction, reading the 1954 amendment as eliminating only deductions for expenses incidental to "resort area" medication but retaining deductions for food and lodging en route to medical care.[88] The Seventh Circuit went one step further, extending deductibility to a special post-operative care situation.

---

[79] Int. Rev. Code of 1939, § 23(x), 56 Stat. 825-26 (1942).

[80] *See* I.R.C. § 162(a)(2).

[81] *See* H.R. Rep. No. 1337, 83d Cong., 2d Sess. app. 60 (1954), *reprinted in* [1954] U.S. Code Cong. & Ad. News 4017, 4197; S. Rep. No. 1622, 83d Cong., 2d Sess. 219-20 (1954), *reprinted in* [1954] U.S. Code Cong. & Ad. News 4021, 4856.

[82] Treas. Reg. § 1.213-1(e)(1)(iv) (1957).

[83] 369 U.S. 499 (1962).

[84] 33 T.C. 155 (1959).

[85] 289 F.2d 291 (3d Cir. 1961).

[86] 369 U.S. at 502-03 (citing S. Rep. No. 1622, 83d Cong., 2d Sess. 219-20 (1954); H.R. Rep. No. 1337, 83d Cong., 2d Sess. app. 60 (1954)). Both committee reports discuss the hypothetical case of a patient traveling to Florida to alleviate chronic ailments; they concluded that transportation expenses should be deductible, but not living expenses while in Florida.

[87] 51 T.C. 410, 413-14 (1968), *aff'd,* 428 F.2d 243 (6th Cir. 1970).

[88] 428 F.2d 243, 245-46 (6th Cir. 1970).

In *Kelly v. Commissioner*,[89] the taxpayer had undergone surgery in New York after suffering an appendicitis attack while there on a business trip. His hospital discharged him shortly after the operation because of a room shortage, but his physician advised him not to return home immediately. The taxpayer rented a hotel room until his doctor decided he was strong enough to leave New York. The taxpayer deducted the cost of lodging and food at the hotel. The Commissioner disallowed the deduction under section 1.213-1(e)(1)(v) of the regulations, which allows the deduction of food and lodging only for inpatient hospital care and for care in an institution other than a hospital.[90] In effect, the Seventh Circuit treated the hotel room as an "institution" within the regulations because it was necessary to the taxpayer's recovery.[91]

The 1954 amendment, the regulation and *Bilder* reflect a general concern to prevent deduction of expenses for personal enjoyment in the guise of medical expenses—here, vacations in generally attractive surroundings. In both *Montgomery* and *Kelly*, the element of personal enjoyment as an admixture to the medical care was minimal, and in that respect the result is sound. Applying the "but for" test, it is clear the expenses both were related to treatment and would not have been incurred without medical reasons. The difficulty is in limiting deductibility to such cases, while disallowing expenses motivated both by medical care and personal consumption elements. The distinction is frequently easy to make. Thus, in Revenue Ruling 76-79,[92] the taxpayer, on his doctor's advice, took a cruise with a group of physicians. While on the cruise ship, the physicians reviewed the patient's medical records, performed certain tests on him and reported the progress of his condition to his home physician. In addition, they provided seminars on the taxpayer's physical condition and supervised his dietary program. The taxpayer could have obtained similar medical services in his home town. The ruling disallowed all the expenses except those directly related to examination of the medical records, performance of tests and transmission of the results to the patient's personal physician.[93] A case for deductibility would have been made if the services had been unique and not otherwise obtainable. But sometimes the distinc-

---

[89] 440 F.2d 307 (7th Cir. 1971).

[90] The other requirement for complete deductibility under Treas. Reg. § 1.213-1(e)(1)(v)(*a*) (1957)—that medical care be a principal reason for the institutionalization—clearly was met.

[91] *But see* Loren Wilks, 27 T.C.M. (CCH) 1086 (1968) (denying deduction for lodging during outpatient treatment for terminal cancer). The decision in *Kelly* makes sense to the extent that the services received from the hotel merely served as a substitute for the services the taxpayer would have received in the hospital had there been room. The Seventh Circuit made no effort to account for the difference, if any, between hospital and hotel costs.

[92] 1976-1 C.B. 70.

[93] The ruling stated that the seminars promoted only the taxpayer's general well-being and thus were nondeductible. *Id.* Compare the disallowance under section 162 of professional education expenses in a vacation setting. Reuben B. Hoover, 35 T.C. 566 (1961) (allowing deduction of only that portion of the expense of a lecture cruise that the court estimated to equal the cost of attending lectures at a university).

tion between medical and personal expense is not so clear. In Revenue Ruling 75-187,[94] the taxpayers underwent treatment for a sexual problem, concededly a medical expense. Their physician advised them that the probability of successful treatment would be enhanced if they resided at a hotel rather than at the hospital during the treatment period. Without citing *Kelly,* the ruling found the lodging cost nondeductible because, in the Service's view, it was indistinguishable from a stay in any other personal residence.[95] Applying the but-for test, the opposite result should obtain. The taxpayers presumably continued to maintain their normal residence; the hotel expense was in excess of their normal living expense and was incurred only to obtain the best medical treatment.[96]

Other long distance travel may involve an admixture of personal or recreational motive. A taxpayer who travels to another location for alleviation of a particular ailment and not for general health improvement may deduct his transportation.[97] The cost of transporting his nurse—or spouse acting as his nurse—is also deductible.[98] And a taxpayer may deduct the transportation cost of visiting a physician in another city if he has more confidence in him—notwithstanding that he spends some time in social or recreational activities on the trip—provided that the trip's primary purpose is medical.[99] As in the business expense area, the cost of transportation need not be allocated so long as the primary motive is not personal or recreational.[100] When the taxpayer uses his own automobile to provide medical transportation, he may deduct either the out-of-pocket costs paid by him or the standard mileage allowance of seven cents per mile.[101] Neither method is intended to allow for depreciation on the automobile. This is consistent both with the statutory limitation of the deduction to a "payment" for medical expenses and with the regulations' general rule allowing medical capital expenses to be deducted in the year of payment. For these purposes, depreciation is not a payment.[102]

---

[94] 1975-1 C.B. 92.

[95] The ruling did cite Wade Volwiler, 57 T.C. 367 (1971), in which the taxpayer's daughter resided separately in a rooming house as part of her psychiatric care. The Tax Court disallowed the deduction of the rooming house cost on the grounds that it was not a medical institution or otherwise specially equipped for treatment. It should be noted that there was no duplication of the daughter's residence expense in that she resided only in the rooming house, although she could have avoided even that expense by living at home.

[96] *See also* Sidney J. Ungar, 22 T.C.M. (CCH) 766 (1963) (allowing deduction of rent of an apartment used in lieu of a hospital room).

[97] Rev. Rul. 58-110, 1958-1 C.B. 155.

[98] Carasso v. Commissioner, 292 F.2d 367 (2d Cir. 1961), *cert. denied,* 369 U.S. 874 (1962); Leo R. Cohn, 38 T.C. 387, 390 (1962), *acq.* 1963-1 C.B. 4; I.T. 3786, 1946-1 C.B. 75, *declared obsolete,* Rev. Rul. 69-43, 1969-1 C.B. 310, 312. *See also* Robert M. Rose, 52 T.C. 521 (1969), *aff'd per curiam,* 435 F.2d 149 (5th Cir. 1970), *cert. denied,* 402 U.S. 907 (1971) (transportation expenses of one parent accompanying child for medical care deductible, but not those of a second parent who followed later).

