

NOTE

DEFINING "MEDICAL CARE": THE KEY TO PROPER APPLICATION OF THE MEDICAL EXPENSE DEDUCTION

First enacted by Congress in 1942, the medical expense deduction of the federal personal income tax is intended to allow the deduction from gross income of a taxpayer's expenditures, above a certain threshold, which are for "medical care."¹ By far the greatest source of litigation concerning this deduction has been dispute over what constitutes medical care.²

The resulting court decisions and Internal Revenue Service (IRS) rulings defining medical care have been at the least inconsistent and perhaps unconstitutional as well. Particularly with regard to expenditures for unusual treatments and for elective surgery, the decisions and rulings evidence a lack of familiarity with the policy choices behind the medical expense deduction provisions. This Note will examine the application of the medical expense deduction in light of its supporting policy bases and the evident congressional intent behind its enactment. Moreover, an effort will be made to suggest a workable, policy-rooted analysis which should clarify future determinations of when an expense is deductible as one for medical care.

I. PRELUDE TO DEFINING MEDICAL CARE: THE POLICY BEHIND THE MEDICAL EXPENSE DEDUCTION

Current legal literature provides several views of the principal policy choices behind the allowance in section 213 of the tax code³ of the medical expense deduction. Under one view, this deduction constitutes a "tax expenditure," the equivalent of a direct government subsidy of individual medical care expenses in the amount of the reduction in revenue that the

THE FOLLOWING CITATIONS WILL BE USED IN THIS NOTE:

SENATE COMM. ON FINANCE, THE REVENUE BILL OF 1942, S. REP. NO. 1631, 77th Cong., 2d Sess. (1942) [hereinafter cited as S. REP. NO. 1631];

Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972) [hereinafter cited as Andrews].

1. S. REP. NO. 1631 at 6. See I.R.C. § 213, quoted in note 3 *infra*.

2. See Fisher, *What Constitutes a Medical Deduction; Medical Dependency; Sick Pay*, 21 N.Y.U. INST. FED. TAX. 169, 172 (1963).

3. The key operative portion of section 213 provides:

(a) Allowance of deduction.—There shall be allowed as a deduction the following amounts, not compensated for by insurance or otherwise—

(1) the amount by which the amount of the expenses paid during the taxable year . . . for medical care of the taxpayer, his spouse, and dependents . . . exceeds 3 percent of the adjusted gross income . . .

For the statutory definition of "medical care," see text accompanying note 36 *infra*.

deduction produces.⁴ The tax expenditure analysis, popular in the Treasury Department, views most tax deductions as indirect subsidies which are alternatives to budget outlays, credit assistance or other instruments of public policy.⁵ The medical expense deduction is thus seen as a means of accomplishing the non-tax objective of providing for individual medical care.⁶

The allowance of an income tax deduction, however, is not a means well-suited to the achievement of direct government support for the costs of personal health care. Since the amount of government assistance a deduction provides is determined by the individual taxpayer's marginal tax rate,⁷ the section 213 "subsidy" is most beneficial to the relatively wealthier taxpayers in higher tax brackets.⁸ Concomitantly, the deduction "subsidy" renders little or no aid to those in greatest need of subsidization—the poor.⁹ Moreover, medical expenses themselves are regressive in character.¹⁰ Because liquid assets are concentrated toward the upper end of the income scale, the loss of current income caused by medical expenses is a much greater hardship for the poorer citizen.¹¹ Any "subsidy," then, provided by the medical expense deduction will bypass those who need it most.¹²

4. See Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352, 369 (1970): "The present tax system through the tax deduction for medical expenses provides federal financial assistance to meet above average medical expenses." Treasury Department officials compile tax expenditure budgets which set out the revenue losses of various tax provisions—such as section 213—as though they were direct expenditures by the government. See, e.g., *Special Analysis of Tax Expenditures From President Ford's Budget for Fiscal 1978, Special Analysis F, Tax Expenditures*, 11 BNA DAILY TAX REPORT J-1 (Jan. 17, 1977).

5. *Special Analysis of Tax Expenditures from President Ford's Budget for Fiscal 1978, Special Analysis F, Tax Expenditures*, supra note 4; see [1968] SEC. OF THE TREAS. ANN. REP. OF THE STATE OF THE FINANCES 327, 329-30 (guidelines for Treasury Department analysis of the income tax). See also *The 1969 Economic Report of the President: Hearings Before the Joint Economic Committee*, 91st Cong., 1st Sess. 4, 11-31 (1969) (statement of Joseph W. Barr, Secretary of the Treasury).

