

## NOTE

# Deducting the Cost of Sex Reassignment Surgery: How *O'Donnabhain v. Commissioner* Can Help Us Make Sense of the Medical Expense Deduction

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### *Abstract*

*In February 2010, the Tax Court held that a taxpayer's expenses incurred for hormone therapy and sex reassignment surgery were deductible as medical expenses under § 213 because they treated the disease of gender identity disorder. The court, however, was deeply divided in its determination of whether sex reassignment surgery qualifies as nondeductible cosmetic surgery under § 213(d)(9). In 1990, Congress amended § 213 to exclude cosmetic surgery from the definition of deductible medical care. Since then, the Tax Court and the I.R.S. have rarely addressed the meaning and extent of that exclusion. The judges' divergent opinions in O'Donnabhain make it clear that a thorough examination of the statutory meaning of cosmetic surgery is timely.*

*This Note considers what should qualify as cosmetic surgery within the context of the medical expense deduction. It argues that a medical procedure that improves physical appearance should be deductible under § 213 when it is physician-prescribed treatment for a specific disease, and consistent with generally accepted medical practice. This analysis is grounded in the statutory language of § 213, and is supported by broader principles that bear on the policy debate surrounding the medical expense deduction more generally.*

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## I. INTRODUCTION

The Tax Court recently held in *O'Donnabhain v. Commissioner*<sup>1</sup> that a taxpayer's expenses incurred for hormone therapy and sex reassignment surgery ("SRS") were deductible as medical expenses under § 213 because they treated the disease of gender identity disorder ("GID"). The court, however, was deeply divided in its determination of whether SRS qualifies as nondeductible cosmetic surgery under § 213(d)(9). The judges' divergent opinions make clear that a thorough examination of the statutory meaning of cosmetic surgery is timely.

Medical expenses are permitted as itemized deductions to the extent that, in the aggregate, the amount of such unreimbursed expenses exceeds 7.5% of a taxpayer's adjusted gross income ("AGI"), or 10% of his AGI for the purposes of the alternative minimum tax ("AMT").<sup>2</sup> Section 213(d) provides that deductible medical care includes amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease. In 1990, Congress amended § 213 to exclude cosmetic surgery from the definition of medical care.<sup>3</sup> Since then, the Tax Court and the I.R.S. have rarely addressed the meaning and extent of this exclusion. This Note considers what qualifies as cosmetic surgery within the context of the medical expense deduction. Part II examines the role of the medical expense deduction and surveys the policy debate about the deduction. Part III considers the statutory language of § 213 as well as case law that has interpreted § 213. Part III closes by proposing a two-part test for the deductibility of medical procedures that also improve physical appearance. Under this test, physician-prescribed treatment for disease that is consistent with generally accepted medical practice is not cosmetic surgery. Part IV analyzes the controversy in *O'Donnabhain*, and concludes that SRS that is prescribed to treat GID is not cosmetic surgery. This interpretation of § 213 is grounded both in the statutory language and in the policy guidelines established in Part II.

## II. THE TAX POLICY DEBATE ABOUT THE MEDICAL EXPENSE DEDUCTION

### A. Tax Expenditures

The academic debate about the medical expense deduction has traditionally been over whether the deduction is a tax expenditure. An ideal income tax has been described as one in which all personal income is taxed uniformly and comprehensively.<sup>4</sup> The tax expenditure concept is generally attributed to Professor Stanley Surrey.<sup>5</sup> In his book written with Professor Paul McDaniel, Surrey argued that a number of tax code provisions are departures from an ideal income tax and instead consist of special preferences for certain taxpayers or activities.<sup>6</sup> According to Surrey and McDaniel, these

<sup>1</sup> 134 T.C. 34 (2010), *acq.* 2011-47 I.R.B. 2.

<sup>2</sup> I.R.C. §§ 213(a) (West Supp. 2010), I.R.C. 56(b)(1)(B) (West Supp. 2010).

<sup>3</sup> *See infra* Part III.B.2.

<sup>4</sup> *See* William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 317 (1972).

<sup>5</sup> *See* STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985).

<sup>6</sup> *Id.* at 3 ("The tax expenditure concept posits that an income tax is composed of two distinct elements. The first element consists of structural provisions necessary to implement a normal income tax . . . . The second element consists of the special preferences found in every income tax. These provisions, often

“nonneutral” provisions are suspect alternatives to direct grants or other government assistance programs.<sup>7</sup> Surrey and McDaniel identified two major flaws of tax expenditures.<sup>8</sup> First, tax expenditures are inequitable because they are upside-down subsidies.<sup>9</sup> The tax code’s progressive rate structure means that tax expenditures in the form of exclusions or deductions benefit high-income taxpayers more than low-income taxpayers and provide no benefit at all to persons with no tax liability.<sup>10</sup> Tax expenditure deductions are also not progressive because they are itemized deductions and thus not available to taxpayers who take the standard deduction.<sup>11</sup> Second, tax expenditures are inefficient means of achieving their purposes because they often incentivize counterproductive distortions of taxpayer behavior.<sup>12</sup>

Several government entities promulgate tax expenditure budgets, which characterize certain tax code provisions as government expenditures and estimate the lost revenue due to these provisions.<sup>13</sup> The medical expense deduction, among other personal deductions, is included as a tax expenditure in these annual budgets.<sup>14</sup> Scholars are divided on whether the medical expense deduction is appropriately characterized as a tax expenditure. Tax expenditure analysis urges that tax expenditure deductions are inefficient and inequitable. If the medical expense deduction is an expenditure, it may contravene progressivity and be a subsidy to wealthy taxpayers.<sup>15</sup> This section will examine the long-standing debate on this issue.

#### B. Defense of the Medical Expense Deduction

Defense of the medical expense deduction comes in different forms. The seminal defense is the 1972 article written by Professor Williams Andrews.<sup>16</sup> Andrews begins his analysis with the classic Haig-Simons definition of income.<sup>17</sup> Henry Simons described

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called tax incentives or tax subsidies, are departures from the normal tax structure and are designed to favor a particular industry, activity, or class of persons.”).

<sup>7</sup> *Id.* *But cf.* David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 1026-27 (2004) (arguing that tax expenditures are legitimate and useful substitutes for direct government grants).

<sup>8</sup> SURREY & MCDANIEL, *supra* note 5, at 79-87.

<sup>9</sup> *Id.* at 79-82.

<sup>10</sup> *Id.* *See also* Andrews, *supra* note 4, at 310-11; Jeffrey H. Kahn, *Personal Deductions—A Tax “Ideal” or Just Another “Deal”?*, 2002 L. REV. MICH. ST. U. DET. C.L. 1, 4 (2002).

<sup>11</sup> *See* SURREY & MCDANIEL, *supra* note 5, at 79-82; Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 352-53 (1989). *But see* Griffith, *supra* at 355-60 (arguing that there are alternative ways to judge tax progressivity).

<sup>12</sup> *See* SURREY & MCDANIEL, *supra* note 5, at 82-87.

<sup>13</sup> *See, e.g.*, STAFF OF JOINT COMM. ON TAX’N, 111TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2009-2013 (Joint Comm. Print 2010), *available at* <http://www.access.gpo.gov/congress/joint/hjoint01cp111.html>; OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2012, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT 239-56 (2011), *available at* [http://www.whitehouse.gov/omb/budget/Analytical\\_Perspectives](http://www.whitehouse.gov/omb/budget/Analytical_Perspectives).

<sup>14</sup> STAFF OF J. COMM. ON TAX’N, *supra* note 13, at 42; OFFICE OF MGMT. & BUDGET, *supra* note 13, at 243.

<sup>15</sup> *See generally* Kahn, *supra* note 10, at 3-4 (“Critics of personal deductions contend that the deductions do not implement the goals and purposes of a progressive income tax system, but rather are employed as a device to subsidize taxpayers for programmatic purposes. The critics maintain that, as a result, these deductions will erode the tax base, reduce progressivity, and contravene the principles of horizontal and vertical equity.” (citations omitted)).

<sup>16</sup> Andrews, *supra* note 4.

<sup>17</sup> *Id.* at 320-25. Simons viewed his definition as a refinement of Robert Haig’s. Haig’s definition was “the money value of the net accretion to one’s economic power between two points of time.” ROBERT M. HAIG ET AL., *THE FEDERAL INCOME TAX* 7 (Robert M. Haig ed., 1921) (emphasis in original).

personal income as the algebraic sum of the market value of rights exercised in consumption and the accumulation of net worth.<sup>18</sup> According to Andrews, Simons' description of income is best understood not as a final definition, but rather as an attempt to delineate a universe in which to further elaborate on income.<sup>19</sup> The most important thrust of Simons' efforts is to highlight the insufficiency of net receipts as the entire scope of personal income.<sup>20</sup>

Because it is difficult to measure consumption directly, money income is commonly accepted as the starting point for the measurement of personal income, with adjustments made to properly reflect the taxpayer's full consumption plus accumulation.<sup>21</sup> Simons indicated that if a taxpayer's consumption includes things that the taxpayer did not pay for, the market value of that consumption should be included in the taxpayer's income.<sup>22</sup> On the other hand, if the taxpayer's consumption plus accumulation is *less* than his money income, he should be entitled to a deduction.<sup>23</sup> Typically, this is understood to be the business expense deduction in which the taxpayer is allowed to deduct from his income the cost of producing that income.<sup>24</sup> However, Andrews argues that there are deductible expenses that are not business related but also do not reflect the taxpayer's consumption.<sup>25</sup>

According to Andrews, medical expenses are not taxpayer consumption.<sup>26</sup> Andrews contends that the use of consumption as a tax base is meant to measure "material well-being and taxable capacity."<sup>27</sup> When a taxpayer spends money on medical care because of his poor health, the expense merely returns the taxpayer to a state of well-being.<sup>28</sup> By incurring the medical expense to treat himself, the taxpayer is put in the same position as someone in good health whose earnings equal his own after subtracting the cost of the medical expense.<sup>29</sup> Implicit in this analysis is the argument that, because the disease is not voluntary, the taxpayer is not consuming when he acts to treat the disease.<sup>30</sup> Another way to express this is that the taxpayer's ability to pay should be evaluated only after his necessary expenses beyond normal living expenses have been

<sup>18</sup> HENRY C. SIMONS, *PERSONAL INCOME TAXATION* 50 (1938). In its short form, this definition is described as consumption plus accumulation.

<sup>19</sup> See Andrews, *supra* note 4, at 324-25.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.* at 327-31; William J. Turnier, *Personal Deductions and Tax Reform: The High Road and the Low Road*, 31 VILL. L. REV. 1703, 1706-07 (1986).

<sup>22</sup> Andrews, *supra* note 4, at 325.

<sup>23</sup> *Id.*

<sup>24</sup> See *id.*

<sup>25</sup> See *id.* at 313-17 (maintaining that expenses deductible under the medical expense and charitable contribution deductions are not properly depicted as taxpayer consumption).

<sup>26</sup> *Id.* at 331-43.

<sup>27</sup> *Id.* at 335.

<sup>28</sup> *Id.* at 334-36. *But see* Griffith, *supra* note 11, at 369-75 (contending that Andrews fails to draw a sufficient distinction between monetary and nonmonetary well-being and questioning Andrews' normative justifications in general).

