# NOTES

## TAXATION: LODGING EXPENSES AS A MEDICAL DEDUCTION

UNTIL RECENTLY the lodging expenses incurred on a trip taken for the cure or mitigation of a specific mental or physical disorder have not been a deductible medical expense under the federal income tax.[1] In *Robert M. Bilder*,[2] however, the Tax Court has permitted a hyperkinetic New Jersey attorney to deduct the cost of his lodging during a three-month winter trip[3] to Florida. The taxpayer had suffered four heart attacks and needed mild exercise in order that new blood vessels to supply the heart might develop. Because he also suffered from "unusual inner stress and tension," his physician[4] advised him to spend the winter in

[1] The transportation expenses of such a trip are specifically declared deductible under § 213(e)(1)(B) of the 1954 Code.

The deduction has been granted for lodging expenses incurred as part of a hospital bill since the medical expense deduction was introduced in 1942. See INT. REV. CODE OF 1954, § 213(e); Treas. Reg. § 1.213-1(e)(1)(iv) (1959); Rev. Rul. 58-110, 1958-1 CUM. BULL. 155.

The medical expense provision under the 1939 Code was more liberally interpreted. For instance, hotel expenses incurred when daily visits were required to a medical clinic were deductible. Treas. Reg. 118, § 39.23(x)-1 (1955). Travel, meals, and lodging expenses incurred "primarily for and essential to the rendition of medical services" were deductible under § 23(x) of the 1939 Code. I.T. 3786, 1946-1 CUM. BULL. 75. See, *e.g.*, William B. Watkins, 23 P-H Tax Ct. Mem. 177 (1954). Section 213 of the 1954 Code employs virtually the same language as § 23(x) of the 1939 Code except for the addition of § 213(e)(1)(B), which deals with the deductibility of transportation expenses. In Frank S. Delp, 30 T.C. 1230, 1235 (1958), the Tax Court noted that congressional committee reports on the 1954 Code reveal an intention to codify prior concepts of "medical care." S. REP. NO. 1622, 83d Cong., 2d Sess. 220 (1954). See generally, Annot., 37 A.L.R.2d 551 (1954).

[2] 33 T.C. No. 17 (Oct. 26, 1959).

[3] The taxpayer was allowed to deduct $500 in 1954 and $277 in 1955 for his personal lodging expenses and $250 for transportation expenses each year. The court cited Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930). He was not allowed to deduct that portion of the lodging expenses ($1500 in 1954 and $829 in 1955) which represented housing for his wife and child, although a single hotel room would have been more expensive.

[4] The court described the taxpayer's physician as "one of the most eminent heart specialists in the United States if not the world." 33 T.C. No. 17, at 2.

The fact that the trip was taken at the suggestion of a physician is a great evidentiary aid, if not a prerequisite to deductibility. Edward T. Havey, 12 T.C. 409, 412 (1949); Martin W. Keller, 18 P-H Tax Ct. Mem. 593, 594 (1949). *But see*, John L. Seymour, 14 T.C. 1111, 1117 (1950). That the advice of a chiropractor or osteopath might suffice, see I.T. 3598, 1943 CUM. BULL. 157-58; Ochs v. Commissioner, 195 F.2d 692, 695 n. 2 (2d Cir. 1952) (dissenting opinion).

a mild climate where he could exercise outdoors and avoid the tension of confinement indoors.[5] Pursuant to this advice the taxpayer chose a Florida resort area which offered a mild winter and the services of one of the few doctors in the state competent to supervise his use of a then new anticoagulant drug. As evidence that the trip was not merely a vacation, but was for the "cure, mitigation, treatment, or prevention of disease,"[6] the Tax Court considered the general inconvenience resulting from the disruption of the taxpayer's home and employment[7] as well as the specific advice of his physician. In allowing the deduction of the cost of his apartment as a medical expense, the court departed sharply from previous interpretations of section 213(e)(1)(B) of the 1954 Code and disregarded express congressional intent.

That Congress did not intend for the medical expense deduction to include the lodging expenses of such a trip is clearly indicated by the committee reports, which provide that the deduction of the expenses of "transportation primarily for and essential to medical care" specifically

[5] The taxpayer "was at the time the advice was given a hyperkinetic person with an unusual inner stress and tension. To confine him either at home or a hospital in the relatively cold climate of New Jersey throughout the winter months would have resulted in danger to his health from two sources. Such extended inactivity would have increased his inner stress and tension, which are medically accepted as tending to cause the recurrence of heart attacks in one who has previously suffered one or more such incidents. Mild exercise of the type not available while confined to home or hospital is required for such a person and was prescribed for petitioner in order that new vascular passages for blood to the heart may more readily and quickly develop." 33 T.C. No. 17, at 2.