6. See Surrey, supra note 4, at 369.

7. *Id.* An income tax deduction, such as provided for in section 213, will reduce the individual's tax bill by a percentage of the deducted amount equal to the individual's tax rate.

8. Since the deduction will reduce an individual's tax bill by a percentage of the deducted amount equal to his tax rate, the wealthier taxpayer in a higher income bracket will receive a greater benefit from an amount deducted. The three percent floor to the section 213 medical expense deduction, however, mitigates this upside down effect by disallowing deductions for medical expenses unless the total exceeds three percent of the taxpayer's gross income. See B. BITTKER & L. STONE, *FEDERAL INCOME ESTATE AND GIFT TAXATION* 189 (4th ed. 1972).

9. Individuals who pay little or no income taxes receive little or no benefit from the deduction. Moreover, since it is an itemized deduction, see I.R.C. §§ 62-63, it provides no "subsidy" for persons taking the standard deduction.

10. See Jensen, *Rationale of the Medical Expense Deduction*, 7 NAT'L TAX J. 274, 277 (1954).

11. *Id.*

12. For additional criticism of the tax expenditure concept of deductions, see Andrews 310-11; Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J.

A second rationale frequently offered to justify the section 213 medical expense deduction relies on the deduction's effect as a "tax incentive" which influences private spending behavior by encouraging medical care expenditures.¹³ Allowance of a deduction for medical expenditures is viewed as a stimulus to the purchase of health care since the government is picking up part of the cost.¹⁴ The efficacy of the section 213 deduction for this purpose, however, is limited. The higher-income taxpayer would purchase necessary medical care with or without the deduction and thus needs no incentive. The poor, since they reap little or no benefit from the medical expense deduction, are given no incentive to purchase health care. As is the case for the "tax expenditure" argument, "tax incentive" seems a perverse rationale for the deduction. It provides no stimulus for the poor who cannot afford medical care and who have no income against which to apply deductions.¹⁵

Both the "tax expenditure" and "tax incentive" rationales are inadequate justifications for a medical expense deduction because each focuses on concerns extraneous to the taxation system itself which are best dealt with outside that system.¹⁶ The non-tax goal of providing for and encouraging medical care for the public would be better and more equitably achieved through a national health insurance system. A more persuasive rationale for the deduction, developed by Professor William D. Andrews,¹⁷ is that the deduction of extraordinary medical expenses effectuates intrinsic personal income tax ideals by insuring that only "real income" comprises the income tax base.

The "money" or "source" income of a taxpayer—that is, the aggregate financial gain from all sources¹⁸—does not provide an ideal base upon which to apportion tax burdens. Taxpayers with identical money incomes

244 (1969); Bittker, *The Tax Expenditure Budget—A Reply to Professors Surrey & Hellmuth*, 22 NAT'L TAX J. 538 (1969); Surrey & Hellmuth, *The Tax Expenditure Budget—Response to Professor Bittker*, 22 NAT'L TAX J. 528 (1969). See also Stern, *Uncle Sam's Welfare Program for the Rich*, N.Y. Times, Apr. 16, 1972, § 6 (Magazine), at 28.

13. See TAX INSTITUTE OF AMERICA, *TAX INCENTIVES* (1971); Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

14. See authorities cited in note 13 *supra*.

15. See, e.g., B. BITTKER & L. STONE, *supra* note 8, at 189.

16. See Andrews 311. Politicians, however, would appear to benefit from the characterization of the medical expense deduction as a "tax expenditure." Thus, President Eisenhower appeared a champion of the public by proposing a lowering of the five percent floor to a three percent floor. Said the late President, "The present tax allowances for unusual medical expenses are too limited to cover the many tragic emergencies which occur in too many families." *Annual Budget Message to the Congress: Fiscal Year 1955*, [1954] PUB. PAPERS ¶ 14, at 92.

17. See Andrews.

18. See I.R.C. § 61. Gross income is a rough equivalent of "money" or "source" income.

may, in fact, have quite disparate abilities to spend and consume. It would be a violation of the principle of horizontal equity¹⁹ to tax at the same rate two individuals where, for example, one incurs higher costs to produce his income and therefore has less money to save or spend on consumer purchases. For this reason, Henry Simons' definition of "real income" as the sum of a taxpayer's yearly aggregate personal consumption plus net accumulation of goods and services²⁰ is generally accepted by scholars and commentators as the ideal base upon which to apportion income tax burdens.²¹ The primary purpose for allowing tax deductions, as Professor Andrews views them, is to effectuate the intrinsic tax goal of achieving an ideal income tax base by adjusting money income so that it equals yearly personal consumption plus accumulation.²² When, for whatever reason, a taxpayer's yearly "real income" amounts to less than his money income, a deduction in the amount of the difference is required.²³