[99] Stanley D. Winderman, 32 T.C. 1197 (1959), *acq.* 1960-2 C.B. 7.

[100] *Compare id. with* Treas. Reg. § 1.162-2(b)(1) (1958).

[101] Rev. Proc. 74-24, 1974-2 C.B. 477.

[102] *See* Maurice S. Gordon, 37 T.C. 986 (1962) (depreciation on automobile used to transport son to doctor not deductible under section 213). *But cf.* Sanford H. Weinzimer, 17

V. WORK

Occasionally, expenses for medical treatment help the taxpayer to pursue his trade or business. In this case, the taxpayer normally seeks to deduct the expenditure as a business expense because the three percent of AGI limitation does not apply to business expenses. In addition, a business expense is deductible whether or not the taxpayer itemizes deductions.[103]

Prior to enactment of the medical expense deduction in 1942, taxpayers sometimes sought to characterize health-related expenses as trade or business expenses, this being the only way to deduct those costs. This argument was successful for the actor whose teeth were knocked out in the course of making a movie[104] but not for the actor who bought dentures to relieve a speech impediment.[105] More recently, the Service disallowed as trade or business expenses the costs claimed by psychologists for their own psychoanalysis,[106] even though such treatment is a prerequisite for practicing psychoanalysis. The Service's position apparently was based on the view that, in such circumstances, psychoanalysis constituted preparation for a new business and therefore was nondeductible. The First and Fourth Circuits reached different conclusions on this issue.[107] Even under the latter's more restrictive view, the taxpayer might still defend the deduction as a medical expense by showing that a principal motive for the treatment was to cure a mental disorder.[108] The Service now has altered its position and permits the deduction.[109]

One recurring factual pattern—that of the nonworking wife who accompanies her husband on business trips because the husband's medical

---

T.C.M. (CCH) 712 (1958) (allowing deduction for depreciation of specially equipped automobile necessary to transport handicapped person to work). The result in *Gordon* was carefully preserved in Commissioner v. Idaho Power Co., 418 U.S. 1, 16 & n.11 (1974), which construed the words "paid out" in section 263 to include depreciation of certain equipment. The Court noted that payment for purposes of the medical expense or charitable deduction excluded depreciation, but found that line of authority irrelevant to the application of section 263.

[103] However, only enumerated expenses may be claimed when the trade or business consists of services performed by the taxpayer as an employee. *See* I.R.C. § 62(1).

[104] Reginald Denny, 33 B.T.A. 738 (1935), *nonacq.* XV-1 C.B. 30 (1936).

[105] Sparkman v. Commissioner, 112 F.2d 774 (9th Cir. 1940). *See also* Madge H. Evans, 1939 B.T.A.M. (P-H) ¶ 39,101 (denying deduction for actress' tonsillectomy). A recent ruling denied a deduction for health spa expenses incurred by a law enforcement officer who was required to be in excellent physical condition. Rev. Rul. 78-128, 1978-15 I.R.B. 7. *But see* Charles Hutchison, 13 B.T.A. 1187 (1928) (allowing deduction for stunt man's physical training exercise).

[106] *See, e.g.,* Grant Gilmore, 38 T.C. 765 (1962).

[107] Greenberg v. Commissioner, 367 F.2d 663 (1st Cir. 1966) (allowing deduction); Namrow v. Commissioner, 288 F.2d 648 (4th Cir.), *cert. denied,* 368 U.S. 914 (1961) (denying deduction).

[108] 288 F.2d at 653. *See also* David E. Starrett, 41 T.C. 877 (1964) (allowing deduction for cost of psychoanalysis for medical care despite additional benefit to taxpayer of qualifying for admission to school of psychoanalytic training).

[109] Treas. Reg. § 1.162-5(b)(3)(ii) *ex. (4)* (1967) (allowing deduction of the cost of psychoanalytic training to improve or maintain taxpayer's skills).

condition requires special attention—has sparked strong disagreements over the proper test for business expense deductibility in general.[110] In the typical case, although the wife does not contribute directly to the trade or business aspects of the trip, the taxpayer seeks to deduct her expenses under section 162. In addition to the other advantages of a business deduction noted above, the wife's food and lodging costs may be deducted under section 162 if the travel otherwise qualifies for deduction; under section 213, in contrast, the same costs usually cannot be deducted as transportation costs, even if the service constitutes medical care.[111]

The Tax Court's position on this question has been to deny deductions for the wife's travel under section 162, a position that is consistent with the more general disallowance of travel expenses for wives when their services are not directly related to the trade or business.[112] In *Preston R. Rieley,*[113] the husband's job with the Department of Labor required occasional trips away from his home office. On his doctor's advice, the husband, a diabetic, did not travel alone but had his wife join him; she understood his regimen of medication, diet and exercise. The Tax Court denied deduction of her travel expenses because they were unrelated to the husband's trade or business as a Department of Labor employee;[114] in so doing, the Tax Court cited an earlier case, *William E. Reisner,*[115] which also disallowed deductions for a wife's travel expenses. In *Reisner,* the wife had accompanied her executive husband to attend to his health while he was on a business trip. After finding that the trip was not for pleasure, the court nevertheless concluded that her expense was too remote from the husband's trade or business.[116]

These cases apparently construe the "ordinary and necessary" test for deductibility in section 162 as requiring an expense to be directly productive of goods and services in the particular trade or business. Under this view, a taxpayer may not deduct an expense related to the trade or

---

[110] The legal questions would be identical for a nonworking husband who accompanies his wife on a business trip, but all the cases to date have involved wives accompanying working husbands and that terminology will be followed.

[111] *See* note 79 and accompanying text *supra.*

[112] United States v. Gotcher, 401 F.2d 118 (5th Cir. 1968); Challenge Mfg. Co., 37 T.C. 650, 661 (1962); *see* Stratton v. Commissioner, 448 F.2d 1030 (9th Cir. 1971). *But see* United States v. Disney, 413 F.2d 783 (9th Cir. 1969) (allowing deduction for wife's travel expenses when her presence was necessary to enhance corporation's "family image").

[113] 23 T.C.M. (CCH) 449 (1964).

[114] The question of deductibility of these expenses under section 213 never arose in *Rieley* because the taxpayer had claimed the standard deduction in his return and did not claim a medical deduction in his Tax Court petition. *Id.* at 451.

[115] 34 T.C. 1122 (1960).

[116] *Id.* at 1131. As in *Rieley,* the Tax Court found that it could not rule on deductibility under section 213 because the taxpayer failed to claim a medical expense deduction on his return and also failed to raise it in his Tax Court petition. 34 T.C. at 1131-32.