[6] INT. REV. CODE OF 1954, § 213(e)(1)(A). Section 213(e)(1)(B) further defines deductible "medical care" as amounts paid "for transportation primarily for and essential to medical care referred to in subparagraph (A)."

[7] The taxpayer had given up a $150 weekly drawing account as a partner in a Newark law firm, taken his daughter out of school, and closed his home in New Jersey in order to live in Florida during the winter months.

The Tax Court did not allow deduction of that portion of the rental cost of the apartment which represented housing for the taxpayer's wife and daughter because it was "unable to conclude that having his family in Florida with him was necessary as a part of the treatment of his disease." In a case decided under the 1939 Code, Embry's Estate v. Gray, 143 F. Supp. 603, 609 (W.D. Ky. 1956), the district court allowed the deduction of "hotel expenses, rooms and meals and a reasonable amount for incidental expenses" for both the taxpayer and his wife, whom his physician had advised the taxpayer to take with him. Expenses for their daughter and bar bills were disallowed, however. The case is representative of the more liberal construction given § 23(x) of the 1939 Code.

It seems anomalous that the Tax Court in the *Bilder* case gave so much weight to the fact that the taxpayer's family and home were disrupted in determining that the trip was not a vacation, and, yet, did not allow a deduction for his wife and daughter's housing in Florida.

excludes deduction of the cost of any "meals and lodging while away from home receiving medical treatment," but includes "the cost of food or lodging provided as part of a hospital bill."[8] An example similar to the *Bilder* case was employed by a Senate committee in commenting on section 213(e):[9]

> For example, if a doctor prescribes that a patient must go to Florida in order to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductible *but not his living expenses while there.*[10]

The Tax Court, however, finding no ambiguity on the face of this section, saw no reason for examining "congressional history" for its meaning and allowed the deduction.[11]

Only in relatively few instances have transportation expenses lost "their identity as ordinary personal expense and become deductible as amounts claimed primarily for the prevention or alleviation of disease."[12] A series of decisions has established that transportation expenses are deductible if the trip is taken for the treatment[13] of a specific

[8] S. REP. No. 1622, 83d Cong., 2d Sess. 219 (1954). H.R. REP. No. 1337, 83d Cong., 2d Sess. 29-30 (1954). See Treas. Reg. § 1.213-1(e)(1)(v) (1959). Special foods or beverages may qualify for the medical deduction although not consumed in an institution only if prescribed by a physician for medicinal purposes and is in addition to, rather than a substitute for, the normal diet of the patient. Doris V. Clark, 29 T.C. 196 (1957); Rev. Rul. 55-261, 1955-1 CUM. BULL. 307, 312.

[9] S. REP. No. 1662, 83d Cong., 2d Sess. 219-20 (1954). (Emphasis added.)

[10] The Regulations have incorproated a very similar example, Treas. Reg. § 1.213-1(e)(1)(iv) (1959); Rev. Rul. 58-110, 1958-1 CUM. BULL. 156.

[11] The Tax Court has felt more constrained to determine congressional intent as to § 23(x) of the 1939 Code than § 213(e) of the 1954 Code. It stated that, "As the broad and comprehensive language of this section is susceptible to a variety of conflicting interpretations, we feel impelled, in order to determine the limits of its construction, to inquire into the Congressional intent which lay behind the enactment of this legislation." L. Keever Stringham, 12 T.C. 580, 583 (1949), *aff'd*, 183 F.2d 579 (6th Cir. 1950). In Frank S. Delp, 30 T.C. 1230, 1235 (1958), the court did examine committee reports accompanying the enactment of the 1954 Code to determine congressional intent and quoted H.R. REP. No. 1337, 83d Cong., 2d Sess. 30 (1954): "A new definition of 'medical expenses' provides for the deduction of transportation expenses for travel prescribed for health, but *not the ordinary living expenses incurred during such a trip.*" (Emphasis added.)

[12] L. Keever Stringham, *supra* note 11, quoted in Rodgers v. Commissioner, 241 F.2d 552, 555 (8th Cir. 1957).

