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To: Scott Sinder, Washington

From: Thomas Veal, Chicago

Subject: Tax Consequences of Employer Reimbursement of Cost of Travel to Obtain a Legal Abortion

This memorandum discusses whether reimbursement by an employer's health plan of the cost of a beneficiary's transportation to a facility at which she can legally obtain an abortion is excludible from gross income under section 105 of the Internal Revenue Code.

Summary

1. "Medical care" includes "transportation primarily for and essential to medical care". The IRS has held that legal abortions constitute "medical care". A pre-*Roe* private letter ruling concluded that transportation to a state where an abortion could be legally performed qualified as "essential to medical care".

2. Under Tax Court precedents, "transportation" includes both the cost of travel to the site of a medical procedure and meal and lodging expenses along the way (but not meals and lodging after arrival at the site). The IRS has never formally acquiesced in that position, and it is not reflected in its current publication on medical expense deductions. There are strong arguments that the Tax Court was wrong.

3. Not included in "medical care" are meals and lodging after arrival at the facility, other than those provided by the facility itself, with an exception (limited to $50 a night and rarely applicable, since abortions seldom involve an overnight stay) for non-hospital lodging if the care is provided by a physician at a licensed hospital or equivalent facility.

4. The transportation expenses of someone who accompanies a patient may constitute "medical care", but only if she could not have made the trip alone and the companion's presence was "indispensable". The limited lodging deduction is available for the companion's lodging.

5. The phrase "essential to medical care" implies that the taxpayer doesn't have an unlimited choice of sites at which to receive the care and that her selection should be based on medical considerations. There is, however, very little authority on this point.

One should bear in mind that whatever principles apply to abortion-related transportation expenses will also apply to other medical travel. The current rules were fashioned to combat perceived abuses, so that the IRS has little incentive to loosen them.

Discussion

Section 105 of the Internal Revenue Code governs the exclusion from gross income of medical expense reimbursements by an employer's health plan for its employees. Reimbursements paid by the employer or attributable to employer contributions are excluded –

> if such amounts are paid, directly or indirectly, to the taxpayer to reimburse the taxpayer for expenses incurred by him for the medical care (as defined in section 213(d)) of the taxpayer, his spouse, his dependents (as defined in section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof), and any child (as defined in section 152(f)(1)) of the taxpayer who as of the end of the taxable year has not attained age 27". IRC §105(b).

The standard for exclusion from gross income is thus the same, with a few differences that are not pertinent here, as for the deductibility of medical expenses by an individual taxpayer.[1]

The IRS has held that legally performed abortions are a form of "medical care". Rev. Rul. 73-201, 1973-1 C.B. 140. "Amounts expended for illegal operations or treatments are not deductible." Treas. Reg. §1.213-1(e)(1)(i).

"Medical care" includes, in addition to direct treatment, "transportation primarily for and essential to medical care". IRC §213(d)(1)(B); Treas. Reg. §1.213-1(e)(1)(i). The regulations elaborate on the transportation exclusion:

> Expenses paid for transportation primarily for and essential to the rendition of the medical care are expenses paid for medical care. However, an amount allowable as a deduction for "transportation primarily for and essential to medical care" shall not include the cost of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a taxpayer go to a warm climate in order to alleviate a specific chronic ailment, the cost of meals and lodging while there would not be deductible. On the other hand, if the travel is undertaken merely for the general improvement of a taxpayer's health, neither the cost of transportation nor the cost of meals and lodging would be deductible. If a doctor prescribes an operation or other medical care, and the taxpayer chooses for purely personal considerations to travel to another locality (such as a resort area) for the operation or the other medical care, neither the cost of transportation nor the cost of meals and lodging (except where paid as part of a hospital bill) is deductible. [Treas. Reg. §1.213-1(e)(1)(iv)][2]

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[1] The section 105 exclusion, unlike the section 213 deduction, is not limited to expenditures in excess of ten percent of adjusted gross income. The modification of the definition of "dependent" allows employer plans to treat some persons as dependents who are excluded for other purposes, *viz*., married dependents, dependents of persons who are themselves claimed as dependents on another taxpayer's return, and "qualified relatives" whose income exceeds the statutory ceiling for that status.

[2] Treas. Reg. §1.213-1(e)(1)(v) discusses meals and lodging included in hospital bills. It is unlikely to be pertinent to abortion procedures, unless complications necessitate hospital care after the abortion.

Regulations and rulings under the Internal Revenue Code of 1939 allowed a deduction for "travel" to obtain medical treatment, which the IRS interpreted very liberally. The 1954 Code included the current statutory deduction for the cost of "transportation". In *Commissioner v. Bilder*, 369 U.S. 499 (1962), the Supreme Court held that the purpose of the new provision (then section 213(e), now section 213(d)) was "to deny deductions for all personal or living expenses incidental to medical treatment other than the cost of transportation of the patient alone", *id*. at 502. The Court relied primarily on the following language in the House and Senate committee reports:

> Subsection (e) defines medical care to mean amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of diseases or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or for transportation primarily for and essential to medical care. The deduction permitted for "transportation primarily for and essential to medical care" clarifies existing law in that it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductible but not his living expenses while there. However, if a doctor prescribed an appendectomy and the taxpayer chose to go to Florida for the operation not even his transportation costs would be deductible. The subsection is not intended otherwise to change the existing definitions of medical care, to deny the cost of ordinary ambulance transportation nor to deny the cost of food or lodging provided as part of a hospital bill. [H. R. Rep. No. 1337, 83d Cong., 2d Sess. A60 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 219-220 (1954)]

IRS Publication 502 (2021), *Medical and Dental Expenses*, states that deductible medical transportation expenses include –

- bus, taxi, train, airplane or ambulance fares,
- out-of-pocket automobile expenses (not including depreciation, insurance, general repair and maintenance costs), which may be assumed to be $0.16 per mile in lieu of keeping records of actual expenses, and
- "transportation expenses of a parent who must go with a child who needs medical care" or "of a nurse or other person who can give injections, medications, or other treatment required by a patient who is traveling to get medical care and is unable to travel alone".