<sup>29</sup> Andrews, *supra* note 4, at 334-36. For example, A is ill, earns \$50,000, and spends \$10,000 to become healthy, whereas B earns only \$40,000 but is in good health and does not have the \$10,000 medical expense. *But see* Louis Kaplow, *The Income Tax as Insurance: The Casualty Loss and Medical Expense Deductions and the Exclusion of Medical Insurance Premiums*, 79 CAL. L. REV. 1485, 1493-94 (1991) (arguing that the taxpayers are not put in the same position by § 213, because A is only compensated to the extent that his loss exceeds the nondeductible floor).

<sup>30</sup> See Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far From Ideal World*, 31 STAN. L. REV. 831, 859, 863-64 (1979).

deducted from his net receipts.<sup>31</sup> Andrews argues that it follows that the medical expense deduction is not a tax expenditure and does not conflict with an ideal income tax.<sup>32</sup> Instead, the deduction is a refinement of the concept of income to bring it into line with normative tax principles.<sup>33</sup>

Andrews' position is that the medical expense deduction is a way to fine-tune the tax base to ensure that only income is being taxed. In this scheme, medical expenses are not consumption, and must be subtracted from net receipts before we can arrive at taxable income. But, one need not reconceptualize consumption in order to accept the medical expense deduction as being in line with tax policy. Related lines of argument contend that tax policy goals allow for the deduction within an ideal income tax, but without finding this justification in the definitions of income or consumption. For example, Professor Jeffrey Kahn argues that the medical expense deduction is not an expenditure because it furthers progressivity.<sup>34</sup> Although its precise justification is debated among scholars, progressivity enjoys majority support and is a foundational tenet of tax law.<sup>35</sup> Progressivity is defensible on equitable grounds because it provides for an equalization of sacrifice among taxpayers.<sup>36</sup> We can define consumption in a more conventional sense—for example, as using money to obtain satisfaction<sup>37</sup>—and still follow Kahn's logic. Kahn argues that progressive tax rates are meant to provide for a zero tax rate on subsistence income.<sup>38</sup> Because the tax structure is standardized and crude, adjustments are sometimes necessary for taxpayers with subsistence expenses far beyond the norm.<sup>39</sup> Routine medical expenses are part of the ordinary living expenses covered by the standard tax brackets.<sup>40</sup> However, progressivity requires that taxpayers with unusually large medical expenses be accommodated through the medical expense deduction.<sup>41</sup> A taxpayer with such expenses experiences a reduction in his ability to pay.<sup>42</sup> Even if we concede that the taxpayer's medical expenses are consumed assets, equitable principles—themselves a normal part of tax law—require that the taxpayer's burden be mitigated by a

<sup>31</sup> Andrews, *supra* note 4, at 326-27.

<sup>32</sup> See Andrews, *supra* note 4, at 331-43.

<sup>33</sup> See *id.*

<sup>34</sup> See Kahn, *supra* note 10, at 14 (citations omitted).

<sup>35</sup> See *id.* at 16.

<sup>36</sup> See Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. Chi. L. Rev. 417, 421 (1952) (suggesting that progressive tax rates balance out regressivity in other tax provisions and thus make the total burden of all taxes proportionate to taxpayer income); Kahn, *supra* note 10, at 21-23 (proposing that progressive taxation is equitable because the value to a taxpayer of each dollar declines as the taxpayer's income increases). See also Andrews, *supra* note 4, at 325-27 (arguing that the purpose of the income tax is to levy taxes according to ability to pay).

<sup>37</sup> Kelman, *supra* note 30, at 834. See also Turnier, *supra* note 21, at 1730 ("Medical expenses reflect expenditures to finance consumption of goods and services by the taxpayer to attain a personal benefit, namely the alleviation of a disease or the repair of an injury.").

<sup>38</sup> Kahn, *supra* note 10, at 27-29.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* Scholars have suggested that the medical deduction's statutory floor is meant to ensure that only extraordinary expenses will be reimbursed. See Boris I. Bittker, *Income Tax Deductions, Credits, and Subsidies for Personal Expenditures*, 16 J.L. & ECON 193, 198 (1973) (referring to an earlier version of § 213); Kahn, *supra* note 10, at 28.

<sup>42</sup> See James E. Jensen, *Medical Expenditures and Medical Deduction Plans*, 60 J. POL. ECON. 503, 503 (1952) ("Medical expenditures reduce the ability to pay taxes, and, therefore, a medical deduction from the income tax creates a differentiation according to ability to pay."); Turnier, *supra* note 21, at 1730-31. See also STAFF OF J. COMM. ON TAX'N, 110TH CONG., TAX EXPENDITURES FOR HEALTH CARE 24 (J. Comm. Print 2008), available at <http://jct.gov/publications.html> (citing Andrews, *supra* note 4; Turnier, *supra*).

deduction.<sup>43</sup> Thus, according to Kahn, because the deduction is recommended by principles within the tax structure, it is not an expenditure.<sup>44</sup>

These arguments are not totally disparate. Although they differ in their conclusions about the meaning of income, there are significant generalities that can be drawn. Specifically, defenses of the medical expense deduction rely, implicitly or explicitly, on the understanding that taxpayers with medical expenses stemming from involuntary disease that are beyond routine expenses merit a reduction in their tax burdens because of the financial hardship of the medical expenses. Proponents of the deduction argue that such taxpayers experience a reduction in ability to pay.<sup>45</sup> Tax expenditure analysis criticizes tax spending for programs outside of tax law's purview.<sup>46</sup> However, the medical expense deduction may be a valuable method of addressing significant differences in taxpayers' financial positions. Whether or not we find the genesis of the deduction in the definition of consumption, or qualify it as an expenditure, it can still be justified by equitable principles within tax law.

### C. Criticism of the Medical Expense Deduction

The most noteworthy condemnation of the medical expense deduction is the 1979 article written by Professor Mark Kelman in response to Professor Andrews.<sup>47</sup> Kelman argues that non-income-seeking expenditures that are not consumption do not exist.<sup>48</sup> Kelman maintains that net receipts minus the cost of obtaining the receipts is "tautologically" income.<sup>49</sup> Kelman's article was written specifically to attack Andrews' position. However, his comments can easily be extended to other defenses of the medical expense deduction. Kelman advances several criticisms of Andrews, the most important of which I will address here. First, Kelman notes that it is not always clear that a taxpayer has purchased medical services because of a departure from a baseline state of good health.<sup>50</sup> A taxpayer may choose to make medical purchases without being in poor health.<sup>51</sup> Second, Kelman points out a problem of mixed motives—namely, that income

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<sup>43</sup> See Kahn, *supra* note 10, at 17, 27; Turnier, *supra* note 21, at 1706-07. The Joint Committee on Taxation has described the purpose of the medical expense deduction as follows: "The primary rationale for allowing an itemized deduction for medical expenses is that 'extraordinary' medical costs—those in excess of a floor designed to exclude predictable, recurring expenses—reflect economic hardship, beyond the individual's control, which reduces the ability to pay Federal income tax." STAFF OF J. COMM. ON TAX'N, 97TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, at 24 (J. Comm. Print 1982). *But see* Laura E. Cunningham, *National Health Insurance and the Medical Deduction*, 50 TAX L. REV. 237, 250-51 (1995) (arguing that deductions actually taken under § 213 often go far beyond those expenses which can properly be deemed extraordinary).

<sup>44</sup> See Kahn, *supra* note 10.

<sup>45</sup> See STAFF OF J. COMM. ON TAX'N, 110TH CONG., A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS 52 (J. Comm. Print 2008) ("Some tax expenditures may be designed to provide a better measure of what Congress deems to be the correct measure of 'ability to pay,' and thereby improve horizontal equity. For example, the deduction for medical expenses in excess of 7.5 percent of adjusted gross income may reflect a determination that two taxpayers with the same gross income are not similarly situated if one has high medical expenses and the other does not.").

<sup>46</sup> See *supra* notes 6-12 and accompanying text.

<sup>47</sup> Kelman, *supra* note 30.

<sup>48</sup> *Id.* at 834.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 862.

<sup>51</sup> *Id.* See also *id.* at 867 (suggesting that the purchase of preventative care does not necessarily result from the taxpayer's poor health).

and taste factor into many purchases of medical services.<sup>52</sup> Wealthy taxpayers are more likely to spend money in a medical setting for things that are not medically important (for example, private hospital rooms<sup>53</sup> or more expensive doctors<sup>54</sup>). These are arguments about the voluntariness of medical expenses.<sup>55</sup> Defenses of the medical expense deduction rely on the assumption that differences in medical spending reflect differences in need rather than choices among indulgences.<sup>56</sup> Kelman's criticism essentially questions whether medical expenses truly affect taxpayers' ability to pay.<sup>57</sup> If certain medical expenses are discretionary luxuries unrelated to disease, they do not represent a financial burden and accommodating them through the medical expense deduction is not progressive.

Professor Louis Kaplow has attacked the medical expense deduction as a misallocation of resources due to its status as a government-funded alternative to private health insurance.<sup>58</sup> According to Kaplow, this substitution discourages the purchase of private health insurance, which leads to increasing medical costs and unnecessary risk-taking by taxpayers.<sup>59</sup> However, this line of argument depends on the impropriety of the deduction rather than establishing its weakness.<sup>60</sup> If the medical expense deduction is a tool for measuring taxpayers' ability to pay, the deduction is not a misallocation of resources. On the contrary, denying the deduction would be a misallocation of resources because it might dissuade taxpayers from purchasing essential medical care—the opposite effect that the deduction appears designed to promote.<sup>61</sup>

#### D. The Role of the Medical Expense Deduction

The question of whether the medical expense deduction is a tax expenditure may not be crucial to determine if it is an acceptable policy. Professors David A. Weisbach and Joseph Nussim argue that it is irrelevant whether government spending programs that

<sup>52</sup> *Id.* at 864-68. See also Cunningham, *supra* note 43, at 250-51 (discussing the problem of mixed motives).

<sup>53</sup> Kelman, *supra* note 30, at 864, 866; see also Cunningham, *supra* note 43, at 250; Griffith, *supra* note 11, at 371 n.159.

<sup>54</sup> See Kelman, *supra* note 30, at 866.

<sup>55</sup> See Cunningham, *supra* note 43, at 250 (“Although a utilitarian ethic supports excluding the costs of medical care from the tax base, there remains a significant problem in distinguishing ‘true’ medical expenses, which imply essential and involuntary expenses, from ‘luxury’ medical expenses, which reflect an individual's consumption choices.”).

<sup>56</sup> See, e.g., Andrews, *supra* note 4, at 336 (“The deduction will reflect differences in health only as they manifest themselves in financial terms by requiring substantially different levels of expenditure for medical services. In this respect the deduction treats substantial medical expenses like a loss of earnings.”).

<sup>57</sup> See Cunningham, *supra* note 43, at 250-51.