Both *Rieley* and *Reisner* relied upon an early case, George W. Megeath, 5 B.T.A. 1274 (1927), in which the Board of Tax Appeals summarily denied deduction of the trans-Atlantic steamship expenses the taxpayer had paid for his wife and nurse to join him on a business trip because of his poor health.

business, even if the expense would not otherwise be incurred, unless it is a normal market component of the product.[117]

The Tax Court's position on medically motivated travel accompaniment has not prevailed in other courts. In *Allenberg Cotton Co. v. United States*,[118] the taxpayer corporation sought to deduct the travel expenses of its president, who was a diabetic, and his wife, for a business trip to Europe. The president's doctor had recommended that his wife accompany him. The district court allowed the deduction under section 162, reasoning that the trip was necessary to the business, the wife was necessary to the trip, and section 162 did not require more. Similarly, in *Quinn v. United States*,[119] another district court permitted deduction of expenses incurred by the wife of a diabetic executive to accompany him on a business trip.

In addition, in two recent rulings the Service implicitly departed from its prior litigating position. Revenue Ruling 75-316[120] held deductible under section 162 amounts paid to readers by blind professionals and semiprofessionals to assist them in their work. This ruling applied a three-part test: the taxpayer may deduct such expenses if they are necessary to the work, if they produce only incidental benefit outside the work context, and if the Code and regulations are silent as to this particular expense. The result in this instance seems unobjectionable because the expenditure has no personal enjoyment consequences. But application of this test in the next ruling led to more surprising results.

Revenue Ruling 75-317[121] discussed two situations in which handicapped individuals paid for the travel, meals and lodging of persons who assisted them on business trips. In the first situation, the taxpayer required aid only when away from home: he was confined to a wheelchair and needed help in overcoming architectural barriers, carrying baggage and traveling on an airline that does not accept unaccompanied passengers in a wheelchair. In the second situation, the taxpayer required such assistance even under regular working conditions; in addition, he required assistance for driving, daily removal and replacement of prostheses, and administration of medication. In both cases, the taxpayer's wife often performed the needed service. Applying the three-part test announced in the previous ruling, Revenue Ruling 75-317 reached opposite conclusions in the two situations. Expenses in the first case were found to be deductible under section 162; they also qualified as adjustments to gross income under section 62 as employee travel expenses, even when the taxpayer's wife was the companion. The Service reasoned that

[117] Consistent with this view, the regulations deny deduction of commuting expenses, *see* Treas. Reg. § 1.162-2(e) (1958), and the Tax Court denied deduction of child care expenses as business expenses. *See* Henry C. Smith, 40 B.T.A. 1038 (1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940).

[118] 61-1 U.S. Tax Cas. ¶ 9131 (W.D. Tenn. 1960).

[119] 77-1 U.S. Tax Cas. ¶ 9369 (D. Md. 1976). In both cases, the expenditure was not included in the income of the individuals.

[120] 1975-2 C.B. 54.

[121] 1975-2 C.B. 57.

the expenses were necessary to work and were incurred only on these trips. In the second situation, however, the amounts expended were regularly required for the taxpayer's personal activities and therefore did not meet the second branch of the test. These expenses were akin to nursing service expenses, which are expressly enumerated as medical expenses in the regulations.[122] Because payments to outsiders for providing the services would be medical expenses, this analysis precludes any deductions for food and lodging expenses of the wife, which expenses are nondeductible under section 213.

This ruling seems to be an unfortunate compromise which departs from the stricter view of business expenses taken in earlier rulings.[123] Application of the second requirement in Revenue Ruling 75-316—that the goods or services not be used in the individual's personal activities—seems particularly misdirected in the case of travel assistance expenses of the handicapped. Other applications of this test, such as to cases involving seeing-eye dogs, involve expenditures that may buy a mixture of business and personal use, not readily allocated between the two. In the case of the handicapped, allocation of cost for each trip presents no problem. If the Service sought to broaden the nature of the causality which defines business expenses of a medical nature, its resolution in Revenue Ruling 75-317 is questionable. The Service should treat similarly the travel expenses of the handicapped person who needs daily assistance and the handicapped person who needs assistance only during travel. If the touchstone is that the taxpayer incurs extra expense in taking the trip, he does so in both cases and satisfies but-for causality. If the concern is that the taxpayer may obtain an improper deduction for the personal expense of a wife joining her husband on a trip, that danger remains despite a requirement that the services not be used daily by the handicapped person.

Even the Tax Court now appears to be changing its earlier view on the nondeductibility of travel assistance under section 162. *Robert E. Drury*[124] dealt with a deduction claimed by a scholar for his expenses in publishing a scholarly article when the normal channels of publication were blocked by a rival. In the course of its opinion allowing the deduction, the Tax Court cited *Quinn* with apparent approval for the proposition that a

---

[122] Treas. Reg. § 1.213-1(e)(1)(ii) (1957).

[123] The Service formerly considered the cost of a seeing-eye dog to be a medical, not a business, expense, Rev. Rul. 57-461, 1957-2 C.B. 116, and it similarly characterized a professional singer's throat treatment expenses. Rev. Rul. 71-45, 1971-1 C.B. 51. In the same vein, the Tax Court held a lawyer's hearing aid to be a medical expense. Paul Bakewell, Jr., 23 T.C. 803 (1955). By contrast, the Service found the cost of frequent medical examinations, which were a condition of flight agents' employment, to be deductible business expenses. Rev. Rul. 58-382, 1958-2 C.B. 59. Yet the flight agent case is distinguishable from the travel assistance expense cases: all flight agents must incur the same expense so that the cost of medical examinations becomes "ordinary and necessary" to all in the business; the travel assistance expense, however, is unique to the handicapped.

[124] 36 T.C.M. (CCH) 835 (1977).

handicapped person could claim a trade or business deduction for his wife's travel expenses necessitated by the handicap.[125]

To recapitulate, the Tax Court and Service originally treated the wife's expenses as lacking the requisite business purpose because her services were not directly involved in the trade or business. Under the more recent Service view, she supplies that business purpose by making it possible for the husband to make the trip, but her services revert to personal in character if they are needed apart from the trip. *Quinn* and *Allenberg* go further. Instead of distinguishing services needed only for trips from services needed generally, these district court cases allow the deduction if the expenses would not have been incurred but for the business trip. In a private ruling,[126] the Service sought to limit *Quinn* to its facts and continues to rely on the authority of *Rieley, Reisner* and Revenue Ruling 75-317.

The earlier Service view finds support in cases and rulings that distinguish business from personal expenses in other factual settings. Judicial decisions initially treated child care expenses as personal and refused to accept but-for causality, until the result was altered by statute.[127] More recently, the Tax Court held expenses of compulsory home leave for a foreign service officer to be inherently personal in nature.[128] Commuting expenses have long been classified as personal, notwithstanding that the taxpayer would not incur them but for the need to work.[129] In *Fausner v. Commissioner,*[130] the Supreme Court affirmed the disallowance of any deduction for the cost of carrying tools to work by car in a situation in which the taxpayer concededly would have driven to work in any event. The Court added that, if additional costs are incurred to transport job-required tools, an allocation of cost between the personal commuting expense and the business expense might be feasible. A similar "additional expense" approach applies to clothes needed for a job, which are treated as business expenses only when they are unsuitable for everyday wear.[131]

---

[125] *Id.* at 838. The opinion gave no indication that this represented a change in position from *Rieley, Reisner* and *Megeath.*

[126] Private Rul. 77-43,051 (July 28, 1977).