The sum of yearly accumulation plus consumption provides an ideal index of the relative increase in material well-being on the basis of which tax burdens may be distributed.²⁴ The accumulation component includes the value of all those rights to property and services added to the taxpayer's store of wealth during the tax period. The personal consumption component, on the other hand, includes all the taxpayer's ultimate,²⁵ potentially beneficial expenditures²⁶ made as a result of personal choices from among the many gratifications (goods or services) available in the distributive sector. This refined definition of personal consumption excludes, for example,

19. Horizontal equity means, simply, that taxpayers with equal abilities to pay should be taxed at equal rates.

20. H. SIMONS, *PERSONAL INCOME TAXATION* 50 (1938): "Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question."

21. See Andrews 313.

22. See Andrews 330-31. As a practical matter, the income tax base calculation must begin with source or money income since taxes are initially collected through the employer withholding system.

23. See Andrews 325. Conversely, it should be noted that if a taxpayer's consumption and accumulation include substantial items not paid for from either current earnings, or savings, these items should be added as an adjustment to money income. See H. SIMONS, *supra* note 20, at 51, 55, 110-24.

24. Andrews 335.

25. "Ultimate" expenditures, as contrasted with "intermediate" expenditures, are those purchases of goods and services which have potential to materially benefit the taxpayer, as opposed to expenditures which are merely a step toward producing income or maintaining the status quo. Ordinary and necessary business expenses are generally considered intermediate expenses, while expenditures for vacations or clothing are generally held to be examples of ultimate expenditures. No precise line can be drawn between the two. See Andrews 322.

26. A potentially beneficial expenditure is one that theoretically goes beyond placing an individual in a whole, status quo position. It is a purchase in the distributive sector made by choice.

everyday business expenses because they are intermediate in nature²⁷ and theoretically provide no benefit to the taxpayer other than to aid in the production of money income.²⁸ A deduction should thus be allowed from money income for the ordinary and necessary expenses of conducting a business, for money income exceeds aggregate personal consumption plus accumulation by at least the amount of these expenses.²⁹

For similar reasons, extraordinary medical expenditures should be excluded from the consumption component of the tax base. Extraordinary expenditures for health care are not the result of voluntary choices among gratifications in the distributive sector, but are instead involuntary, intermediate expenditures based upon a malady-created need. The difference in magnitude of expenditures for medical care between taxpayers in otherwise similar circumstances reflects differences in need rather than choices among gratifications.³⁰ Expenditures for medical care are involuntary in the sense that they are necessitated by ailment or illness. They are also intermediate, since they do not increase a taxpayer's material well-being, except insofar as personal health, once poor, has been improved. Usually, the taxpayer is at most made whole by the expenditure, not made better off. The taxpayer with extraordinary medical expenses will thus realize less of an increase in material well-being than his co-worker with an identical money income who has no extraordinary medical expenses.³¹ A deduction for medical expenses, then, results in a more ideal tax base because expenditures which are not properly characterized as personal consumption are subtracted from money income.

The legislative history of the medical expense deduction discloses no clear rationale for the allowance of the deduction. The reports of the Senate Finance Committee suggest congressional concern that the deduction be confined to expenditures which are "extraordinary"³² and precipitated by a "defect."³³ This may indicate congressional support for Professor Andrews' view of the deduction, in that "extraordinary" expenditures made

27. See note 25 *supra*.

28. Given two taxpayers with equal money incomes, the increase in material well-being of Taxpayer I who has business expenses will be less than that of Taxpayer II who has none. Although Taxpayer I's expenditures may be greater in amount, the sole effect of his business expenditures is to produce money income. His ability to consume and accumulate, in the sense of making voluntary choices among gratifications in the distributive sector, will be reduced vis-a-vis Taxpayer II in the amount of Taxpayer I's business expenditures. Thus, Taxpayer I ought to be allowed a deduction equal to the amount of his business expense, for this is the amount by which his money income exceeds his consumption plus accumulation.

