



## Ensure Reimbursement for Medically-Necessary Treatments

### Issue

Transgender people are barred from deducting the cost of medically-necessary treatments related to gender transition from their federal taxes.

### Short Answer

The Internal Revenue Service should issue new administrative guidance providing that medical expenses for treatments related to gender transition, including sex reassignment surgery, are tax deductible where determined to be medically necessary by the taxpayer's physician.

### Background

Internal Revenue Code Section 213 permits taxpayers to take a deduction for expenses paid for “medical care.” The term “medical care” is defined in Code section 213(d)(1)(A) to mean, in part, “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...*” (emphasis added)

In 1983, the Internal Revenue Service (IRS) issued a private letter ruling which permitted a married couple to deduct travel expenses related to their college-age child's sex reassignment surgery (SRS)<sup>1</sup>. The ruling did not specifically address whether the surgical treatment itself qualified as “medical care.” However, because travel expenses can only be deductible under Code section 213 if related to qualifying “medical care,” and because the IRS ruled that travel expenses related to SRS were deductible in accordance with Code section 213, the ruling impliedly held that SRS constitutes “medical care.”

In 1990, primarily in response to a series of IRS rulings regarding elective cosmetic surgery<sup>2</sup>, Congress amended the definition of “medical care” to exclude expenses related to cosmetic surgery and other “similar procedures.” Notably, in amending Code section 213, Congress did not eliminate the reference in Code section 213(d)(1)(A) to care otherwise “affecting any structure or function of the body.” Rather, Congress chose to add a new category of excluded expenses related to “cosmetic surgery or similar procedures” and left intact the existing language of Code section 213(d)(1)(A). This indicates that there remains some category of non-cosmetic medical expenses that are deductible where such expenses relate to care which is medically necessary and otherwise “affect[s] the] structure or function of the body.”

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<sup>1</sup> PLR 8321042 (February 18, 1983).

<sup>2</sup> In a series of administrative rulings regarding cosmetic surgery (but unrelated to treatments related to gender transition), the IRS held that individual taxpayers could deduct the cost of elective cosmetic surgery. The IRS based its holdings on the statutory language of Code section 213(d)(1)(A), which defines “medical care” in part, to include care “affecting any structure or function of the body.” Thus, although cosmetic surgery is typically elective in nature, the IRS concluded that expenses related to cosmetic surgery were deductible under Code section 213. See e.g., General Counsel Memorandum 36515 (December 11, 1975) (stating that “[c]osmetic surgery is legal and is for the purpose of affecting a structure of the human body,” and that, “[a]ccordingly, we believe that the costs of cosmetic surgery are costs of ‘medical care’ as that phrase is defined in Code § 213 and are deductible subject to the limitations of that section”).



As amended by the 1990 change, Code section 213(d)(9) provides that cosmetic surgery and “other similar procedures” are not deductible unless 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. “Cosmetic surgery” is defined in Code section 213(d)(9)(B) 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.

In 2005, in response to a question raised on audit, IRS Chief Counsel issued guidance which addressed whether a taxpayer could deduct as a Code section 213 expense the costs associated with SRS.<sup>3</sup> Based in large part on Congress’s 1990 amendments to Code section 213 regarding cosmetic surgery and the IRS’s view that Congress intended to deny a deduction for procedures relating to appearance in all but a few circumstances, the IRS ruled that expenses related to SRS are not deductible absent an “unequivocal expression of Congressional intent that expenses of this type qualify under section 213.”

In support of that conclusion, the IRS cited the Senate report to the 1990 amendments regarding cosmetic surgery, which states that expenses for purely cosmetic procedures that are not medically necessary are, in essence, voluntary personal expenditures, and as such, like other personal expenditures, generally should not be deductible in computing taxable income. Based on this language, the IRS concluded that SRS expenses do not fit within the strict boundaries of the statutory language of Code section 213. The IRS reasoned that the SRS expenses were not incurred for treatment of a disfiguring condition arising from a congenital abnormality, personal injury, trauma, or disease (such as reconstructive surgery following the removal of a malignancy). Moreover, it noted that “[w]hether gender reassignment surgery is a treatment for an illness or disease is controversial.”

### Recommendation

When Congress amended Code section 213 to eliminate the deduction for cosmetic surgery, Congress never intended to exclude from the definition of “medical care” procedures that are medically necessary and otherwise “affect [the] structure or function of the body.” As evidenced by the Senate Report to the 1990 amendments and the nature of the statutory changes, Congress was concerned only with excluding from the definition of “medical care” elective cosmetic surgery procedures that are not otherwise medically necessary. Accordingly, notwithstanding the current exclusion for expenses relating to cosmetic surgery and “other similar procedures,” the IRS should issue administrative guidance providing that expenses incurred by a taxpayer in connection with GRS are deductible under Code section 213 where such GRS is determined by the taxpayer’s licensed physician to be medically necessary.

### Authority

The IRS has the same authority to issue the requested administrative guidance as it used to issue the 1983 private letter ruling and the 2005 chief counsel advice respectively. It is not uncommon for

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<sup>3</sup> Chief Counsel Advice 200603025 (October 14, 2005)



the IRS to issue new administrative guidance that revises or otherwise supersedes stated positions as contained in existing rulings or advice.