<sup>58</sup> Kaplow, *supra* note 29, at 1493-99. See also Cunningham, *supra* note 43, at 253 (“Section 213 can be viewed as a form of free government insurance, under which the government acts as a co-insurer to the extent of the tax rate times the amount of the allowable deduction.”); Kelman, *supra* note 30, at 832-33; SURREY & MCDANIEL, *supra* note 5, at 79. Cf. Andrew Blair-Stanek, Note, *Using Insurance Law and Policy to Interpret the Tax Code's Loss and Medical Expense Provisions*, 26 YALE L. & POL'Y REV. 309 (2007) (advocating for using traditional insurance law concepts to reinterpret the medical expense deduction). For further discussion of the relationship between the medical expense deduction and traditional health insurance see *infra* Part III.A.2.

<sup>59</sup> Kaplow, *supra* note 29, at 1493-99. See also STAFF OF JOINT COMM. ON TAX'N, *supra* note 42, at 23. Cf. Robert K. Lu, Note, *Gross Negligence and the Medical Expense Deduction*, 71 S. CAL. L. REV. 845 (1998) (arguing that barring the medical expense deduction in cases where the taxpayer is grossly negligent would increase social welfare).

<sup>60</sup> See Bittker, *supra* note 41, at 199 (responding to a similar position in JAMES M. BUCHANAN, *THE PUBLIC FINANCES* 226 (3d ed., 1970)).

<sup>61</sup> See Bittker, *supra* note 41, at 199.



are executed via the tax system comply with independent tax norms.<sup>62</sup> Instead, they contend that the decision to implement such programs through a tax expenditure or a direct grant is merely a matter of institutional design.<sup>63</sup> The government will inevitably decide to subsidize or encourage any number of activities.<sup>64</sup> The point of Weisbach's and Nussim's analysis is to emphasize that the real concern is whether the form of the subsidy is supportable given overall government policy and structure, not how the subsidy fits within an ideal income tax.<sup>65</sup> In other words, Weisbach and Nussim embrace Surrey's assertion that tax expenditures are nothing more than direct grants disguised.<sup>66</sup> Nonetheless, they find that providing for these direct grants through the tax system may be preferable.<sup>67</sup> Direct subsidies through the tax system may be desirable because they take advantage of the preexisting tax infrastructure for their administration and thus are arguably simpler to implement.<sup>68</sup> The medical expense deduction is evidence of a government spending policy to mitigate the burden of larger-than-average medical expenses for taxpayers for whom the strain of such a burden relates to disease. Under Weisbach's and Nussim's analysis, it is immaterial whether it is a tax expenditure.<sup>69</sup> Instead, it is important that there are advantages to spending via tax expenditure rather than direct grant.<sup>70</sup> In particular, the tax system and evaluation of the burden of large medical expenses both require large-scale information and financial processing, reliance on levels of income, and some form of wealth redistribution.<sup>71</sup> Thus, there are significant benefits of coordination in implementing a subsidy for medical expenses through the tax

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<sup>62</sup> Weisbach & Nussim, *supra* note 7.

<sup>63</sup> *See id.* at 958 ("If the underlying policy is held constant, there are no effects of putting a program into or taking a program out of the tax system even if doing so hurts or enhances traditional notions of tax policy. Welfare is the same regardless of whether the program is formally part of the tax system or is located somewhere else in the government. If we mistakenly look only at the tax system instead of overall government policy, we will draw the wrong conclusions.").

<sup>64</sup> *See id.* at 964.

<sup>65</sup> *See id.* at 963-64. *But see* J. Clifton Fleming, Jr. & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and its International Dimension*, 27 VA. TAX REV. 437, 468-84 (2008) (criticizing Weisbach and Nussim for disregarding the issue of whether something is in fact a tax expenditure before turning to the benefit of its implementation via tax policy instead of with a direct grant).

<sup>66</sup> Weisbach & Nussim, *supra* note 7, at 978-82. *But see* Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 207-13 (2004) (arguing that tax expenditures are not equivalent to direct spending).

<sup>67</sup> Weisbach & Nussim, *supra* note 7, at 978-82.

<sup>68</sup> *Id.* *But see* Edward D. Kleinbard, *The Congress within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U.L. REV. 1, 3 (2010) ("Tax expenditures have grown in importance to the point where they are now the dominant instruments for implementing new discretionary spending policies. While it is certainly true that some forms of government intervention are best delivered through the tax system, it cannot be the case that neutral design principles would lead to the current situation, where we spend more than twice as much through tax expenditures as we do through old-fashioned explicit spending programs. As a result, tax expenditures are filling a role that goes well beyond just another available policy device in Congress's toolkit.").

<sup>69</sup> *See* Weisbach & Nussim, *supra* note 7, at 975 ("[I]f we are going to subsidize medical expenses, whether it is desirable to do so through the tax system should not depend on whether a medical expense deduction meets the definition of income."). *But see* Fleming & Peroni, *supra* note 65, at 469 ("A significant problem with [Weisbach's and Nussim's] argument is that to determine whether a particular government subsidy, such as a deduction for medical expenses, is best delivered as a direct expenditure or as a subsidy through the tax system, we need to know the tax system's content and structure so that we can evaluate the effectiveness of the tax expenditure alternative and the costs it imposes on the tax system.").

<sup>70</sup> Weisbach & Nussim, *supra* note 7, at 959.

<sup>71</sup> *See id.*

system.<sup>72</sup> The remaining issue is which medical expenses are appropriately mitigated through this subsidy.

Andrews acknowledges that some medical expenses will have a notable component of personal gratification.<sup>73</sup> However, it is not possible to avoid all such borderline problems.<sup>74</sup> An apt comparison is the often blurry line between business and personal expenses when evaluating the business expense deduction.<sup>75</sup> Just as a taxpayer makes certain medical decisions influenced by personal rather than medical factors, he may incur business expenses related to his personal values.<sup>76</sup> For example, he may choose a more luxurious office location, or first class business travel.<sup>77</sup> Nonetheless, the element of personal gratification does not mean these are not real medical expenses.<sup>78</sup> To this point, Kelman answers that the comparison is misleading because the business expense deduction, unlike the medical expense deduction, is an integral part of the tax structure.<sup>79</sup> However, Kelman merely describes administrative issues of pinpointing exactly which medical expenses are appropriately deductible, instead of problems with the deduction in general.<sup>80</sup> If the problem is that taxpayers make quasi-medical decisions because of personal taste, the suitable response to this problem is to refine the deduction to account as accurately as possible for only those medical problems that affect taxpayers' ability to pay.<sup>81</sup> The 1990 amendment of § 213 to exclude cosmetic surgery expenses was just such a refinement.<sup>82</sup>

### III. STRUCTURE AND SCOPE OF THE MEDICAL EXPENSE DEDUCTION

#### A. General Statutory Scheme

##### 1. *Mechanics of the Deduction*

Section 213 provides a deduction for expenses paid for the medical care of the taxpayer, his or her spouse, and dependents if the taxpayer is not compensated for the expenses by insurance or otherwise (e.g., by a tortfeasor).<sup>83</sup> Qualified expenses may be deducted if the taxpayer elects to itemize deductions, and only to the extent that such

<sup>72</sup> See *id.*

<sup>73</sup> Andrews, *supra* note 4, at 337.

<sup>74</sup> *Id.*

<sup>75</sup> See Bittker, *supra* note 41, at 199; Griffith, *supra* note 11, at 371 n.159; Kelman, *supra* note 30, at 876-79. But see Joel S. Newman, *The Medical Expense Deduction: A Preliminary Postmortem*, 53 S. CAL. L. REV. 787, 788-89 (1979) (arguing that the medical expense deduction is dissimilar to the business expense deduction because the medical expense deduction has no inherent limiting factors like the profit maximization factor that controls business decisions).

<sup>76</sup> See Bittker, *supra* note 41, at 199.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> Kelman, *supra* note 30, at 876.

<sup>80</sup> See Kahn, *supra* note 10, at 31. Even Kelman conceded that some deduction for medical care might be supportable. Kelman, *supra* note 30, at 834.

<sup>81</sup> See Kahn, *supra* note 10, at 29-31 (suggesting that basing the deduction on a percentage of AGI is because of Congress' recognition that medical expenses will have certain pleasurable attributes, particularly in the case of wealthy taxpayers). But cf. James W. Colliton, *The Medical Expense Deduction*, 34 WAYNE L. REV. 1307, 1310 (1988) (arguing that the 7.5% floor disproportionately advantages lower income taxpayers, who can exceed the floor by spending a lower amount).

<sup>82</sup> See *infra* Part III.B.

<sup>83</sup> I.R.C. § 213(a) (West Supp. 2010) ("There shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent . . . to the extent that such expenses exceed 7.5 percent of adjusted gross income.").

expenses exceed 7.5% of the taxpayer's AGI, or 10% of his AGI for the purposes of the AMT.<sup>84</sup>

The deduction covers "medical care," defined as 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."<sup>85</sup> Medical expenses for "transportation primarily for and essential to medical care"<sup>86</sup> and expenses for prescription drugs and insulin also qualify.<sup>87</sup> Expenses for lodging while away from home receiving medical care are eligible for the deduction if the lodging is primarily for and essential to the medical care, if the medical care is provided by a physician in a licensed hospital or medical care facility, and if the travel has no significant element of personal pleasure.<sup>88</sup> No deduction is allowed for lodging that is lavish or extravagant and the deduction is limited to \$50 "for each night for each individual."<sup>89</sup>

Section 213(d)(9) explicitly excludes cosmetic surgery from the definition of medical care. "Cosmetic surgery" is "any procedure which is directed at improving the patient's appearance and *does not meaningfully promote the proper function of the body or prevent or treat illness or disease.*"<sup>90</sup> However, expenses incurred for cosmetic surgery are deductible if the "the surgery or procedure is necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease."<sup>91</sup>

Many expenses toe the line between deductible "medical care" and "personal, living, or family expenses" which are nondeductible under § 262, unless otherwise expressly provided.<sup>92</sup> The regulations do not authorize deductions for expenditures that are "merely beneficial to the general health of an individual," such as the cost of a vacation; deductions "will be confined strictly to expenses incurred primarily for the

<sup>84</sup> *Id.*; I.R.C. § 56(b)(1)(B) (West Supp. 2010).

<sup>85</sup> I.R.C. § 213(d)(1)(A) (2006).

<sup>86</sup> *Id.* § 213(d)(1)(B) (2006). *See, e.g.,* *Winderman v. Comm'r*, 32 T.C. 1197 (1959) (allowing deduction for transportation expenses for Los Angeles resident to travel to New York City to see a specific doctor in whom he had confidence); Rev. Rul. 58-533, 1958-2 C.B. 108 (allowing deduction for cost of parents' trip to visit institutionalized child if the child's doctor deemed regular visits essential to the child's therapy). If required for the patient's travel, the transportation expenses of an accompanying nurse, family member or other attendant are also deductible. Rev. Rul. 58-110, 1958-1 C.B. 155 (allowing deduction for transportation expenses of an elderly patient and her required nurse to travel on physician's recommendation).

<sup>87</sup> I.R.C. § 213(b) (2006). A prescription drug is "a drug or biological which requires a prescription of a physician for its use by an individual." *Id.* § 213(d)(3). *See also* Rev. Rul. 2003-58, 2003-1 C.B. 959 (noting that § 213(b) does not apply to medical equipment, supplies, or diagnostic devices—such as crutches, bandages, or blood sugar test kits—that may be purchased without a physician's prescription). Non-prescription drugs other than insulin are nondeductible in part because "non-prescription drugs are more likely to represent expenses for ordinary consumption than 'extraordinary' medical costs that should be deductible." STAFF OF J. COMM. ON TAX'N, *supra* note 43, at 25.

