

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:ITA:2 – PLR-165964-02

Date:

January 9, 2003

Dear _____ :

You requested a private letter ruling that egg donor fees and expenses related to obtaining a willing egg donor are allowable as medical care expenses under a flexible spending account. Your ruling request was referred to our office because the answer depends on whether the expenses are deductible under § 213(a) of the Internal Revenue Code.

FACTS:

You have unsuccessfully undergone repeated assisted reproductive technology procedures to enable you to conceive a child using your own eggs. You desire to attempt pregnancy using donated eggs. Your health plan will pay expenses to fertilize and transfer an egg or embryo to you but will not cover expenses to obtain an egg donor. You request a ruling that the following expenses are medical expenses for purposes of § 213:

- ! The donor's fee for her time and expense in following proper procedures to ensure a successful egg retrieval.
- ! The agency fee for procuring the donor and coordinating the transaction between the donor and recipient.
- ! Expenses for medical and psychological testing of the donor prior to the procedure and insurance for any medical or psychological assistance that the donor may require after the procedure.
- ! Legal fees for preparing a contract between you and the egg donor.

LAW AND ANALYSIS:

A taxpayer may deduct expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, spouse, or dependent, to the extent the expenses exceed 7.5 percent of adjusted gross income, under § 213(a). Section 213(d)(1)(A) provides that medical care includes amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.

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Rev. Rul. 73-201, 1973-1 C.B. 140, and Rev. Rul. 73-603, 1973-2 C.B. 76, hold that vasectomies and operations that render a woman incapable of having children affect a structure or function of the body and thus may qualify as medical care under § 213. A procedure for the purpose of facilitating pregnancy by overcoming infertility similarly affects a structure or function of the body and may be medical care.

Expenses preparatory to the performance of a procedure that qualifies as medical care that are directly related to the procedure may also constitute medical care for purposes of § 213. For example, Rev. Rul. 68-452, 1968-2 C.B. 111, holds that surgical, hospital, and transportation expenses incurred by a donor in connection with donating a kidney to the taxpayer are deductible medical expenses of the taxpayer-recipient for the years in which the taxpayer pays them, subject to the limits of § 213. Similarly, expenses the taxpayer pays to obtain an egg donor, including the donor's expenses, are directly related and preparatory to the taxpayer's receiving the donated egg or embryo. The expenses are therefore the taxpayer's medical expenses and are deductible by the taxpayer in the year paid.

Like other preparatory expenses, legal expenses may be deductible as medical expenses under § 213 if there is a direct or proximate relationship between the legal expenses and the provision of medical care to a taxpayer. *Lenn v. Commissioner*, T.C. Memo 1998-85. For example, legal expenses incurred to create a guardianship in order to involuntarily hospitalize a mentally ill taxpayer were held to be deductible medical expenses because the medical treatment could not otherwise have occurred. *Gerstacker v. Commissioner*, 414 F.2d 448 (6th Cir. 1969). In contrast, the court in *Jacobs v. Commissioner*, 62 T.C. 813 (1974), held that legal expenses related to obtaining a divorce that the taxpayer claimed was necessary for his mental health were not deductible because the divorce would have occurred regardless of the petitioner's depression. Thus, the legal expenses were not directly related to the taxpayer's medical treatment.

You have represented that you will pay the fee to the donor, the fee to the agency that procured the donor, the donor's medical and psychological testing expenses, the insurance for post-procedure medical or psychological assistance to the donor, and the cost of the legal contract between you and the donor, in order to enable you to obtain a donated egg for implantation into your body. Because these costs are preparatory to the performance of your own medical procedure, the expenses are medical care for purposes of § 213.

HOLDING:

The unreimbursed expenses for the egg donor fee, the agency fee, the donor's medical and psychological testing, the insurance for post-procedure donor assistance, and the legal fees for preparation of the contract, are medical care expenses that are deductible under § 213.

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CAVEATS:

A copy of this letter must be attached to any income tax return to which it is relevant. We enclose a copy of the letter for this purpose. Also enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110 of the Internal Revenue Code.

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

Sincerely,

Thomas D. Moffitt
Branch Chief
Office of Associate Chief Counsel
(Income Tax & Accounting)

Enclosures (2)