[127] Henry C. Smith, 40 B.T.A. 1038 (1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940); *see* Feld, Deductibility of Expenses for Child Care and Household Services: New Section 214, 27 Tax L. Rev. 415, 416-18 (1972). Section 44A now allows a 20% credit for certain dependent and household expenses. I.R.C. § 44A(a).

[128] David I. Hitchcock, 66 T.C. 950 (1976). *See also* Richard Drake, 52 T.C. 842 (1969) (disallowing deduction for soldier's mandatory haircuts); Robert C. Fryer, 33 T.C.M. (CCH) 122 (1974) (same for airline pilot).

[129] Treas. Reg. § 1.162-2(e) (1958). For an analysis questioning the logic of this result, see Klein, Income Taxation and Commuting Expenses, 54 Cornell L. Rev. 871 (1969). *See also* Rev. Rul. 75-380, 1975-2 C.B. 59 (allowing deduction of costs of transporting materials necessary for work to the extent that such costs exceed regular commuting costs).

[130] 413 U.S. 838 (1973) (per curiam).

[131] *See* Treas. Reg. § 1.262-1(b)(8) (1958); Rev. Rul. 70-474, 1970-2 C.B. 34. *Compare* Donnelly v. Commissioner, 262 F.2d 411 (2d Cir. 1959) (denying deduction for clothes not specifically required as condition of employment and which might be adapted to ordinary use). *See also* Betsy Lusk Yeomans, 30 T.C. 757 (1958) (allowing deduction of cost of clothes worn by fashion coordinator during work when clothes were not suitable for personal wear).

In these cases, both the tools and the clothes are directly related to income production. *Fausner* suggests a two-step approach: first, determine whether the expense is directly related to the business activity; if so, allow the additional cost as a deduction.

As applied to the two situations in Revenue Ruling 75-317, this two-step approach suggests nondeductibility of the wife's expenses under section 162 if deductible business expenses are considered to be only those that are directly productive of goods or services. However, if one views business expenses as those that render the conduct of business possible, the additional expense approach of *Fausner* allows the costs connected with the wife's travel to be deducted in both situations, as occurred in *Allenberg* and *Quinn*. On balance, the Service's initial view appears more consistent with prior section 162 authority, which would treat the transportation expenses and food and lodging expenses of third parties as deductible medical expenses.

VI. Repairs and Improvements

Conventional physical health care presents little practical problem for deduction. The distinction between care for a particular ailment and expenses for general well-being has served well in practice to minimize controversy. Surprisingly little litigation arises over memberships in health spas, expenses for massages and the like, which may have both general good effect and particular impact on a specific ailment.[132] Self-prescription has not fared well, at least when the treatment has nonmedical dimensions. One case denied a deduction for dancing lessons as a treatment for varicose veins.[133] Similarly, the Service's ruling as to special diets, permitting a deduction for excess costs over normal food, was conditioned on a physician's prescription.[134] And the famous ruling granting a deduction for clarinet lessons to remedy a malocclusion would have been unthinkable without the recommendation of an orthodontist.[135] The line apparently has been to disallow deductions for idiosyncratic personalized expenses, without foreclosing unconventional medical treatment.[136]

Expenses for beautification are usually considered personal expenses,

---

[132] *See* Rev. Rul. 55-261, 1955-1 C.B. 307, 310 (health spa fees are deductible only when treatment is prescribed by physician and substantiated in writing as necessary to medical care).

[133] Adler v. Commissioner, 330 F.2d 91 (9th Cir. 1964).

[134] Rev. Rul. 55-261, 1955-1 C.B. 307, 312. *See also* notes 73-77 and accompanying text *supra*.

[135] Rev. Rul. 62-210, 1962-2 C.B. 89. *See also* Ann Coopersmith, 30 T.C.M. (CCH) 1203 (1971).

[136] The Service thus ruled that health treatment, even if not recognized by the state nor provided by a licensed practitioner, constituted medical care. Rev. Rul. 72-593, 1972-2 C.B. 180 (permitting deduction of acupuncture expenses); Rev. Rul. 63-91, 1963-1 C.B. 54 (proscription against deduction for illegal expenses does not extend to illegality solely by reason of practitioner's failure to obtain license).

unless incurred in a conventional medical context. Thus, cosmetics are not deductible,[137] but cosmetic surgery is.[138] And in one situation in which a doctor prescribed a wig for the mental health of a girl who had lost her hair due to disease, the Service ruled the expense deductible.[139] These distinctions seem sensible as ruling out deductions for common personal expenses but without examining too closely the motive and purpose of a particular medical procedure performed in accordance with usual hospital and physician practice. In like fashion, the taxpayer bears no tax duty to mitigate his medical expenses. He is not required to accept the least costly medical treatment, even if the extra cost is expended primarily for personal comfort rather than quality of health care. The full cost of a private hospital room is a medical expense even if a cheaper semi-private room would have done just as well for the patient's medical needs.[140] This rule undoubtedly permits some deduction for expenditures that may be regarded as primarily personal, but the rule is an administrative necessity. It avoids in each instance a potential dispute over cost allocations or quality comparisons between the health care actually purchased and hypothetical care then available.

More problematic than expenditures for physical treatment are those made for mental illness and related problems. Traditional psychiatric or psychological treatment is a medical expense, as might be expected.[141] But when the therapy extends to activities normally considered recreational, or to common personal items or services, the courts and the Service have been more skeptical.[142] The Tax Court disallowed a deduction for "milieu" therapy, in which the patient was encouraged to make purchases of furniture, remodel a cottage and incur comparable expenses.[143] Similarly, dancing lessons prescribed as therapy for an emotionally disturbed person were not deductible.[144] In another case, the court held that, notwithstanding the advice of the taxpayer's psychiatrist that his depression would probably continue as long as he was married, the cost of a divorce was not a medical expense.[145] Nor is the cost of marriage counsel-

[137] Treas. Reg. § 1.213-1(e)(2) (1957).

[138] Rev. Rul. 76-332, 1976-2 C.B. 81.

[139] Rev. Rul. 62-189, 1962-2 C.B. 88.

[140] *But cf.* Rev. Rul. 62-210, 1962-2 C.B. 89 (limiting deduction of the cost of clarinet lessons designed to remedy a malocclusion to that amount needed for treatment).

[141] Rev. Rul. 55-261, 1955-1 C.B. 307.

[142] For example, although the Service ruled that amounts paid to Christian Scientist practitioners were deductible as medical expenses, Rev. Rul. 55-261, 1955-1 C.B. 307, authorities have not extended this line very far. The Tax Court denied deductions for a trip to Lourdes, *see* Vincent P. Ring, 23 T.C. 950 (1955), and for Scientology processing. Donald H. Brown, 62 T.C. 551, *aff'd per curiam*, 523 F.2d 365 (8th Cir. 1975).

[143] Frank M. Rabb, 31 T.C.M. (CCH) 476 (1972). See also Wade Volwiler, 57 T.C. 367 (1971) (items must be used "primarily" for medical purposes).