<sup>88</sup> I.R.C. § 213(d)(2) (2006).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* § 213(d)(9)(B) (2006) (emphasis added).

<sup>91</sup> *Id.* § 213(d)(9)(A) (2006). *See infra* Part III.B.2 for further discussion of the exclusion of cosmetic surgery expenses.

<sup>92</sup> *See* *Stringham v. Comm'r*, 12 T.C. 580, 584-85 (1949) ("The real difficulty arises in connection with determining the deductibility of expenses which, depending on the peculiar facts of each case, may be classified as either 'medical' or 'personal' in nature . . . [W]here the expenses sought to be deducted may be either medical or personal in nature, the ultimate determination must be primarily one of fact.").

prevention or alleviation of a physical or mental defect or illness.”<sup>93</sup> In *Havey v. Commissioner*,<sup>94</sup> the Tax Court rejected a deduction for a couple’s vacation expenses, even though the trips were recommended by the wife’s doctor after she suffered a coronary occlusion. The court opined that:

To be deductible as a medical expense, there must be a direct or proximate relation between the expenses and the diagnosis, cure, mitigation, treatment, or prevention of disease or the expense must have been incurred for the purpose of affecting some structure or function of the body. . . . It seems clear to us that the deduction in question may be claimed only where there is a health or body condition coming within the statutory concept and where the expense was incurred primarily for the prevention or alleviation of such condition. An incidental benefit is not enough.<sup>95</sup>

Thus, even if the taxpayer is ill, expenses on the boundary between medical and personal are not deductible if the medical benefit is remote or incidental.<sup>96</sup> The Tax Court developed the prevailing test for deductibility in *Jacobs v. Commissioner*, holding that a taxpayer seeking a § 213 deduction must show: (1) “the present existence or imminent probability of a disease, defect or illness—mental or physical,”<sup>97</sup> and (2) that the expenses incurred are “directly or proximately related to the diagnosis, cure, mitigation, treatment, or prevention of the disease or illness.”<sup>98</sup> When the expenses provide both medical and personal benefits, the taxpayer must also pass a “but for” test and show

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<sup>93</sup> Treas. Reg. § 1.213-1(e)(1)(ii) (1979). See *Brown v. Comm’r*, 62 T.C. 551 (1974) (finding amounts paid for Scientology processing and auditing and related travel expenses not deductible because the nature of the services was that of personal counseling for general well-being rather than psychotherapy). *But see* Rev. Rul. 62-210, 1962-2 C.B. 89 (allowing deduction for clarinet lessons to ameliorate child’s malocclusion). Expenses incurred for exercise, such as for athletic devices, lessons, or club memberships are often denied deductibility because of this principle. See, e.g., *France v. Comm’r*, 40 T.C.M. (CCH) 508 (1980), *aff’d per curiam*, 690 F.2d 68 (6th Cir. 1982) (disallowing expenses incurred for dancing lessons recommended by physician); *Altman v. Comm’r*, 53 T.C. 487 (1969) (holding the cost of getting to and from a golf course not deductible because the taxpayer, an emphysema sufferer, could get exercise otherwise); *Adler v. Comm’r*, 330 F.2d 91 (9th Cir. 1964) (finding dancing lessons for taxpayer with varicose veins nondeductible). Nonetheless, some taxpayers have been successful in deducting the costs of therapeutic swimming pools. Compare *Cherry v. Comm’r*, 46 T.C.M. (CCH) 1031 (1983) (allowing deduction for operating expenses of swimming pool used by taxpayer to alleviate emphysema and bronchitis) with *Haines v. Comm’r*, 71 T.C. 644 (1979) (denying deduction for the cost of a swimming pool used by taxpayer with a fractured leg requiring physical therapy because of lack of showing that the primary purpose for the pool was medically therapeutic rather than for general health and convenience).

<sup>94</sup> 12 T.C. 409 (1949).

<sup>95</sup> *Id.* at 412-13.

<sup>96</sup> See, e.g., *Jacobs v. Comm’r*, 62 T.C. 813 (1974) (finding that expenses of divorce are not deductible, even though recommended by psychiatrist because of the negative repercussions of marriage on taxpayer’s mental health); *Rabb v. Comm’r*, 31 T.C.M. (CCH) 476 (1972) (denying deduction for shopping trips as “milieu therapy”).

<sup>97</sup> *Jacobs*, 62 T.C. at 818.

<sup>98</sup> *Id.* See, e.g., Rev. Rul. 2002-19, 2002-16 I.R.B. 778 (finding that expenses paid for a weight-loss program as treatment for a specific disease, including obesity or hypertension diagnosed by a physician, are deductible if the taxpayer has been directed by a physician to lose weight as treatment, but that diet food is not deductible); Rev. Rul. 99-28, 1999-1 C.B. 1269 (allowing a deduction for expenses incurred to stop smoking, including smoking-cessation programs and prescription drugs to alleviate the effects of nicotine withdrawal, because nicotine is addictive and smoking is detrimental to the health of the smoker).

“both that the expenditures were an essential element of the treatment and that they would not have otherwise been incurred for nonmedical reasons.”<sup>99</sup>

## 2. Relationship to Health Insurance

Section 213(d)(1)(D) provides that the term “medical care” covers “insurance . . . covering medical care.” Under this provision, taxpayers may deduct premium payments for insurance that covers any items that would qualify as “medical care” within the meanings of §§ 213(d)(1)(A) and 213(d)(1)(B). Insurance premiums deductible under § 213 are combined with other qualified medical costs in applying the nondeductible floor.<sup>100</sup> The cost of employer-provided health insurance is deductible as a business expense for employers and excludable as a fringe benefit for employees.<sup>101</sup> Self-employed taxpayers may deduct some or all of the insurance expenses incurred for the taxpayer, his spouse, and his dependents under § 162(l), to the extent that the deduction does not exceed the taxpayer’s earned income from the trade or business providing the insurance. This is allowed as a business expense deduction and corresponds to the exclusion of employer-sponsored insurance from employee gross income.<sup>102</sup> Because premiums paid by families are deductible subject to the nondeductible floor, whereas employer-provided (including self-employed) insurance is fully deductible, there are some inconsistencies in the tax treatment of health insurance between different groups of taxpayers.

In many ways, § 213 acts as a government-funded alternative to private insurance.<sup>103</sup> However, the scope of coverage under § 213 is considerably broader than that of private health insurance or traditional government-funded health insurance (e.g., Medicare and Medicaid).<sup>104</sup> For example, Medicare and Medicaid, as well as many private insurers, deny coverage for medical services that are not medically necessary.<sup>105</sup> Conversely, § 213 does not require that treatment be medically necessary. Instead, it allows a deduction for medical care that is primarily for the prevention or alleviation of a disease, even if medical insurers would not find the treatment necessary.<sup>106</sup> The medical

<sup>99</sup> *Jacobs*, 62 T.C. at 819 (emphasis omitted). See, e.g., *Ende v. Comm’r*, 34 T.C.M. (CCH) 1096 (1975) (denying deduction for cost of attending ballet school for child with scoliosis in the absence of evidence that the child would not have taken ballet lessons without the disorder).

<sup>100</sup> See I.R.C. § 213(a) (West Supp. 2010).

<sup>101</sup> See *id.* § 106(a) (2006) (“[G]ross income of an employee does not include employer-provided coverage under an accident or health plan.”); Treas. Reg. § 1.106-1 (1960) (“The gross income of an employee does not include contributions which his employer makes to an accident or health plan for compensation (through insurance or otherwise) to the employee for personal injuries or sickness incurred by him, his spouse, or his dependents . . .”).

<sup>102</sup> To prevent the self-employed taxpayer from benefitting twice, he is denied the deduction if he or his spouse is eligible to participate in an employer-subsidized health plan. I.R.C. § 162(l)(2)(B) (West Supp. 2010).

<sup>103</sup> See *supra* notes 58-61 and accompanying text (discussing criticism of the medical expense deduction on this account).

<sup>104</sup> See Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1170-71 (2004).

<sup>105</sup> See *id.* Medical services that are not “reasonable and necessary” for the treatment or prevention of illness, 42 U.S.C. § 1395y(a)(1)(A), (B) (2000), are excluded from federal Medicare. Medicaid similarly limits coverage. See 42 C.F.R. § 440.230(d) (1981) (“The agency may place appropriate limits on a service based on such criteria as medical necessity.”). Cf. Mark A. Hall & Gerard F. Anderson, *Health Insurers’ Assessment of Medical Necessity*, 140 U. PA. L. REV., 1637, 1638 n.4 (1992) (explaining that the term “medically necessary” is generally used by health insurers to mean medically appropriate rather than strictly necessary, and incorporates concepts such as cost effective care and accepted medical practice).

<sup>106</sup> See *supra* note 93 and accompanying text.

expense deduction is rather comprehensive in its embrace of most expenses that can be legitimately tied to specific health conditions, including many categories of expenses that are not covered by traditional health insurance. For example, § 213 covers expenses for transportation, as well as meals and lodging, when they are essential to the medical care.<sup>107</sup> Taxpayers have successfully deducted the cost of playing a musical instrument,<sup>108</sup> legal fees to commit a mentally ill person,<sup>109</sup> and the excess cost of food taken solely to alleviate or treat illness.<sup>110</sup> Many kinds of health-related capital expenditures are treated favorably under § 213. Notably, taxpayers have successfully deducted the cost of therapeutic swimming pools<sup>111</sup> in addition to various medically-required residence alterations, including “expenses incurred by a physically handicapped individual for removing structural barriers in his or her personal residence for the purpose of accommodating his or her handicapped condition.”<sup>112</sup> The cost of servicing such items is deductible as well.<sup>113</sup> Deductible medical care may also be provided by a non-medical professional, such as an acupuncturist,<sup>114</sup> unlicensed chiropractor,<sup>115</sup> or Christian Science practitioner.<sup>116</sup> Thus, the purview of § 213 is significantly broader than that of traditional health insurance.

## B. Cosmetic Surgery

### I. Early Treatment of Cosmetic Surgery

Expenses incurred for cosmetic surgery that is not necessary to ameliorate a deformity arising from or directly related to a congenital abnormality, personal injury resulting from accident or trauma, or disfiguring disease are nondeductible under § 213(d). However, before § 213(d) was added in 1990, the courts and the I.R.S. had allowed deductions for cosmetic procedures, due to the statutory definition of “medical care” including procedures “for the purpose of affecting any structure or function of the body.” In *Mattes v. Commissioner*, the taxpayer was permitted to deduct the cost of a surgical hair transplant performed by a physician as a purely cosmetic remedy for the taxpayer’s baldness.<sup>117</sup> Although the court acknowledged that baldness is not a health risk,<sup>118</sup> it reasoned that, “since the expense is for a medical surgical treatment to correct a specific physiological condition . . . it is deductible under section 213 without the

<sup>107</sup> See *supra* notes 86-89 and accompanying text.

<sup>108</sup> Rev. Rul. 62-210, 1962-2 C.B. 89 (allowing deduction for clarinet lessons to ameliorate a child’s malocclusion).