29. See I.R.C. §§ 162, 165, 183, 212, 217 (deductible expenses related to the production of income).

30. Andrews 336.

31. See note 28 *supra*.

32. S. REP. NO. 1622, 83d Cong., 2d Sess. 35 (1954).

33. S. REP. NO. 1631 at 6.

solely to alleviate health "defects" are intermediate and involuntary. However, other language in the reports suggests that the deduction was enacted for humanitarian, tax expenditure purposes.³⁴

The important point is, however, that Professor Andrews' analysis is the only rationale which justifies the deduction in terms of goals intrinsic to our system of income taxation. Section 213 is neither an effective subsidy nor a good incentive. The ideal tax base is a dollar amount corresponding as closely as possible to a taxpayer's ability to pay.³⁵ A taxpayer with involuntary intermediate expenses simply does not have the same ability to spend and save as another taxpayer with an equal money income and no such expenses. Deductions for such things as medical expenses are justified adjustments to money income which bring the latter in line with a tax base founded upon ability to pay.

II. WHAT CONSTITUTES "MEDICAL CARE"?

The broad language of section 213(e) defines medical care as amounts paid for:

- (A) the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,
- (B) for transportation primarily for and essential to medical care referred to in subparagraph (A), or
- (C) for insurance . . . covering medical care referred to in subparagraphs (A) and (B).³⁶

Section 213 is an exception carved out of the general rule of section 262, which prohibits deductions for personal, living or family expenses.³⁷ These latter expenses ought to be taxed because they are expenses for personal consumption.³⁸ Underlying the overall purpose of section 213 is the premise that medical care expenses are something other than personal expenses—that to constitute a medical care expense, an expenditure must be

34. The Senate Finance Committee's report recommending enactment of Section 23(x) of the Revenue Bill of 1942, the predecessor to section 213, stated that the proposal was "in consideration of the heavy tax burden that must be borne by individuals during the existing emergency and of the desirability of maintaining the present high level of health and morale." S. REP. NO. 1631 at 6.

35. See generally Jensen, *supra* note 10.

36. I.R.C. § 213(e).

37. I.R.C. § 262 provides: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."

38. See note 20 *supra* and accompanying text. It should be noted that at least a certain level of such expenditures may be viewed as involuntary since all persons must maintain a minimum level of existence regardless of their choices or desires. Since all persons must maintain this minimum level of existence, however, a tax deduction is not necessary to preserve horizontal equity.

intermediate in nature, at most returning the taxpayer to a status quo, a whole position of good health.³⁹ Thus, expenditures which are not for the diagnosis, prevention or treatment of a specific defect—even if they be for the general improvement of one's health—should not constitute medical care expenses.⁴⁰ So limiting the definition of medical care expenses allowed by the deduction comports with Professor Andrews' conception of deductions as a means of securing an ideal tax base of yearly personal consumption plus accumulation.

Characterizing a particular expense as either "medical" or "personal" is difficult.⁴¹ Essentially, it involves a finding of fact.⁴² Fundamental to the characterization is a determination of first, whether an expenditure is directed to a "defect," and second, whether it is for one of the purposes enumerated in section 213(e)(1)(A).⁴³ For example, expenditures for health club facilities, although they improve the general health of an individual, are generally held non-deductible because the costs are not incurred in response to a specific defect.⁴⁴ Similarly, food and lodging expenses incurred in obtaining medical treatment away from home generally do not constitute medical care,⁴⁵ unless incurred as a necessary incident to in-patient hospital care,⁴⁶ since they are ordinary living expenses, not expenses for one of the purposes enumerated in section 213(e)(1)(A).

39. L. Keever Stringham, 12 T.C. 580, 583-84 (1949), *aff'd per curiam sub nom.* Commissioner v. Stringham, 183 F.2d 579 (6th Cir. 1950). "Congress made it very clear that the benefit of the deduction it was creating for 'medical expenses' was in no way to encompass items which were primarily personal living expenses." 12 T.C. at 584.

40. See, e.g., Treas. Reg. § 1.213-1(e)(1)(ii) (1957).

41. Thus, in one of the first cases to construe section 213, the Tax Court, in L. Keever Stringham, 12 T.C. 580, 584-85 (1949), *aff'd per curiam sub nom.* Commissioner v. Stringham, 183 F.2d 579 (6th Cir. 1950), stated:

The real difficulty arises in connection with determining the deductibility of expenses which, depending upon the peculiar facts of each case, may be classified as either "medical" or "personal" in nature. There would seem to be little doubt that the expense connected with items which are wholly medical in nature and which serve no other legitimate function in everyday life is incurred primarily for the prevention or mitigation of disease. On the other hand, it is obvious that many expenses are so personal in nature that they may only in rare situations lose their identity as ordinary personal expenses and acquire deductibility as amounts claimed primarily for the prevention or alleviation of disease. Therefore, it appears that . . . where the expenses sought to be deducted may be either medical or personal in nature, the ultimate determination must be primarily one of fact.