[144] John J. Thoene, 33 T.C. 62 (1959) (doctor recommended a general program of exercise and social activity, including dancing); *cf.* Leon S. Altman, 53 T.C. 487 (1969) (emphysema victim's deduction for transportation costs to golf course disallowed); Private Rul. 78-03,037 (1978).

[145] Joel H. Jacobs, 62 T.C. 813 (1974). The Tax Court added that the taxpayer had failed to show that but for the depression he suffered he would not have petitioned for divorce.

ing deductible, on the ground that the expense is made to improve the marriage and not to alleviate or treat a mental disease or defect.[146] But psychiatric treatment for sexual inadequacy or incompatability is treated as medical care because it affects a function of the body.[147] While the distinction is one of degree, it is analogous to that made in the physical area between expenses for the taxpayer's general well-being and those made for a specific problem.

For capital items, the regulations allow a deduction for expenditures in the year of payment, less any increase in value to other assets.[148] This rule eliminates most questions as to the deductibility of prostheses, wheelchairs and similar capital investments suited only to the ill or handicapped.[149] Thus, a taxpayer may deduct the excess cost of adapting an automobile to accommodate a wheelchair passenger.[150] The alternative—to require a taxpayer to distinguish repairs from improvements, to capitalize the cost of the latter, and to depreciate the cost over the useful life of the asset—would seem to burden unduly the "relief" to be given by the deduction. In general, the resultant matching of cash payment and deduction seems appropriate. The capital expenditure must be for the primary purpose of medical care: for example, when the primary purpose of the expenditure is to help the patient commute to and from work, an expense normally regarded as personal, the cases and rulings consistently have denied the deduction.[151] Only when the work itself is therapeutic will commuting expenses be deductible as medical expenses.[152]

Capital improvements susceptible to greatest possible abuse are those made to property which might serve nonmedical purposes, like those attached to a residence. The regulations now allow a deduction in the full amount of the excess of cost over increased value to other property.[153]

Not all legal fees expended for "medical" reasons are nondeductible. When a patient refused to accept therapy for a mental disorder, the legal fees expended to establish a guardianship as a prerequisite to treatment were deductible. Gerstacker v. Commissioner, 414 F.2d 448 (6th Cir. 1969); Rev. Rul. 71-281, 1971-2 C.B. 165.

[146] Rev. Rul. 75-319, 1975-2 C.B. 88.

[147] Rev. Rul. 75-187, 1975-1 C.B. 92 (cost of treatment was held deductible but costs of lodging at a nearby hotel were held nondeductible).

[148] Treas. Reg. § 1.213-1(e)(1)(iii) (1974). *See* Riach v. Frank, 302 F.2d 374 (9th Cir. 1962).

[149] Rev. Rul. 67-76, 1967-1 C.B. 70 (permitting the taxpayer to deduct the item's maintenance and operating costs as well); Rev. Rul. 55-261, 1955-1 C.B. 307, 308.

[150] Rev. Rul. 70-606, 1970-2 C.B. 66. *See* Private Rul. 77-30,014 (1977).

[151] Donnelly v. Commissioner, 262 F.2d 411 (2d Cir. 1959); Ann Coopersmith, 30 T.C.M. (CCH) 1203 (1971); Rev. Rul. 66-80, 1966-1 C.B. 57.

[152] Misfeldt v. Kelm, 52-2 U.S. Tax Cas. ¶ 9495 (D. Minn. 1952); Sanford H. Weinzimer, 17 T.C.M. (CCH) 712 (1958).

[153] For example, a taxpayer with a coronary condition may deduct the cost of installing an elevator in his home, less the increase in value to the house. This approach represents a change from that of regulations first promulgated under the 1954 Code, which permitted a deduction only for capital items not attached to the property and allowed no deduction if the improvement enhanced the value of other property. Treas. Reg. § 1.213-1(e)(1)(iii), T.D. 6279, 1957-2 C.B. 190. The Service litigated this position with little success outside the Tax Court. In Hollander v. Commissioner, 219 F.2d 934 (3d Cir. 1955), the Third Circuit reversed the Tax Court and permitted a deduction for a stair elevator. The taxpayer, who had suffered a coronary thrombosis, had no bath or bedroom on the first floor of her home.

Additionally, the taxpayer must show that the primary purpose for the expenditure was medical. The more common a capital item, however, the harder it becomes for a taxpayer to establish a medical purpose in contrast to a normal living motivation. In some cases, taxpayers deducted the cost of installing air conditioning. When the taxpayers established a need based on allergic reaction to dust, cardiac condition, or special respiratory condition, the deduction was allowed, but not otherwise.[154] Other examples of improvements sometimes permitted include swimming pools[155] and special plumbing fixtures.[156]

The problem that an expenditure may provide a mixture of personal gratification and medical treatment is aggravated as to capital improvements because of the large amount that may be deducted in a single year.[157] The three percent of AGI limitation is unlikely to eliminate this problem, as it frequently does with small expense items of dubious character. The limitation contained in the regulations—that enhancement in value of the taxpayer's property be subtracted in computing the medical

---

Although the Tax Court had found that the purpose of the improvement was to prevent her from doing any further damage to her heart, it denied the deduction because of the inclinator's capital nature. For similar rulings, see Berry v. Wiseman, 174 F. Supp. 748 (W.D. Okla. 1958); Post v. United States, 150 F. Supp. 299 (N.D. Ala. 1956); Snellings v. United States, 149 F. Supp. 825 (E.D. Va. 1956); Alexander v. United States, 57-1 U.S. Tax Cas. ¶ 9335 (W.D. Tenn. 1956); *cf.* Estate of Hayne, 22 T.C. 113 (1954) (cost of installing elevator for stroke victim not deductible even though elevator did not increase value of property). *But see* Rev. Rul. 59-411, 1959-2 C.B. 100 (allowing deduction for permanent capital improvement to extent that it does not increase value of other property). In Riach v. Frank, 302 F.2d 374 (9th Cir. 1962), the taxpayer installed a "Hil-A-Vator" on his residential property to transport him up and down a steep hillside separating the street level and the shore of Lake Washington. His heart condition prevented him from using the lower two thirds of his property without this device. The Ninth Circuit rejected the argument that in the prior cases the improvement was installed for essential living functions, finding it reasonable for the taxpayer to expect to go from one part of his property to another. Because the Hil-A-Vator was installed primarily for mitigation and prevention of disease, it was a medical expense. The court rejected the government's stance against deduction of capital item expenditures, but it held that any enhancement in value was in the nature of "compensation" for the expenditure and nondeductible. The excess over the enhancement could be deducted in full. Shortly after the decision in *Riach,* the present regulation, reaching similar results, was made final. T.D. 6604 (1962).

[154] Raymon Gerard, 37 T.C. 826 (1962), *acq.* 1966-2 C.B. 5. *But see* Wallace v. United States, 439 F.2d 757 (8th Cir. 1971); Wade v. United States, 61-2 U.S. Tax Cas. ¶ 9709 (D. Ariz. 1961); Rev. Rul. 76-80, 1976-1 C.B. 71 (vacuum cleaner not deductible). In John L. Seymour, 14 T.C. 1111 (1950), the taxpayer was barred from deducting the cost of installing an oil furnace to ease an allergy to coal dust and ashes. *See* Frank S. Delp, 30 T.C. 1230 (1958).