<sup>109</sup> *Gerstacker v. Comm’r*, 414 F.2d 448 (6th Cir. 1969) (finding legal expenses of obtaining guardianship for a mental patient unwilling to seek treatment deductible).

<sup>110</sup> *Kalb v. Comm’r*, 37 T.C.M. (CCH) 1511 (1978) (permitting deduction for the excess cost of high-protein food medically required due to abnormally low blood sugar); *Cohn v. Comm’r*, 38 T.C. 387 (1962), *nonacq.* 1963-2 C.B. 6 (allowing deduction for the additional cost of restaurant-prepared salt-free meals for a taxpayer with heart problems). But see *Becher v. Comm’r*, 53 T.C.M. (CCH) 683 (1987) (denying deduction for the excess cost of organic food, despite taxpayer’s physician’s recommendation that taxpayer eat such food due to various chemical allergies).

<sup>111</sup> See *supra* note 93.

<sup>112</sup> S. Rep. No. 99-313, at 59, *reprinted in* 1986-3 C.B. (vol. 3) 1, 59.

<sup>113</sup> Treas. Reg. § 1.213-1(e)(1)(iii) (1979). See also Rev. Rul. 83-33, 1983-1 C.B. 70 (permitting deduction for the cost of maintaining a medically therapeutic swimming pool).

<sup>114</sup> Rev. Rul. 72-593, 1972-2 C.B. 180.

<sup>115</sup> Rev. Rul. 63-91, 1963-1 C.B. 54.

<sup>116</sup> Rev. Rul. 55-261, 1955-1 C.B. 307. But see *Tautolo v. Comm’r*, 34 T.C.M. (CCH) 1198 (1975) (disallowing deduction for treatment by native Samoan healers because it was for general health); *Ring v. Comm’r*, 23 T.C. 950 (1955) (denying deduction for trip to a shrine).

<sup>117</sup> *Mattes v. Comm’r*, 77 T.C. 650 (1981).

<sup>118</sup> *Id.* at 655.

necessity of examining a taxpayer's motive for such treatment. In such context, we need not draw the fine line between medical and personal expenses."<sup>119</sup> The I.R.S. similarly endorsed the deductibility of cosmetic procedures. For example, a taxpayer was allowed to deduct expenses incurred for a face-lift procedure, even though not recommended by the taxpayer's physician.<sup>120</sup> In its ruling, the I.R.S. commented that, "[s]ince the purpose of the taxpayer's operation was to affect a structure of the human body, its cost is an amount paid for medical care."<sup>121</sup>

## 2. *Enactment of § 213(d)(9)*

In 1990, Congress enacted section 11342(a) of the Omnibus Budget Reconciliation Act of 1990,<sup>122</sup> which amended § 213 to add § 213(d)(9). The amendment denies deductions for cosmetic surgery except under certain specified conditions. The Senate Finance Committee report<sup>123</sup> says that:

[E]xpenses paid for cosmetic surgery or other similar procedures are not deductible medical expenses, unless the surgery or procedure is necessary to ameliorate a deformity arising from, or directly related to . . . disfiguring disease. . . . Thus, under the provision, procedures such as hair removal electrolysis, hair transplants, liposuction, and face lift operations generally are not deductible. In contrast, expenses for procedures that are medically necessary to promote the proper function of the body and only incidentally affect the patient's appearance or expenses for treatment of a disfiguring condition arising from . . . disease (such as reconstructive surgery following removal of a malignancy) continue to be deductible.<sup>124</sup>

The exclusion of most cosmetic surgery procedures is an attempt by Congress to separate essential medical expenses, such as those used to treat disease, from those expenses that represent elective consumption by the taxpayer in the form of medical expenses.<sup>125</sup> Because the former expenses affect a taxpayer's ability to pay, they alone are the proper subject of the medical expense deduction.<sup>126</sup>

Under § 213(d)(9), procedures that meaningfully promote the proper function of the body, or treat or prevent disease or illness, are not cosmetic surgery, and thus are still deductible, even when they improve physical appearance.<sup>127</sup> In *Al-Murshidi v.*

<sup>119</sup> *Id.* at 656.

<sup>120</sup> Rev. Rul. 76-332, 1976-2 C.B. 81.

<sup>121</sup> *Id.* See also Rev. Rul. 82-111, 1982-1 C.B. 48 (finding that hair transplants and hair removal by electrolysis are medical care, but tattooing and ear piercing are not, because—as the skin is penetrated only superficially—they do not sufficiently affect a structure or function of the body).

<sup>122</sup> Pub. L. No. 101-508, 104 Stat. 1388-471.

<sup>123</sup> There was no formal report printed separately because the bill was brought to the Senate floor before a report could be printed. Instead, the report was printed directly in the Congressional Record. See 136 CONG. REC. S15629 (1990).

<sup>124</sup> 136 CONG. REC. S15629, S15711 (1990).

<sup>125</sup> See Newman, *supra* note 75, at 789-94 (describing legislative evidence that the deduction was conceived of in terms of the effect of medical expenses on the ability to pay, but arguing that the deduction lost this position over time).

<sup>126</sup> See *supra* Part II.B.1.

<sup>127</sup> See, e.g., Rev. Rul. 2003-57, 2003-22 I.R.B. 959 (allowing a deduction for expenses incurred for laser eye surgery to remedy myopia because the surgery "meaningfully promotes the proper function of the body"); Rev. Rul. 2002-19, 2002-16 I.R.B. 778 (finding that expenses paid for a weight-loss program as treatment for a specific disease, including obesity or hypertension diagnosed by a physician, are deductible if the taxpayer has been directed by a physician to lose weight as treatment). *But see* O'Donnabhain v.

*Commissioner*, the Tax Court allowed the taxpayer a deduction for her expenses incurred for three surgeries, including liposuction, to remove a mass of loose-hanging skin remaining after the taxpayer independently lost over 100 pounds.<sup>128</sup> The court reasoned that:

Petitioner was 100 pounds overweight and suffered from morbid obesity. Obesity is well recognized in the medical community as a serious disease. . . . Furthermore, petitioner continued to suffer from the effects of the above-described skin mass that was a deformity. This mass was not merely unsightly, it was prone to infection and disease and interfered with the petitioner's daily life. . . . The procedures that petitioner underwent meaningfully promoted the proper function of her body and treated her disease.<sup>129</sup>

Taxpayers are also able to deduct expenses for cosmetic surgery—procedures that improve appearance, but do not meaningfully promote the proper function of the body or treat disease or illness—if those procedures are necessary to ameliorate a deformity arising from (or directly related to) a congenital abnormality, personal injury resulting from accident or trauma, or a disfiguring disease.<sup>130</sup> For instance, the I.R.S. permits deduction for the expenses of breast reconstruction following a taxpayer's mastectomy as treatment for breast cancer because reconstruction “ameliorates a deformity directly related to a disease.”<sup>131</sup> However, expenses for teeth whitening are not a permitted deduction, because tooth discoloration is “not a deformity and is not caused by a disfiguring disease or treatment.”<sup>132</sup>

The meaning and extent of the statutory exclusion of cosmetic surgery have not been fully addressed since the 1990 amendment. Despite a handful of Tax Court and I.R.S. decisions on the matter, it is not yet entirely clear when a medical procedure that improves appearance is deductible under § 213. A medical procedure that improves appearance should be excluded from the statutory definition of cosmetic surgery if it passes two hurdles. First, the procedure should be prescribed to the taxpayer by a medical professional as treatment for a specific disease or infirmity. Second, a medical procedure that improves appearance should be generally accepted in the medical community as appropriate treatment for the disease for which it is prescribed.

The first requirement corresponds to the maxim that deductible medical expenses are not those for the general health of the taxpayer or those with remote or incidental medical benefits, but instead are incurred for the explicit purpose of treating a concrete

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Comm'r, 134 T.C. 34 (2010), *acq.*, 2011-47 I.R.B. 2 (holding that breast augmentation surgery in connection with male to female SRS is nondeductible because it was for the purpose of improving appearance and not to treat disease).

<sup>128</sup> *Al-Murshidi v. Comm'r*, No. 4230-008, 2001 WL 1922698 (T.C. Dec. 13, 2001).

<sup>129</sup> *Id.* at 3.

<sup>130</sup> See I.R.C. § 213(d)(9)(A) (2006).

<sup>131</sup> Rev. Rul. 2003-57, 2003-22 I.R.B. 959.

<sup>132</sup> *Id.* See also I.R.S. Priv. Ltr. Rul. 200344010 (Oct. 31, 2003) (“[T]reatment *j* is cosmetic surgery pursuant to § 213(d)(9)(B) because it will improve Taxpayer's appearance without also meaningfully promoting the proper function of the body or preventing or treating illness or disease. However, [treatment *j* will improve condition *d*], a deformity that arose from, or is directly related to, the congenital abnormalities . . . suffered by Taxpayer. Thus, treatment *j* is [deductible].”).



medical problem.<sup>133</sup> This is the same test that is applied to all medical expenses deducted under § 213.<sup>134</sup>

The difficulty with procedures that improve appearance is that non-medical benefits from the procedures may be prevalent as well. Thus, it is especially important in this area to carefully distinguish between disease-treating medical expenditures and quasi-medical expenses that do not trigger Congress's policy for mitigating the financial burden of serious health problems. Examining case law on the traditional scope of the medical expense deduction sheds some light on this issue. Taxpayers have long been forbidden from deducting expenses that do not appear to be legitimately medical, even when those expenses are incurred due to the urging of medical professionals. For example, taxpayers have been unsuccessful in attempts to deduct divorce expenses incurred to treat severe depression,<sup>135</sup> shopping trips as therapy for neurosis,<sup>136</sup> and dancing lessons to treat arthritis<sup>137</sup>—despite the fact that the aforementioned treatments were recommended by doctors for specific medical problems. The unifying reason for the denial of deductions for these expenses is that the “treatments” were not accepted in the medical community as legitimate treatments for the diseases they purported to address. Medical procedures that improve appearance are likely to be subject to exactly this problem. Therefore, it is appropriate to demand that medical procedures that improve appearance be generally accepted as medical treatment for the illnesses for which they are prescribed.

This does not mean that there needs to be consensus in the medical community about what is an appropriate course of treatment in any given case. To the contrary, scientific and medical experts often dispute such questions. Nonetheless, disagreement about suitable medical therapies can exist without this fact undermining the judgment of medical experts.<sup>138</sup> If a treatment is recognized by a significant portion of the medical community, a court or the I.R.S. should defer to these medical experts in determining whether the treatment truly treats disease. Given how broadly the medical expense deduction has been interpreted in the past,<sup>139</sup> this can be a relatively low bar. Those treatments that are endorsed by a noteworthy number of medical professionals as treatment for a specific disease may also improve appearance without a serious danger of being undertaken for their nonmedical benefits, and thus should escape being classified as cosmetic surgery under § 213(d)(9) when they are recommended by doctors.

<sup>133</sup> See *supra* notes 93-96 and accompanying text.

<sup>134</sup> See *id.*

<sup>135</sup> *Jacobs v. Comm’r*, 62 T.C. 813 (1974).

<sup>136</sup> *Rabb v. Comm’r*, 31 T.C.M. (CCH) 476 (1972).