[13] In many cases the California and Florida climates may be much more important to physical recovery than drugs and other items which constitute the more usual forms of "medical care." Webster, *Medical Expense Deductions Under Section 23(x)*, 31

disease,[14] instead of the general improvement of the taxpayer's health or morale,[15] and is taken before the end of the convalescent period.[16] Moreover, although the taxpayer need not be cured as a result of the trip in order to qualify for the deduction, there must be a direct relation between his disease and the climate to which he travels.[17] "An incidental benefit is not enough."[18] The decisions applying these standards are not, however, in complete harmony. In *Commissioner v. Stringham*[19] the Sixth Circuit allowed the deduction of both transportation expenses and the cost of maintaining the taxpayer's five-year-old child in a private school in Arizona while the child recovered from a respiratory condition. In *Ochs v. Commissioner*, the Second Circuit denied a deduction to another taxpayer for similar expenses incurred in sending his young daughters to a boarding school so his wife could recover from throat cancer at home.[20] The court distinguished the *Stringham* case on the facts. There the expenses of sending a child to boarding school were incurred because of the child's own ill health. In the *Ochs* case, however, the children were in excellent health. In another case the Eighth Circuit disallowed the deduction of travel expenses incurred by a wealthy taxpayer who left St. Louis to escape its harsh winters and

TAXES 7, 12 (1953). The Tax Court has recognized the therapeutic value of the warm southern climate in the treatment of particular diseases. William B. Watkins, 23 P-H Tax Ct. Mem. 177 (1954) (arthritis); William H. Duff, II, 22 P-H Tax Ct. Mem. 1161 (1953) (psoriasis). The court has held, however, that a change of climate to improve taxpayer's general health, but not to obtain medical care, does not qualify for the deduction. Frances Hoffman, 17 T.C. 1380 (1952); Rev. Rul. 56-474, 1956-2 CUM. BULL. 157. Nor may a taxpayer deduct the cost of a trip to Rome, for an audience with the Pope, and to the religious shrine at Lourdes, France, to seek spiritual aid, not medical treatment, to hasten recuperation from a cancer operation. Vincent P. Ring, 23 T.C. 950 (1955).

[14] Martin W. Keller, 18 P-H Tax Ct. Mem. 593 (1949).

[15] Samuel Dobkin, 15 T.C. 886 (1950); Edward A. Havey, 12 T.C. 409 (1949); Rev. Rul. 57-130, 1957-1 CUM. BULL. 108.

[16] Frances Hoffman, 17 T.C. 1380 (1952).

[17] Samuel Dobkin, 15 T.C. 886 (1950); L. Keever Stringham, 12 T.C. 580, 585 (1949), *aff'd*, 183 F.2d 579 (6th Cir. 1950); Edward A. Havey, 12 T.C. 409 (1949). See Rev. Rul. 56-474, 1956-2 CUM. BULL. 157.

[18] Edward A. Havey, *supra* note 17, at 413.

[19] 183 F.2d 579 (6th Cir. 1950). The court allowed the deduction of a portion of the tuition charged as representing the cost of medical facilities and the child's meals and lodging under the rule in Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930).

[20] 195 F.2d 692 (2d Cir. 1952), *affirming* 17 T.C. 130 (1951). If the medical deduction is truly an attempt to correlate the burden of taxation and the ability to pay, it seems that there is little significant difference between removing an unhealthy environment from the sick person, as in the *Ochs* case, and removing the sick person to a more healthy environment, as in the instant case. See Note, 28 IND. L.J. 264, 268 (1953).

sultry summers. Although the trip was recommended by a physician, the court agreed with the Tax Court[21] that the taxpayer's retired status, the frequency of the trips, the number of years he had been making them, and his election to make such trips rather than moving permanently to a more favorable climate, made his expenses for transportation, food, and lodging nondeductible.[22]

In the instant decision, the Tax Court applied four tests in determining whether the lodging expenses of the taxpayer were deductible as a medical expense.[23] The first of these tests deals with the motive or purpose of the expenditures.[24] The court found that this test was satisfied because the sole purpose of the trip was to provide the taxpayer with a climate in which he could strengthen his heart muscles by outdoor exercise while avoiding the tensions of indoor confinement.

The second test is whether the expenditures would have been made but for the advice of a physician.[25] The considerable inconvenience and disruptive effect of moving his home and family to Florida for three months convinced the Tax Court that the taxpayer's trip was not a vacation and that the expenses would not have been incurred but for the advice of his physician.[26]

The third test requires that there be a direct relation between the expenditure and the treatment of the disease.[27] Expenses incurred merely to improve the general condition or morale of the taxpayer

[21] Bertha M. Rodgers, 25 T.C. 254 (1955).

[22] Rodgers v. Commissioner, 241 F.2d 552, 555-56 (8th Cir. 1957). See also, Ochs v. Commissioner, 195 F.2d 692, 697 (2d Cir. 1952) (dissenting opinion).

[23] These are the tests developed to determine deductibility of "transportation" expenses. The Tax Court found the general criteria of deductibility under § 23(x) of the 1939 Code in Edward A. Havey, 12 T.C. 409 (1949), and L. Keever Stringham, 12 T.C. 580 (1949); Ochs v. Commissioner, 195 F.2d 692, 696 (2d Cir. 1952).