[155] Mason v. United States, 57-2 U.S. Tax Cas. ¶ 10,012 (D. Hawaii 1957) (hydrotherapy prescribed for polio victim). *But see* Rev. Rul. 54-57, 1954-1 C.B. 67 (general health improvement).

[156] Rev. Rul. 70-395, 1970-2 C.B. 65 (handicapped person). The cost of a special device to add fluoride to home drinking water is deductible when installed on a dentist's advice, Rev. Rul. 64-267, 1964-2 C.B. 69, but the cost of distilled water, purchased without medical advice, to avoid drinking fluoridated water, is not. Rev. Rul. 56-19, 1956-1 C.B. 135.

[157] For years prior to 1967, the statute imposed a maximum dollar limit on the medical expense deduction. For 1966 the limit was $5000 per exemption claimed on the return, but in no event more than $10,000 for a single individual and $20,000 for a joint return. I.R.C. § 213(c) (repealed by Pub. L. No. 89-97, § 106(d)(1), 79 Stat. 336 (1965)).

expense—doubtless serves to minimize abuse. However, people who do not have medical problems also frequently pay more for an improvement than the resultant increase in value to the property, and this element of essentially personal expenditure is beyond the reach of the regulation. In addition, a danger exists that the capital improvement, although currently intended primarily for a medical purpose, in fact will be used for recreational or other nonmedical purposes in the future. Ordinarily, when a capital item is purchased for business use, we need not consider the future uses of the property: determinations concerning the deductions attributable to the property are made on a year-by-year basis. By contrast, the determination for medical expenses must be made in the first year. Although the availability of the improvement for future nonmedical use is accounted for to some extent by subtracting the enhancement in value to the property, this adjustment cannot take all such use into consideration. Finally, as noted earlier, the taxpayer normally has no tax duty to mitigate expenses of medical care.

These problems are well illustrated in *Collins H. Ferris.*[158] Because the taxpayer's wife was required to swim twice daily to remedy a painful spinal condition, the Ferris family built a swimming pool in their home. Of a total cost of $194,000, they spent $22,500 for special touches, such as a sauna and ceramic tile surrounding the pool. The taxpayer claimed a deduction of $86,000, after subtracting what he estimated to be the increased value to the house.[159] While the Service conceded the appropriateness of a swimming pool as medical care in this case, it contended that a pool suitable for the wife's needs could have been built for $70,000, resulting in deductible medical expenses of $39,000.[160] The taxpayer's extra cost should be disallowed as personal, the Commissioner argued, because it was incurred chiefly to cause the pool to conform with the architecture of the house. The Tax Court, however, allowed most of the deduction. Having determined that the primary purpose of the pool's

---

[158] 36 T.C.M. (CCH) 765 (1977).

[159] The taxpayer computed the deduction as follows:

	[figures rounded to nearest $100]
cost of construction	$177,000
architect/engineer's fees	17,700
pool cost	$194,700
(nonessentials)	(22,500)
medical care portion	$172,200
(increase in value to house)	(86,200)
deductible medical expense	$ 86,000

[160] The Service's computation of the deduction based on the more modest swimming pool is as follows:

pool cost	$70,000
(increase in value to house)	(31,000)
deductible medical expense	$39,000

construction was medical, it held that the full amount of the expenditure, less only improvement value, qualifies for deduction. Just as he has no obligation to choose the least expensive medical services, the taxpayer may buy a better-than-minimum capital item. Any enhancement in property value must be subtracted from the expenditure, which, in the court's view, adequately protects the general revenue. Thus, if the taxpayer had installed the pool represented by the Commissioner's bare-bones figure, adjusted for expenditures previously omitted, he would have spent $80,000. According to expert testimony, the value of the house would not have been enhanced at all by such a pool, so the full amount would have been a medical expense. On the basis of the taxpayer's approach, and after relatively small adjustments, the amount actually permitted as a deduction was $82,000.[161]

The latter point hardly establishes that the revenue is adequately protected by the Tax Court's approach, resting as it does on findings based on appraisal evidence regarding both the value actually added to the house and the value that might have been added by a hypothetical pool not built. Even the difference of $2,000 on the court's calculation arguably represents a degree of personal enjoyment that section 213 was not intended to subsidize. Moreover, as with any capital investment, the taxpayer may use borrowed money for the expenditure.[162] This use of leverage permits, as elsewhere, a large deduction for a small current cash expenditure: the medical deduction tax shelter. The timing advantage not only confers the usual benefits of tax deferral, but also reduces the adverse impact of the three percent floor: this limitation applies only once, in the year of purchase, rather than in each year the medical benefits are enjoyed or the debt payments are made. Thus, taxpayers in higher brackets happily bunch payments in a single year.

A similar danger to the revenue arises from any effort to bunch medical expense payments or otherwise to shift the year in which the deduction may be claimed. In requiring that the expense be "paid" during the taxable year, the statute seems to permit some shifting when the expenses are incurred in another year. However, in *Robert S. Bassett,*[163] the Tax Court denied a deduction in an earlier year for a taxpayer's prepayment of the cost of hospital services to be rendered in a later year. The court found the payment to be a deposit against expenses yet to be incurred rather than a payment for an expense already giving rise to an obligation to pay. But a nonrefundable advance payment by the taxpayers to an institution, to assure acceptance of their handicapped daughter for lifetime care upon their deaths or other inability to care for her, was ruled

---

[161] This medical expense is the largest I have found for a single capital item in the reported cases. *See* note 157 *supra.*

[162] A taxpayer conceivably might finance any medical care by borrowing, but the possibility of securing the loan with the purchase arises only when the expenditure buys a capital asset.

[163] 26 T.C. 619 (1956).

by the Service to be a medical expense in the year of payment.[164] As with the capital expenditure, the Service appears willing, provided that the obligation has been incurred, to permit some bunching of payments in order to avoid the recordkeeping and other complications of spreading the tax effects over several years.[165]

VII. Old Age

Aging frequently brings its own special wrinkles to the medical expense problem. One often litigated question concerns whether a taxpayer may claim deductions for health care expenses of an elderly parent or other relation. The taxpayer may do so if the patient is a dependent of the taxpayer—a person bearing a stated relationship to the taxpayer and having more than half of his support provided by the taxpayer during the taxable year.[166] Litigation usually focuses upon the support test. The tax concept of "support" is not well defined,[167] and the Code itself provides little elucidation. Moreover, when there are competing sources of funding to provide support—as when the elderly person has some of his own income, or other siblings of the taxpayer provide funds—the determination whether one particular taxpayer provided more than half the support may be difficult. The statute now provides some guidance on the latter question by permitting two or more taxpayers who together contribute over half the support to determine by agreement which of them will claim the deduction.[168] In this manner, taxpayers obtain certainty in planning, and the Commissioner does not risk two taxpayers claiming the same individual as a dependent.

If a taxpayer incurs significant expenses for an elderly parent's medical care; deductibility of the expense may be a considerable benefit, far exceeding in importance the additional personal exemption. But the expansion of public programs of support for the needy, as well as private and public medical insurance programs, may push the taxpayer's percentage of support of his parent to less than half if these other sources are

---

[164] Rev. Rul. 75-303, 1975-2 C.B. 87; Rev. Rul. 75-302, 1975-2 C.B. 86.