<sup>137</sup> *France v. Comm’r*, 40 T.C.M. (CCH) 508 (1980), *aff’d per curiam*, 690 F.2d 68 (6th Cir. 1982).

<sup>138</sup> Cf. Margaret A. Berger & Lawrence M. Solan, *The Uneasy Relationship Between Science and Law: An Essay and Introduction*, 73 BROOK. L. REV. 847, 850-51 (2008) (“[S]cientists are not as certain as the lawyers would like them to be. Although there are many scientific truths accepted in both the scientific and lay communities, much of contemporary science involves researchers hypothesizing about natural phenomena and offering tentative explanations that become the subject of further research, which results in both refinements and broad challenges. Moreover, there is often legitimate disagreement among scientists about the mechanisms that cause disease.”); Samuel R. Gross & Jennifer L. Mnookin, *Expert Information and Expert Evidence: A Preliminary Taxonomy*, 34 SETON HALL L. REV. 141, 166-67 (2003) (“Knowledgeable people may disagree on what the answer is, or whether it is known, or even whether the question is answerable. And even if there is a reasonably clear answer out there somewhere, it may be no mean feat to find it. None of us can absorb even a tiny fraction of the general knowledge that exists in our extremely complex culture. We have no choice but to rely on experts. . . .”).

<sup>139</sup> See *supra* notes 107-16 and accompanying text.

The preceding analysis leaves open the possibility that taxpayers may be able to deduct expenses incurred to treat mental disease or illness that also happen to improve physical appearance. Treatment of mental illness is eligible for § 213 deductions.<sup>140</sup> The 1990 amendment is directed at procedures that affect a structure or function of the body, but are not excluded from the definition of cosmetic surgery under § 213(d)(9)(B) by treating a disease or illness. Medical procedures that affect a structure or function of the body but do not treat disease are cosmetic surgery if they improve appearance.<sup>141</sup> However, if a procedure that improves physical appearance also treats mental illness (a disease), it is not cosmetic surgery under § 213(d)(9)(B) and need not fulfill the requirements of § 213(d)(9)(A) in order to be deductible.

Before the enactment of § 213(d)(9), taxpayers had been allowed to deduct treatment for mental illness where the treatment also affected physical appearance. For example, before § 213(d)(9) was enacted, the I.R.S. approved a deduction for a physician-recommended wig for a child who had lost all of her hair as the result of disease, because the wig was thought essential for the girl's mental health.<sup>142</sup> Section 213(d)(9) highlights a concern about medical procedures that improve appearance but are not undertaken for sufficiently medical reasons. Under this scheme, the wig would be properly deductible now if it were both directed at treating the girl's specific mental health problem and accepted as such treatment by a significant number of medical professionals.<sup>143</sup> The wig appears to have been prescribed in order to remedy the patient's specific mental affliction. However, the wig is cosmetic if it is not also genuine medical treatment for her disease. Because it improves appearance, its deductibility should turn on whether there is general agreement by medical professionals that a wig is a fitting course of treatment for the girl's mental health problems. If such agreement could be shown, the wig would escape classification as cosmetic under § 213(d)(9) due to its status as a treatment for disease. Similarly, other procedures that treat specific mental diseases, but also improve appearance, should be deductible if there is adequate acceptance in the medical community for these treatments to be considered legitimately medical.

#### IV. *O'DONNABHAIN V. COMMISSIONER*

##### A. The Controversy and the Internal Revenue Service's Position

The taxpayer, Rhiannon O'Donnabhain, was born a genetic male.<sup>144</sup> However, she<sup>145</sup> was intensely uncomfortable in the male gender role from early childhood.<sup>146</sup> O'Donnabhain was first diagnosed with severe gender identity disorder ("GID") as an adult, after having been married for more than twenty years and fathering three

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<sup>140</sup> See Treas. Reg. § 1.213-1(e)(1)(ii) (1979) (sanctioning § 213 deduction for treatment for mental defect or illness). See also *Starrett v. Comm'r*, 41 T.C. 877 (1964) (allowing taxpayer with mental illness to deduct the cost of psychoanalysis).

<sup>141</sup> See I.R.C. § 213(d)(9)(B) (2006).

<sup>142</sup> Rev. Rul. 62-189, 1962-2 C.B. 88.

<sup>143</sup> This assumes that the wig was recommended to treat the girl's mental health and not to ameliorate the deformity of baldness, which was the result of organic disease. If the girl's doctor endorsed her purchase of a wig for the latter purpose, the wig would be cosmetic, but potentially deductible under § 213(d)(9)(A).

<sup>144</sup> *O'Donnabhain v. Comm'r*, 134 T.C. 34 (2010), *acq.*, 2011-47 I.R.B. 2.

<sup>145</sup> O'Donnabhain self-identifies as female, and will be referred to throughout with the feminine pronoun.

<sup>146</sup> *O'Donnabhain*, 134 T.C. at 35.

children.<sup>147</sup> GID is a condition listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders<sup>148</sup> ("DSM IV TR"), a diagnostic tool for mental disorders. The DSM IV TR's diagnostic criteria indicate that an individual has GID when he or she displays: (1) a repeatedly stated desire to be, or insistence that he or she is, the other sex; (2) persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex, including a preoccupation with getting rid of primary or secondary sex characteristics; (3) the absence of a physical intersex condition; and (4) clinically significant distress or impairment in social, occupational, or other important areas of functioning resulting from the disturbance.<sup>149</sup> GID is "severe" when the symptoms are particularly acute, or cause notable functional impairment.<sup>150</sup>

O'Donnabhain's psychotherapist recommended a course of treatment based on the Harry Benjamin Standards of Care ("Benjamin Standards"), published by the World Professional Association for Transgender Health, the most widespread standard of care for professionals working with people with GID.<sup>151</sup> In accordance with the Benjamin Standards, the taxpayer received feminizing hormone therapy from 1997 through 2001.<sup>152</sup> In 2000, she decided to undertake the Benjamin Standards' "real life" experience, which consists of presenting as female full time.<sup>153</sup> At this point the taxpayer legally changed her name from Robert Donovan to Rhiannon O'Donnabhain.<sup>154</sup> When these steps failed to assuage O'Donnabhain's distress about her sex, her psychotherapist concluded that O'Donnabhain satisfied the Benjamin Standards' criteria for sex reassignment surgery ("SRS").<sup>155</sup> In order to satisfy the Benjamin Standards, the taxpayer was examined and recommended for the surgery by a second licensed psychotherapist, and then referred to an experienced reconstructive surgeon who specialized in SRS.<sup>156</sup> This surgeon also concluded that O'Donnabhain was a good candidate for SRS.<sup>157</sup>

In October 2001, the taxpayer underwent SRS.<sup>158</sup> This consisted of genital reconstruction surgery, which reconfigured O'Donnabhain's male genitalia to create, in appearance and function, female genitalia.<sup>159</sup> The surgeon also performed breast augmentation surgery, to make her breasts (which had experienced notable development due to hormone therapy) more closely resemble female breasts.<sup>160</sup>

On her 2001 federal income tax return, O'Donnabhain claimed her expenses for SRS, totaling more than \$20,000 and not compensated by insurance or otherwise, as a § 213 itemized deduction. These expenses included the cost of the genital and breast surgeries, post-surgical stay at the surgeon's facility, medical equipment, travel and

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<sup>147</sup> *Id.* at 35-36.

<sup>148</sup> 4th ed. 2000 text revision.

<sup>149</sup> *See* DSM IV TR at 581.

<sup>150</sup> *See id.* at 2.

<sup>151</sup> *O'Donnabhain*, 134 T.C. at 37-39. *See also* THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, SIXTH VERSION (2001), available at <http://www.wpath.org/documents2/socv6.pdf>.

<sup>152</sup> *O'Donnabhain*, 134 T.C. at 39.

<sup>153</sup> *Id.* at 39-40.

<sup>154</sup> *Id.* at 40.

<sup>155</sup> *Id.* at 40-41.

<sup>156</sup> *Id.* at 41.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

lodging for pre-surgical consultation and surgery, psychotherapy, consultation costs for her second referral, and hormone therapy.<sup>161</sup> The I.R.S. initially gave O'Donnabhain a refund, but later disallowed the expenses on audit, finding that, under § 213(d)(9), the treatments were cosmetic in nature and thus nondeductible.<sup>162</sup>

The I.R.S. relied on a number of alternative justifications to support its conclusion. First, the I.R.S., while conceding that GID is a mental disorder, claimed that it is not a disease for the purposes of § 213, because it does not have an organic or physiological origin that reflects an abnormal structure or function of the body.<sup>163</sup> Second, the I.R.S. maintained that, based on the legislative history of § 213(d)(9), any medical procedure that is primarily directed towards improving appearance must be medically necessary to remain deductible under § 213.<sup>164</sup> According to the Service, the taxpayer's expenses did not treat disease because they were not medically necessary, and because there was controversy over the efficacy of SRS.<sup>165</sup> Finally, the I.R.S. claimed that O'Donnabhain was misdiagnosed with GID, and therefore—even if SRS could be treatment for a disease—it was not in O'Donnabhain's case.<sup>166</sup>

#### B. The Tax Court Opinions

The majority of the Tax Court allowed O'Donnabhain deductions for all her expenses except for the breast augmentation surgery.<sup>167</sup> The judges authored six different opinions.

Judge Gale, writing for the majority, reached that decision by applying the leading test for deductibility that the court formulated in *Jacobs v. Commissioner*.<sup>168</sup> The threshold question under the *Jacobs* test is whether O'Donnabhain suffered from “the present existence or imminent probability of a disease, defect or illness—mental or physical.”<sup>169</sup> The I.R.S. argued that O'Donnabhain was misdiagnosed with GID, and that GID is not a disease under § 213, because it does not have an organic or physiological origin that reflects an abnormal structure or function of the body.<sup>170</sup> Judge Gale, relying on the expertise of O'Donnabhain's doctors, dismissed the contention that O'Donnabhain was incorrectly diagnosed with GID.<sup>171</sup> He also concluded that GID is a disease under § 213.<sup>172</sup> Although the I.R.S.'s position in this case seemed to be that § 213 encompasses only those diseases with physiological origins, the weight of authority—and the I.R.S.'s own regulation<sup>173</sup>—signaled the contrary.<sup>174</sup> According to Judge Gale, mental disorders

<sup>161</sup> *Id.* at 41-42.

<sup>162</sup> See CCA 200603025 (Jan. 20, 2006). *But see* I.R.S. Priv. Ltr. Rul. 8321042 (Feb. 18, 1983) (allowing a taxpayer to deduct the costs incurred in connection with his son's SRS before the passage of § 213(d)(9)). The I.R.S. recently acquiesced in the *O'Donnabhain* decision and stated that it will no longer follow the position that it took in CCA 200603025. See 2011-47 I.R.B. 2.

<sup>163</sup> *O'Donnabhain*, 134 T.C. at 46-47, 54.

<sup>164</sup> See CCA 200603025 (Jan. 20, 2006).

<sup>165</sup> See *O'Donnabhain*, 134 T.C. at 53. See also CCA 200603025 (Jan. 20, 2006).

<sup>166</sup> See *O'Donnabhain*, 134 T.C. at 53.