[24] This test obviates the complexities of apportioning an expenditure motivated by more than one reason. The Treasury Department provided that, "Allowable deductions under section 23(x) will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness." 26 C.F.R. § 39.23(x)-1 (1954). See Edward A. Havey, 12 T.C. 409, 412 (1949); Note, 28 IND. L.J. 264, 271 (1953).

A taxpayer recently won approval of his deduction of travel expenses from Los Angeles to New York to consult a physician. His social and recreational activities on the trips were minor and secondary to the primary purpose of obtaining professional services. The court found that the trips would not have otherwise been made. Stanley D. Winderman, 32 T.C. No. 114 (Sept. 14, 1959).

[25] See note 4 *supra*.

[26] Edward A. Havey, 12 T.C. 409 (1949). See Webster, *supra* note 13, at 8.

[27] Ochs v. Commissioner, 195 F.2d 692, 695 n. 2 (2d Cir. 1952) (dissentiong opinion); Martin W. Keller, 18 P-H Tax Ct. Mem. 593 (1949); Rev. Rul. 56-474, 1956-2 CUM. BULL. 157.

would clearly fail to qualify for the deduction.[28] In this case the warm climate was sufficiently related to the mitigation of the effects of prior heart attacks and to the prevention of future attacks. Because he suffered no further attacks, the court felt that the treatment had accomplished its purpose.

Fourthly, the treatment must be proximate in time to the illness. Was the treatment reasonably designed to effect the diagnosis, care, mitigation, or prevention of a specific disease or to affect any structure or function of the body?[29] The government argued that the treatment was not sufficiently proximate to the onset or recurrence of the attacks. Due to the peculiar nature of the disease, however, the court felt that the proximity of the treatment to the illness was not "an apt test of the deductibility of these expenditures."[30]

The medical expense deduction is designed to distribute the burden of taxation as equitably as possible[31] by alleviating the financial hardship of unusual medical expenses.[32] Because of the particular facts in the *Bilder* case[33] and the evident good faith of the taxpayer,[34] it is arguable that the decision is both equitable and in harmony with the rationale underlying the medical deduction.[35] The decision is nevertheless in direct conflict with congressional intent. In so far as it represents a departure from the rather narrow definition of medical care consistently

[28] See note 15 *supra*.

[29] The court must decide whether the existing symptoms justify the treatment, Bessie Cohen, 20 P-H Tax Ct. Mem. 25 (1951), and must determine whether the length of time between the onset of the disease and the expense in question is reasonable. Frances Hoffman, 17 T.C. 1380 (1952); Samuel Dobkin, 15 T.C. 886, 888-89 (1950); Edward A. Havey, 12 T.C. 409, 413 (1949).

[30] 33 T.C. No. 17, at 6.

[31] "The credit for dependents . . . is plainly designed to effectuate a system of income taxation based on the taxpayer's ability to pay." Morrell v. Commissioner, 107 F.2d 34, 36 (3d Cir. 1939). See 3 PAUL & MERTENS, FEDERAL INCOME TAXATION § 30.07 (1934); Note, 28 IND. L.J. 264, 265 (1953).

[32] Representative Henshaw commented, "This amendment will be a help to persons or families having to undergo nnusual outlays for medical purposes in any year." 88 CONG. REC. 8469 (1942).

[33] In Commissioner v. Stringham, 183 F.2d 579 (6th Cir. 1950), the court stated: "Each case of this character must be decided on its own particular facts, and an opinion from us could create no rule of thumb for determination of the applicability of the term 'medical care' to all cases which may arise."

[34] In L. Keever Stringham, 12 T.C. 580, 585 (1949), the court stated: "Although we do not feel that the *bona fides* of a taxpayer's motive in incurring an expense should be determinative of its deductibility, we do believe that we should accord it considerable weight."

[35] Note, 28 IND. L.J. 264 (1953), contains an excellent discussion of the medical expense deduction and presents a review of the case law to 1953.

contended for by the Revenue Service[36] and heretofore enforced by the Tax Court since 1954, the *Bilder* decision may encourage those taxpayers who would enjoy a government subsidy for their lodging expenses incurred on a trip for their health.[37]

[36] Webster, *supra* note 13.

[37] In 1943 Dean Griswold commented on the then new provision in the Revenue Act of 1942 allowing ". . . the deduction of what may be called extra-ordinary medical expenses. . . . This deduction should be of real benefit to many persons who are confronted with heavy medical expenses. There will doubtless be attempts to abuse it by persons who seek to deduct the costs of their annual vacations in Florida on the ground that their health requires it or that their doctor has ordered it. But most of the claims will be legitimate, and the relief afforded will be a real contribution to the problem of the costs of medical care." Griswold, *The Doctor's Federal Taxes*, 31 CALIF. L. REV. 237, 253-54 (1943).