A question that *Bilder* didn't address was whether meals and lodging could be part of "transportation". The Tax Court, drawing a very fine distinction, held in *Morris C. Montgomery*, 51 T.C. 410 (1968), *aff'd*, 428 F.2d 243 (6th Cir., 1970), that the cost of meals and lodging

"incurred while traveling to the point where the prescribed medical treatment or health benefits were to be received" is a medical expense, with a caveat:

> [W]e do not share respondent's concern that our construction will open the door to trips to obtain medical treatment by roundabout routes with stopovers at resort facilities. We are not bereft of talent to deal with such situations as they arise and to sift out those expenses which are not *required to bring the patient to the place of medication*. [51 T.C. at 414 (emphasis in original)]

The IRS has never formally accepted or rejected *Montgomery*. The issue has not, however, been litigated for many years. The most recent case appears to be *William L. Pfersching*, 46 T.C.M. (CCH) 424 (1983), which said nothing of substance.

Owing to the steep decline in the cost of air travel since the early 1980's, meals and lodging while en route to a medical facility are probably *de minimis* in most instances. If they should again become an issue, there is a strong statutory argument that *Montgomery* was wrongly decided, as discussed in the Appendix.

On another question, the Tax Court's decisions are in conflict. A memorandum opinion held that the cost of return transportation from "the place of medication" is wholly nondeductible. *Alexander Lopkoff*, 45 T.C.M. (CCH) 256 (1982), *aff'd per curiam on other issues*, 337 F.2d 859 (5th Cir., 1964). A later memorandum opinion reached the opposite conclusion. *Daniel S. W. Kelly*, 28 T.C.M. (CCH) 1208 (1969), *reversed on another issue*, 440 F.2d 307 (7th Cir., 1971). Private letter rulings have since stated, without discussion, that transportation expenses include round trip costs. PLR 8126044; PLR 7924046.

In *Leo R. Cohn*, 38 T.C. 387 (1962), *acq. on this issue*, 1963-2 C.B. 4, the Tax Court held that, notwithstanding the Supreme Court's reference to "the cost of transportation of the patient alone", transportation costs for someone accompanying a patient were deductible where the latter "could not have made these trips alone". *Id.* at 390. The companion's presence must, however, be "indispensable"; it is not enough to "[make] the trip more pleasant and beneficial". *Daniel E. Mizl*, 40 T.C.M. (CCH) 552 (1980). IRS Publication 502 reflects that position.

A pre-*Roe* private letter ruling addressed the deductibility of the cost of traveling from a minor's home state to one in which she could legally obtain an abortion. Her father accompanied her. His presence was necessary, the IRS held, both because the woman's doctor had diagnosed "symptoms of depressive psychosis" and because the hospital where the abortion would be performed required the presence of a parent to give permission for the procedure. The father picked up his daughter at the college she was attending, drove to the airport, accompanied her on the flight and to the hospital, and flew home with her after she was discharged. The ruling allowed the father to deduct his and his daughter's travel costs to and from the hospital. Meal and lodging expenses incurred while the two were in the abortion provider's locale were not deductible.

A final question, which has received very little attention, is the precise meaning of "essential to medical care". Is transportation "essential" if a patient chooses, for some non-medical reason, to go a facility that is substantially more expensive to travel to than another that could provide the same procedure? For example, could a resident of Idaho choose to fly to California or New York to obtain an abortion rather than make a short drive to Washington State? This issue is unresolved, indeed has barely been raised in reported decisions or rulings.

In *Stanley D. Winderman*, 32 T.C. 1197 (1959), *acq.*, 1960-2 C.B. 7 (decided under the 1939 Code, but there is no reason to think that a decision under the 1954 Code would have been different), the taxpayer, who lived in California, flew to New York each year for his annual physical. The Tax Court held that his cost of transportation was a deductible medical expense. The rationale was that he was a longstanding patient of the New York physician, who had been his doctor for years before he moved to California and in whom he had particular confidence. A later Tax Court case held that a taxpayer who lived in New York but regularly consulted a doctor in California could not deduct transportation expenses, because she had a doctor near to her home in whom she had equal confidence. *Jill Ford Murray*, 43 T.C.M. (CCH) 1377 (1982).

Appendix

A provision of section 213 separate from the deduction for "transportation primarily for and essential to medical care" is pertinent to the questions addressed in this memorandum. Section 213(d)(2) provides that, where a patient does not stay at a hospital overnight,[3] up to $50 a night may be deducted "for lodging (not lavish or extravagant under the circumstances) while away from home primarily for and essential to medical care referred to in paragraph (1)(A)", but only if –

- the medical care "is provided by a physician in a licensed hospital (or in a medical care facility which is related to, or the equivalent of, a licensed hospital)", and

- "there is no significant element of personal pleasure, recreation, or vacation in the travel away from home".

The implication is that section 213(d)(1)(B), the deduction for transportation, does not include lodging of any kind. If it does not, it is hard to see any reasonable argument that meals are deductible as part of "transportation".

Publication 502 states that section 213(d)(2) does not provide any deduction for meals other than hospital meals. Lodging costs of a companion whose presence is "indispensable" are deductible, subject to the $50 a night limitation.

[3] Hospital board and meal charges are deductible as part of the cost of medical care. These will rarely be incurred in connection with abortions.