<sup>167</sup> *Id.* at 76-77.

<sup>168</sup> *Id.* at 50 (citing *Jacobs v. Comm'r*, 62 T.C. 813, 818 (1974)). The *Jacobs* test is discussed in more detail in *supra* notes 97-99 and accompanying text.

<sup>169</sup> *Jacobs*, 62 T.C. at 818.

<sup>170</sup> See *supra* notes 163-166 and accompanying text.

<sup>171</sup> *O'Donnabhain*, 134 T.C. at 63-64.

<sup>172</sup> *Id.* at 55-63.

<sup>173</sup> See Treas. Reg. § 1.213-1(e)(1)(ii) (1979) (identifying expenses incurred primarily for the prevention or alleviation of mental defects and illnesses as deductible, without specifying the need for a physiological origin).

are diseases under § 213 without the requirement of a demonstrated physiological origin.<sup>175</sup> Instead, mental conditions are diseases “where there [is] evidence that mental health professionals regard[] the condition as creating a significant impairment to normal functioning and warranting treatment.”<sup>176</sup> In particular, the majority found GID to be a disease because it is a “widely recognized and accepted diagnosis in the field of psychiatry” and “a serious, psychologically debilitating condition” that is associated with self-mutilation and suicide if left untreated.<sup>177</sup>

Under the *Jacobs* test, O’Donnabhain’s expenses must have been “directly or proximately related to the diagnosis, cure, mitigation, treatment, or prevention of the disease or illness.”<sup>178</sup> Judge Gale opined that the hormone therapy and genital surgery treated O’Donnabhain’s GID because, despite some controversy, they are well-recognized and accepted therapies for severe GID according to the Benjamin Standards and many psychiatric professionals.<sup>179</sup> The majority also noted that SRS is the only known effective treatment for severe GID, where psychotherapy alone is not effective.<sup>180</sup> O’Donnabhain also passes the *Jacobs* but-for test<sup>181</sup> because, even if the hormone therapy and genital surgery had some nonmedical benefit, they were an essential element of her treatment of severe GID, and would not have occurred except to alleviate her suffering from GID.<sup>182</sup> In response to the Service’s argument that, given the legislative history of § 213(d)(9), medical procedures that affect appearance must be medically necessary to be deductible, Judge Gale concluded that the hormone therapy and genital surgery were necessary to treat O’Donnabhain’s GID.<sup>183</sup> Nonetheless, he found that, because O’Donnabhain had experienced sufficient breast growth during the hormone phase of her treatment, her breast augmentation surgery did not treat her disease and was therefore cosmetic and nondeductible.<sup>184</sup>

In a concurring opinion, Judge Holmes agreed with the majority’s result, but disagreed with the majority’s reasoning that SRS is the proper and necessary treatment for GID.<sup>185</sup> Judge Holmes, noting the medical controversy over SRS, would have relied on a test that determined deductibility based on whether the treatment is therapeutic to the taxpayer, based on the taxpayer’s good-faith, subjective motivation.<sup>186</sup> Judge Holmes also took issue with the majority’s determination that SRS was medically necessary for O’Donnabhain, opining that “[M]edically necessary’ is a loaded phrase. Construing it

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<sup>174</sup> *O’Donnabhain*, 134 T.C. at 56-58. *But see* 2011-47 I.R.B. 2 (acquiescing in the *O’Donnabhain* decision).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 57.

<sup>177</sup> *Id.* at 61.

<sup>178</sup> *Jacobs v. Comm’r*, 62 T.C. 813, 818 (1974).

<sup>179</sup> *O’Donnabhain*, 134 T.C. at 65. *See also* Judith S. Stern & Claire V. Merkin, *Brian L. V. Administration for Children’s Services: Ambivalence Toward Gender Identity Disorder as a Medical Condition*, 30 WOMEN’S RTS. L. REP. 566, 567-74 (2009) (discussing the acceptance of SRS in the psychiatric community).

<sup>180</sup> *O’Donnabhain*, 134 T.C. at 67-68.

<sup>181</sup> *Jacobs*, 62 T.C. at 819.

<sup>182</sup> *O’Donnabhain*, 134 T.C. at 76.

<sup>183</sup> *Id.* at 70, 77.

<sup>184</sup> *Id.* at 72-73.

<sup>185</sup> *Id.* at 85-100 (Holmes, J., concurring).

<sup>186</sup> *Id.* at 91.

puts us squarely, and unnecessarily, in the middle of a serious fight within the relevant scientific community . . . .”<sup>187</sup>

Judge Goeke wrote a concurring opinion in which he reasoned that O’Donnabhain’s genital surgery was not cosmetic because it was not directed at improving her appearance, but rather was functional.<sup>188</sup> However, he disagreed with the majority’s reasoning that left open the possibility of deductibility for surgeries directed solely at altering physical appearance if they alleviate mental pain.<sup>189</sup> Therefore, while he upheld the taxpayer’s deductions for expenses incurred for SRS, he would have ruled that breast augmentation surgery is cosmetic as a matter of law.<sup>190</sup>

Judges Foley and Gustafson both authored dissenting opinions. Judge Gustafson grounded his analysis solely on the statutory language of § 213.<sup>191</sup> Section 213(d)(1)(A) provides that medical care consists of “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.” Section 213(d)(9)(B) defines cosmetic surgery as “any procedure which is directed at improving the patient’s appearance, and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.” Thus, Judge Gustafson argued that, because of the omission of the word “mitigate” in § 213(d)(9)(B), procedures that improve appearance, but merely mitigate rather than prevent or treat illness, are not excluded from the definition of cosmetic surgery and are only deductible if they fall within the exception of § 213(d)(9)(A).<sup>192</sup> To “treat” a disease, a procedure must “bear directly on the condition in question.”<sup>193</sup> Mitigation, on the other hand, merely makes a disease less severe, or lessens the symptoms.<sup>194</sup> Therefore, “‘treatment’ addresses underlying causes and ‘mitigation’ lessens effects.”<sup>195</sup> According to Judge Gustafson, SRS *mitigated* O’Donnabhain’s symptoms of GID, but was not a *treatment* because “A procedure that changes the patient’s healthy male body (in fact, that disables his healthy male body) and leaves his mind unchanged . . . has not treated his mental disease.”<sup>196</sup>

Judge Foley’s dissenting opinion focused on the definition of cosmetic surgery found in § 213(d)(9)(B), which provides that “‘cosmetic surgery’ means any procedure which is directed at improving the patient’s appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.”<sup>197</sup> Judge Foley contended that the statutory definition does not exclude from cosmetic surgery *any* procedure that treats disease.<sup>198</sup> Instead, he argued that the test for cosmetic surgery set forth in 213(d)(9)(B) consists of two parts.<sup>199</sup> The threshold question is whether the

<sup>187</sup> *Id.* at 92. See also Anthony C. Infanti, *Dissecting O’Donnabhain*, 126 TAX NOTES 1403, 1404 (“The statute embodies no requirement of medical necessity, and this phrase appears only in passing in a Senate committee report and not at all in the House conference report relating to the enactment of section 213(d)(9).”) (citations omitted).

<sup>188</sup> *O’Donnabhain*, 134 T.C. at 101 (Goeke, J., concurring).

<sup>189</sup> *Id.* at 102.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 109-22 (Gustafson, J., dissenting).

<sup>192</sup> *Id.* at 116-21.

<sup>193</sup> *Id.* at 116 (citations omitted).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 117.

<sup>196</sup> *Id.* at 122.

<sup>197</sup> *Id.* at 104-09 (Foley, J., dissenting).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

procedure is directed at improving appearance.<sup>200</sup> The second part of the test asks whether the procedure meaningfully promotes proper bodily function or prevents or treats disease.<sup>201</sup> Judge Foley argued that this second part is disjunctive and indicates that a procedure that is directed at improving appearance is cosmetic surgery *either* if it does not meaningfully promote proper function of the body, *or* if it does not prevent or treat disease or illness.<sup>202</sup> Even if SRS treated O'Donnabhain's disease, it did not (according to Judge Foley) meaningfully promote the proper function of her body, and thus is within the definition of nondeductible cosmetic surgery in § 213(d)(9)(B).<sup>203</sup>

### C. Analysis

The statutory language of § 213(d)(9) is not nearly as murky as one would believe after reading the various Tax Court opinions authored in *O'Donnabhain*. Section 213(d)(9)(B) excludes from the definition of "medical care" any procedure which is directed at improving appearance, but "does not meaningfully promote the proper function of the body or prevent or treat illness or disease." Such procedures are cosmetic surgery. Judge Foley, ostensibly adhering to the plain language of § 213(d)(9), argued that in order for a procedure that improves appearance to avoid classification as cosmetic surgery, it must *both* meaningfully promote the proper function of the body, *and* treat or prevent disease or illness.<sup>204</sup> However, this interpretation itself ignores the plain language of the statute. In order for Judge Foley's interpretation to be correct, the statute must read (or we must interpret it to read), "does not meaningfully promote the proper function of the body *or does not* prevent or treat illness or disease." Judge Halpern, concurring in the result, authored an opinion that largely consisted of responses to arguments advanced by Judges Foley and Gustafson in their dissenting opinions.<sup>205</sup> Judge Halpern's explanation of the logical fallacy of Judge Foley's analysis is helpful:

Because the second part of the test contains two expressions separated by "or", that part of the test contains a "disjunction"; i.e., a compound proposition that is true if one of its elements is true. Importantly, however, the second part of the test contains not just a disjunction (i.e., (p or q)), but rather the negation of a disjunction (i.e., not (p or q)). Judge Foley errs because he assumes that the expression "not (p or q)" is [logically] equivalent to the expression "(not p) or (not q)" . . . [when, in fact, its] equivalent is of the form "(not p) and (not q)", which, substituting the relevant words, is: "does not meaningfully promote the proper function of the body *and* does not prevent or treat illness or disease."<sup>206</sup>

In other words, Judge Foley is mistaken in his interpretation of the meaning of § 213(d)(9), because he believes it to mean that a procedure that is directed at improving appearance is cosmetic if either it does not meaningfully promote the proper function of the body, or if it does not prevent or treat disease or illness. In fact, based on the plain language of the statute, a procedure need satisfy only one of these conditions to avoid

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 77-85 (Halpern, J., concurring).

<sup>206</sup> *Id.* at 83-84 (emphasis added).

being classified as cosmetic surgery. Therefore, a procedure that meaningfully treats disease cannot be cosmetic surgery given the language of § 213(d)(9)(B).

Judge Gustafson accepted both that O'Donnabhain had GID, a serious medical condition, and that the medical community favors SRS for patients with severe GID that have not responded to other therapies.<sup>207</sup> However, he argued that § 213(d) excludes from the definition of cosmetic surgery therapies that treat disease, but not those that merely mitigate symptoms.<sup>208</sup> According to Judge Gustafson, "treatment" is directed at the causes of a disease, whereas "mitigation" minimizes the effects of disease.<sup>209</sup> In his opinion, SRS mitigates the symptoms of GID, but does not treat the disease because the underlying mental disorder is not addressed by SRS.<sup>210</sup> Judge Halpern responded to this point by arguing that for someone suffering from GID, the disease is the symptoms.<sup>211</sup> This may be true. However, the response need not be limited to GID specifically. For most mental disorders (and many physical disorders), treatment is limited to managing symptoms. Scientific knowledge has not progressed to the point where doctors know exactly what causes all illness, or what can be done to cure the underlying diseases.<sup>212</sup> Expenses to treat mental illness are nonetheless deductible.<sup>213</sup> GID is a mental disorder, and is subject to similar treatment regimes. In order to allow a deduction for those expenses incurred to treat GID, a disease, we can only be as precise as current medical knowledge allows. At present, SRS is the most effective known treatment for severe GID and is generally endorsed as such treatment by the medical community.<sup>214</sup> O'Donnabhain was deemed a suitable candidate for SRS by three medical professionals.<sup>215</sup> Therefore, O'Donnabhain's SRS was treatment for disease for the purposes for § 213.