[165] A useful comparison is Rev. Rul. 58-303, 1958-1 C.B. 61, in which, as a condition of his father's admittance, a son paid to a religious institution operating a nursing home a lump sum amount equal to one year's maintenance multiplied by the father's life expectancy. In determining whether the son provided over half the father's support, so as to render the father a dependent under section 152, the Service required the payment to be amortized over the father's life.

[166] I.R.C. § 152(a). The taxpayer may claim an additional personal exemption for a dependent parent only if the latter earned less than $750 of gross income in the year. I.R.C. § 151(e). The gross income requirement does not carry over to the medical expense deduction.

[167] *See* Comment, *Turecamo v. Commissioner:* Treatment of Benefits Received Under the Medicare Program for Purposes of the Dependency Exemption Support Test, 126 U. Pa. L. Rev. 673 (1978). *See also* I.R.C. § 677(b); Rev. Rul. 59-357, 1959-2 C.B. 212; Rev. Rul. 56-484, 1956-2 C.B. 23.

[168] I.R.C. § 152(c). Similar rules permit divorced or separated parents to allocate dependent status. *See* I.R.C. § 152(e).

taken into account. In *Turecamo v. Commissioner,*[169] the taxpayers provided food, lodging, clothing and entertainment for Mrs. Turecamo's mother, Mrs. Kavanaugh. During the year in question, Mrs. Kavanaugh was hospitalized for two months. Her total bill amounted to $11,096, $10,435 of which was paid by basic Medicare benefits (part A benefits).[170] The taxpayers paid the balance and other medical expenses, which amounted to $3531. They deducted this amount and also claimed a personal exemption for Mrs. Kavanaugh as a dependent. The Commissioner disallowed these deductions, arguing that the part A benefits constituted part of Mrs. Kavanaugh's support for that year and that the taxpayers had therefore provided less than half her support. The Tax Court and the Second Circuit held for the taxpayers.

Both courts were faced with two lines of decision that converged in *Turecamo.* The Tax Court had held that welfare payments and other benefits of a social welfare nature, although excluded from the recipient's gross income, counted as support provided by the recipient for himself.[171] The Service had ruled that part A basic Medicare benefits were of this character and must be included in the support computation as having been provided by the recipient.[172] On the other hand, health insurance had been consistently counted toward support when premium payments were made but not when the insurance company paid out proceeds.[173] Given this background, the Service ruled that supplementary Medicare benefits (part B benefits) counted toward support when the premiums were paid, but the part B benefits themselves should be excluded from support.[174] Both the Tax Court and the Second Circuit rejected the public welfare benefits argument and instead analogized part A payments to insurance. In reaching this conclusion, the Second Circuit found it persuasive that the program spread risks among the class of beneficiaries. Moreover, the court concluded that large, random payments should not be allowed to distort the relationship between the Turecamos and Mrs. Kavanaugh; the *Turecamo* result also facilitates planning with a view to tax consequences.[175]

Once the taxpayer establishes the dependency relationship, he still must show that the expense is for medical care. Sometimes the care is provided at home. The expense of a companion or housemaid is deemed purely

[169] 554 F.2d 564 (2d Cir. 1977), *aff'g* 64 T.C. 720 (1975).

[170] *See* Social Security Act, subch. XVIII, 42 U.S.C. §§ 1395-1395pp (Supp. V 1975).

[171] Helen M. Lutter, 61 T.C. 685 (1974), *aff'd per curiam,* 514 F.2d 1095 (7th Cir.), *cert. denied,* 423 U.S. 931 (1975); Eddie L. Carter, 55 T.C. 109 (1970), *acq.* 1971-2 C.B. 2; Rev. Rul. 71-468, 1971-2 C.B. 115.

[172] Rev. Rul. 70-341, 1970-2 C.B. 31, 32.

[173] Mawhinney v. Commissioner, 355 F.2d 462 (3d Cir. 1966) (per curiam), *aff'g* 43 T.C. 443 (1965); Rev. Rul. 64-223, 1964-2 C.B. 50. *But see* Samples v. United States, 226 F. Supp. 115 (N.D. Ga. 1963) (medical bills covered by insurance are still includable in computation to determine whether taxpayer supports brother).

[174] Rev. Rul. 70-341, 1970-2 C.B. 31, 32.

[175] There is no risk under the *Turecamo* result that the Treasury might be whipsawed by duplicative dependency claims, because only one taxpayer will be able to claim that he provided more than half the support under the court's computation.

personal,[176] while expenses for nursing care, including board, are treated as medical expenses.[177] In a few instances, the Tax Court has allowed a deduction even when the person who provides the care is a relative of the taxpayer.[178]

Nursing home care presents further definitional problems. Nursing homes often provide food, lodging and other benefits normally treated as nondeductible personal expenses. The regulations call for a factual determination of whether and to what extent care in such an institution should be treated as a medical expense.[179] If the availability of medical care in the institution is a principal reason for the individual's presence there, all costs incidental to providing such care, including meals and lodging, are deductible; if the individual's condition is such that the availability of medical care is not a principal reason for his presence in the institution, only that portion of the cost directly attributable to nursing or other conventional medical treatment qualifies for a deduction. Medical care need only be one of the "principal" reasons. In *W.B. Counts,*[180] the Commissioner sought to disallow the cost of placing the taxpayer's father in a nursing home after the mother had been admitted to recover from a stroke, on the ground that the father's presence was motivated by a desire to be near his wife. The taxpayer successfully defended the deduction by showing that the father's condition confined him to bed and required nurse supervision. But in *John Robinson,*[181] the taxpayer was unable to live alone and care for himself. The principal reason for residing at the nursing home was to preserve his general dignity in his remaining years. The Tax Court held this insufficient to warrant a medical deduction.

Even if the cost of the nursing home is not fully deductible as a medical expense, the specific portion allocable to medical care may be claimed. The taxpayer, however, has the burden of showing what part of the general fee is attributable to this expense.[182] The same rule applies to payment of a lump sum fee to the retirement home: the expenditure is deductible if the home provides a separate statement which, based on prior experience, allocates a portion of the fee to provision of medical care.[183]

In some instances, taxpayers have successfully claimed charitable con-

[176] *See* Rev. Rul. 58-339, 1958-2 C.B. 106 (portion of housemaid's salary attributable to nursing care may be deducted). Note that, if the expenses are necessary to enable the taxpayer to be gainfully employed, they may be taken as a credit under section 44A if the parent is incapable of caring for himself.

[177] Treas. Reg. § 1.213-1(e)(1)(ii) (1957).

[178] Walter D. Bye, 31 T.C.M. (CCH) 238 (1972) (niece); Estate of Myrtle P. Dodge, 20 T.C.M. (CCH) 1811 (1961) (daughter).

[179] Treas. Reg. § 1.213-1(e)(1)(v) (1957). Compare the treatment of special schools, discussed at text accompanying note 51 *supra.*

[180] 42 T.C. 755 (1964).