Section 213(d)(9) provides that a procedure that treats disease remains deductible despite its effect on appearance because it is not included in the definition of cosmetic surgery. Judge Holmes' concurring opinion reveals his lack of appreciation of this important point. Judge Holmes contended that the test for deductibility should be whether the treatment is therapeutic, given the taxpayer's subjective, good-faith motivation.<sup>216</sup> He argued this way because he saw no need to evaluate generally acceptable standards of care, and cited years of case law in which unorthodox expenses were nonetheless found deductible because they were subjectively therapeutic.<sup>217</sup> This formulation, however, is much too broad and does not properly implement the statutory requirement. A taxpayer may subjectively believe that a treatment that improves physical appearance is therapeutic to him, and yet the statute does not allow for deduction unless the treatment promotes proper function of the body, treats a disease, or ameliorates a specific type of deformity. The enactment of § 213(d)(9) demonstrates Congress's intent to deny deductibility to appearance-improving medical procedures that are not genuine treatment for disease. In order to comply with this objective, the standard for deductibility must be more stringent than that proposed by Judge Holmes. Specifically,

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<sup>207</sup> *Id.* at 110 (Gustafson, J., dissenting).

<sup>208</sup> *Id.* at 111-19.

<sup>209</sup> *Id.* at 116.

<sup>210</sup> *Id.* at 121-22.

<sup>211</sup> *Id.* at 79 (Halpern, J., concurring).

<sup>212</sup> *See supra* note 138.

<sup>213</sup> *See supra* note 140.

<sup>214</sup> *See supra* notes 179-80 and accompanying text.

<sup>215</sup> *See supra* notes 155-57 and accompanying text.

<sup>216</sup> *O'Donnabhain*, 134 T.C. at 91 (Holmes, J., concurring).

<sup>217</sup> *Id.* (citations omitted).



the appearance-improving procedure must be one that is both prescribed by a medical professional and accepted as bona fide medical treatment by a sufficient number of medical experts.<sup>218</sup> In order to delineate between properly deductible expenses and quasi-medical consumption unrelated to disease, it is necessary to rely on a more rigorous standard than any treatment that is subjectively believed to be therapeutic.

Judge Goeke neglected to consider the appropriate role of medical experts in an adequate § 213(d)(9) analysis. Judge Goeke's error is the reverse of that of Judge Holmes in that he construed the statutory requirement too narrowly. Judge Goeke was concerned that the majority's analysis would improperly allow for the deductibility of procedures that are directed at altering physical appearance, if they alleviate any mental suffering.<sup>219</sup> To address this problem, he would have ruled that the breast augmentation was per se cosmetic and nondeductible, but the genital surgery was functional rather than cosmetic.<sup>220</sup> However, functionality is not a concern of § 213(d)(9). O'Donnabhain's expenses did improve her appearance, whether or not they also contributed some functionality. The reason that they are deductible, under the statute, is because the procedures were doctor prescribed, medically accepted treatments for her GID. If, in order to treat her GID, O'Donnabhain required breast augmentation, the statute could conceivably allow for that too. This would depend on whether there was sufficient agreement among medical experts that breast augmentation could be appropriate treatment for severe GID. In this case, the breast augmentation was not deductible because the taxpayer's doctor had determined that she had had sufficient breast growth from hormones alone.<sup>221</sup> Thus, the breast augmentation surgery was not prescribed to O'Donnabhain to treat her disease and is cosmetic surgery under § 213(d)(9)(B).

Moreover, Judge Goeke appears to have made an error made by many of the Tax Court judges in their evaluation of this controversy. Namely, it is both unusual and inappropriate for the court to engage in its own medical analysis. The Tax Court judges are not experts in the medical field; they are experts in tax law. While they may interpret and apply standards for the deductibility of medical procedures, this process does not invite independent medical scrutiny. Instead, the Tax Court must rely on the judgment of medical experts in determining whether a procedure is directed at treating a specific medical condition. If a procedure (such as O'Donnabhain's SRS) is recommended by medical professionals to treat a taxpayer's specific disease, and is generally accepted as such treatment by medical experts, it is deductible under § 213.

Cosmetic surgery is excluded from the statutory definition of medical care because it usually consists of entirely elective procedures unrelated to disease, and is just another form of voluntary consumption that should be funded from after-tax dollars. On the other hand, diseases are involuntary, and burdensome expenses to treat disease are medical expenses that merit a tax deduction. The language and structure of § 213(d)(9) forms a dichotomy between those expenses which create a financial burden stemming from disease and those expenses that do not. Because of the suspect status of cosmetic procedures, they must correct a deformity (i.e., result from a medical abnormality or

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<sup>218</sup> See *supra* notes 133-38 and accompanying text.

<sup>219</sup> O'Donnabhain, 134 T.C. at 101-04 (Goeke, J., concurring). Judge Gustafson apparently shared this concern, as evidenced by his discussion of the potential deductibility of cosmetic surgery used to treat Body Dysmorphic Disorder, a mental condition in which the afflicted is preoccupied with a perceived physical deformity that does not exist. *Id.* at 118 n.10 (Gustafson, J., dissenting).

<sup>220</sup> *Id.* at 101-04 (Goeke, J., concurring).

<sup>221</sup> *Id.* at 41.

disease process) in order to remain deductible. Only those medical expenses that give rise to a financial burden originating in disease are the proper subject of the medical expense deduction. Because GID is a disease, its treatment, as prescribed by doctors, is deductible. Its status as a disease excludes appropriately-prescribed SRS from the disallowance of deduction for cosmetic surgery, and from any heightened requirement of medical necessity. Allowing a § 213 deduction for expenses used for SRS is consistent both with the language of § 213, as well as the underlying policies that generally support § 213 deductions.<sup>222</sup>

Allowing a tax deduction for SRS also brings tax policy in line with health care knowledge and developments, and with developments in other areas of the law. Many private employers now cover treatment for GID, including SRS, in their health care plans.<sup>223</sup> This trend is supported by the American Medical Association, which announced in June 2008 that it supports private and public health insurance coverage for GID treatment.<sup>224</sup> These developments are evidence of a growing consensus in the medical community that SRS is a medically legitimate treatment for disease. Moreover, as the medical expense deduction is often broader in scope than health insurance coverage,<sup>225</sup> it is natural and appropriate for tax policy to follow the judgment of health professionals. Many courts have also recognized the importance of SRS for individuals suffering from GID. For example, an increasing number of prisoners have been able to obtain funding for SRS under the Eighth Amendment's prohibition against cruel and unusual punishment, which requires that prisoners receive adequate medical care.<sup>226</sup> The fact that numerous U.S. Courts of Appeal have determined that GID presents serious medical need only underscores the fact that the Tax Court should not second-guess medical experts in their assessment that SRS is treatment for the disease of GID. Courts have also found that SRS cannot be denied under State Medicaid plans as cosmetic surgery.<sup>227</sup> While the Tax Court is not bound by these non-tax interpretations of cosmetic surgery, this line of authority shows persuasively that there is a growing consensus in the medical and legal communities that SRS is a genuine medical treatment despite its effects on physical appearance.

## V. CONCLUSION

The medical expense deduction is important because it mitigates the burden of disease for taxpayers with a decreased ability to pay due to illness. Critics maintain that the deduction is not supportable in practice, because it can allow deduction for expenses that arise from quasi-medical preferences that are unrelated to disease. The exclusion of

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<sup>222</sup> See *supra* Part II.

<sup>223</sup> See Susan L. Megaard, *Scope of the Medical Expense Deduction Clarified and Broadened by New Tax Court Decision*, 112 J. TAX'N 353, 354 (2010) (citations omitted).

<sup>224</sup> See *id.*

<sup>225</sup> See *supra* notes 104-16 and accompanying text.

<sup>226</sup> See, e.g., *O'Donnabhain*, 134 T.C. at 62 (citing *De'lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003); *Allard v. Gomez*, 9 Fed. Appx. 793, 794 (9th Cir. 2001); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000); *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995); *Phillips v. Mich. Dept. of Corr.*, 932 F.2d 969 (6th Cir. 1991), *aff'g* 731 F. Supp. 792 (W.D. Mich. 1990); *White v. Farrier*, 849 F.2d 322, 325-27 (8th Cir. 1988); *Meriwether v. Faulkner*, 821 F.2d 408, 411-413 (7th Cir. 1987)).

<sup>227</sup> See *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980) (holding that SRS is not cosmetic surgery such that it can be denied by State Medicaid plan); *J.D. v. Lackner*, 145 Cal. Rptr. 570, 572 (Ct. App. 1978) (overturning decision that SRS was cosmetic and thus ineligible for Medicaid coverage). *But see* *Smith v. Rasmussen*, 249 F.3d 755, 759-61 (8th Cir. 2001) (denying reimbursement for SRS under State Medicaid plan because of its cosmetic nature).

cosmetic surgery from the definition of medical care should be seen as an effort by Congress to further conform the medical expense deduction to its proper role. Whether or not the medical expense deduction is a tax expenditure, its objective is appropriate government policy. Because the policy itself is suitable, the deduction need not be interpreted narrowly.<sup>228</sup> Given this understanding, it follows that expenses used to treat disease recommended by the taxpayer's doctor and consistent with generally accepted medical practice cannot be disallowed as cosmetic surgery. This conclusion is supported both by the policy justifications for the medical expense deduction as a whole, as well as the statutory language of § 213(d). GID is a well-recognized disease, and SRS is regarded by many medical professionals as its most effective treatment in severe cases. Because GID is a disease, expenses incurred for its treatment are exactly the sort of burdensome expenses that the medical expense deduction is meant to alleviate. Thus, it follows that a tax deduction for physician-recommended SRS is both appropriate and essential.

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<sup>228</sup> Courts often construe deductions narrowly, referencing the familiar maxim that “an income tax deduction is a matter of legislative grace and . . . the burden of clearly showing the right to the claimed deduction is on the taxpayer.” *Interstate Transit Lines v. Comm’r*, 319 U.S. 590, 593 (1943). The appropriateness of such a narrow construction is not undisputed. See MICHAEL J. GRAETZ & DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 229 (6th ed. 2009) (“It is true that the taxpayer bears the burden of proving his right to a deduction, but the question should not be approached in terms of a ‘narrow’ construction or ‘legislative grace.’ The clear intent of Congress to impose the tax on ‘taxable income’ requires recognition of deductions as well as gross income. When Congress wants to limit deductions, it can do so explicitly.”). However, this debate is well beyond the scope of this Note.