[181] 51 T.C. 520 (1968).

[182] *See* James J. Matles, 23 T.C.M. (CCH) 1489 (1964); Rev. Rul. 67-185, 1967-1 C.B. 70.

[183] Rev. Rul. 75-302, 1975-2 C.B. 87. *But see* Rev. Rul. 68-525, 1968-2 C.B. 112 (portion of fee allocable to construction of an infirmary is not deductible, because such construction is not medical expense of taxpayer).

tribution deductions for lump sum payments to nursing homes in which the taxpayers or their relatives will live. In such situations the home is an exempt charity, and the relevant question becomes whether the payment was made in exchange for the home's promise to support the elderly person, barring a deduction, or was a gift, proceeding out of "disinterested generosity."[184] The Eighth Circuit allowed such a deduction when the payment was an unconditional endowment gift without any promise of lifetime care; it reversed as clearly erroneous a finding by the Tax Court that the motive for the gift was admission to the home and receipt of other benefits.[185] But, more recently, the Seventh Circuit held nondeductible the payments made by a son under a founder's gift plan, on the ground that the payment was to gain admittance for the taxpayer's mother.[186] Similarly, when a charity requests a gift from an applicant based on the nature of the accommodations applied for, the Service will consider the payment nondeductible as a charitable contribution.[187]

VIII. Death

Medical expenses incurred for a decedent but paid out of his estate may be deducted as if the expense had been paid by the decedent when incurred. This special treatment accorded by section 213(d) is doubly conditioned: the payment must be made by the estate within a one-year period, and the estate must waive any claim to deduct the expenses for estate tax purposes as administration expenses. Survivors thus may determine whether an income tax deduction or an estate tax deduction is more beneficial.[188]

All definitional problems concerning whether an expense is "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,"[189] end, quite reasonably, upon death. Therefore, all attempts to deduct burial or gravestone costs have been,[190] and should continue to be, rejected by the courts.

IX. Conclusion

The difficult medical expense deduction cases have implicated three often conflicting goals. First, no deduction of personal expenditures in the

---

[184] Duberstein v. Commissioner, 363 U.S. 278, 285 (1960) (defining gift for purposes of I.R.C. § 102) (quoting Commissioner v. LoBue, 351 U.S. 243, 246 (1956)).

[185] Wardwell's Estate v. Commissioner, 301 F.2d 632 (8th Cir. 1962); *cf.* Dowell v. United States, 553 F.2d 1233 (10th Cir. 1977) (connection between taxpayer's "sponsorship gift" to retirement home and later receipt of residential benefits from home was not so strong as to bar deductibility of gift under I.R.C. § 170).

[186] Sedam v. United States, 518 F.2d 242 (7th Cir. 1975), *rev'g* 74-1 U.S. Tax. Cas. ¶ 9442 (S.D. Ind. 1974). *See* Rev. Rul. 58-303, 1958-1 C.B. 61.

[187] Rev. Rul. 72-506, 1972-2 C.B. 106.

[188] *See* Rev. Rul. 77-357, 1977-40 I.R.B. 16.

[189] I.R.C. § 213(e)(1)(A).

[190] Estate of Carolyn W. Libby, 14 T.C.M (CCH) 699 (1955).

guise of health care should be permitted. Second, the system should operate with relative neutrality and should not favor some kinds of health care over others. Third, the medical deduction should entail a minimum of recordkeeping and accounting. The cases and rulings establish a clear middle ground between these sets of claims. The Tax Court's "but for" test, which looks to the nature of the medical exigency and the additional expenditures it requires, provides a useful way to distinguish personal from medical expenses. Similarly, the Service's rule as to capital expenditures does rough justice in allowing some deduction for an expenditure that is occasioned by health care needs but also has personal enjoyment or enhancement of value aspects. Unusual medical care comes within the deduction when validated in some way beyond personal idiosyncracy. In general, these rules tend to favor administrability over undue nicety in scrutinizing the personal and the medical components of a situation. Thus, for example, they do not require mitigation of expenses. Courts and the Service have not refined the deduction by allocating between pleasure and health care elements within a particular expenditure.

These results have their costs. One cost is to discriminate against the deductibility of care arising in an everyday setting rather than an institutional one, as illustrated by the cases involving special schools for children with mental or emotional problems. The increased emphasis within the medical profession on preventive medicine may subject this policy to new scrutiny. Another cost is to allow deduction for items that include some clear elements of personal nonmedical enjoyment, without allocating between the different elements. This problem is exemplified in the capital improvement rules. The Service and the courts have tended to tolerate these costs in order to administer the deduction without elaborate recordkeeping or evidentiary requirements. In the main, a workable balance has been struck.

This does not suggest, however, that the tax definition of medical expenditure need not be reviewed with a critical legislative eye. I noted at the outset that it was possible to characterize the deduction as either an appropriate adjustment to the income tax or an indirect subsidy to alleviate the cost of medical care. In analyzing administration of the deduction, a choice between these views was unnecessary because case law resolution of difficult cases was the same under both. But in making legislative choices, the subsidy view provides us with a perspective for possible changes in the statute. For example, it implicitly directs us to compare other federal subsidy systems for health care. Such a comparison discloses that the medical expense deduction provides support for many expenditures not treated as reimbursable medical expenses by other subsidy arrangements.[191] These expenditures are especially suspect because

[191] The Administration's proposal to change the percentage of AGI subtracted in computing the deduction, *see* note 3 *supra*, would not directly address this kind of problem. However, H.R. 12078, 95th Cong., 2d Sess. (1978), would alter the medical care definition contained in I.R.C. § 213(e)(1) by adding the following phrase to subparagraph (A): "but

they involve significant personal enjoyment attributes. Private schools, travel to another city to visit a particular physician, unusual foods, a companion on trips and a swimming pool may be deducted—and hence partly supported by tax funds—if sufficiently related to medical need. They are not reimbursed or subsidized in direct assistance programs. Indeed, the frontier issues for those subsidy programs are more basic than those litigated under the medical deduction. Medicaid recipients recently litigated their entitlement to a dilation and curettage or reimbursement for eyeglasses.[192] To the extent that characterization of the tax deduction as a subsidy reminds us of these differences, it may be useful in shaping statutory changes.

---

only if such amounts are paid for property or services of a type normally used primarily for such a purpose." This limitation, which apparently is intended to reverse the result in Collins H. Ferris, 36 T.C.M. (CCH) 765 (1977); *see* text accompanying note 158 *supra*, would cast doubt upon the deductibility of many expenses now treated as medical care, particularly those under the "but for" rule. Examples are education expenses, *see* C. Fink Fischer, 50 T.C. 164 (1968), *acq.* 1969-2 C.B. xxiv; text accompanying note 61 *supra*, special diets, *see* text accompanying note 73 *supra*, and travel accompaniment, *see* Rev. Rul. 75-317, 1975-2 C.B. 57; text accompanying note 121 *supra*. The *Ferris* problem can be addressed more narrowly, as by requiring capitalization and depreciation for large capital expenditures.

[192] Medical Society of the State of New York v. Toia, 560 F.2d 535 (2d Cir. 1977); White v. Beale, 555 F.2d 1146 (3d Cir. 1977).