42. 12 T.C. at 585.

43. See text accompanying note 36 *supra*.

44. See, e.g., Disney v. United States, 267 F. Supp. 1 (C. D. Cal. 1967), *aff'd on other grounds*, 413 F.2d 783 (9th Cir. 1969).

45. S. REP. NO. 1622, *supra* note 32, at 35: "A new definition of medical expense is provided which allows the deduction of only transportation expenses for travel prescribed for health, and not the ordinary living expenses incurred during such a trip." The Sixth Circuit has interpreted congressional intent to allow the deduction of food and lodging expenses incurred *in transit* away from home as transportation costs. Morris C. Montgomery, 51 T.C. 410 (1968), *aff'd*, 428 F.2d 243 (6th Cir. 1970).

46. *But see* Kelley v. Commissioner, 440 F.2d 307 (7th Cir. 1971) (when, due to hospital

The attempt to define medical care has produced a group of cases and rulings that are in hopeless conflict. Nevertheless, a rational and consistent application of section 213 is possible through adherence to express congressional intent and the only rational justification for the deduction—the achievement of horizontal equity through use of a more ideal tax base. In order to demonstrate that the section 213 definition of medical care can be consistently applied, this Note will proceed to examine those factual situations which raise the most difficult problems under section 213, in particular the issues presented by elective surgical expenses and unusual treatments.

III. WHAT IS A "DEFECT"?

A. *The Elective Surgery Rulings.*

Congress made it clear that an expense was for medical care only if it was directed at a specific health defect. Such a distinction is justified since an expenditure directed at a defect is an involuntary, intermediate expenditure which ought not be included in the ideal tax base of personal consumption plus accumulation.⁴⁷ Thus, one major problem in distinguishing medical care expenses from personal expenses is determining what constitutes a defect. Illustrative of the problem are the IRS rulings concerning the deductibility of elective surgical expenses. The rulings are shallow, but instructive, for they demonstrate the Service's unfamiliarity with the congressional intent and policy justifications for allowing the medical expense deduction.

The IRS has recently ruled that surgical fees for elective non-therapeutic plastic surgery are deductible medical care expenses under section 213.⁴⁸ The ruling is based upon a superficial reading of the language of section 213(e)(1)(A), which includes in the definition of medical care expenses 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 . . .*"⁴⁹ The view of the IRS is that since the purpose of the taxpayer's cosmetic face-lifting operation was to affect a structure of the human body, its cost is deductible as a medical care expense.⁵⁰ A Treasury Regulation cited in the ruling gives limited support to this position: regulation 1.213-1(e)(1)(i) provides that amounts "paid for the purpose of affecting any structure or function of the body" constitute medical care expenses without any requirement that such expenses also be "for the diagnosis, cure, mitigation, treatment, or prevention of disease."⁵¹ Giving disjunctive, inde-

overcrowding, taxpayer must stay and be treated at a hotel, the costs of meals and lodging therein are deductible).

47. See notes 39 & 40 *supra* and accompanying text.

48. Rev. Rul. 76-332, 1976-2 C.B. 81.

49. I.R.C. § 213(e)(1)(A) (emphasis added).

50. Rev. Rul. 76-332, 1976-2 C.B. 81, 82.

51. Treas. Reg. § 1.213-1(e)(1)(i) (1957).

pendent effect to the two clauses of subparagraph (A) of the statute appears to be a proper construction, particularly since they are separated by the word "or".⁵² Under this interpretation, the IRS would apparently approve the deduction of expenses associated with other elective surgical procedures, possibly including hair transplants, cosmetic breast surgery and rhinoplasty.

That the disjunctive portions of subparagraph (A) provide independent definitions of medical care, does not, however, necessarily mean that *any* amount paid "for the purpose of affecting any structure or function of the body" constitutes a medical care expense under section 213. Suntan lotion, brassieres and hair permanents all affect the structure or function of the human body, yet no one would suggest that the statute be read to allow the deduction of expenditures for these items as medical care. The language of section 213 must be construed in light of the Internal Revenue Code's general denial of deductions for personal, living or family expenses.⁵³

The deduction was first introduced by the Senate Finance Committee as part of the Revenue Bill of 1942.⁵⁴ In its report, the Committee stated:

The term "medical care" is broadly defined to include 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. It is not intended, however, that a deduction should be allowed for any expense that is not incurred primarily for the prevention or alleviation of a physical or mental defect or illness.⁵⁵

The above expression of congressional intent appears, at first blush, irreconcilable with the disjunctive drafting of section 213(e)(1)(A). The Committee's intent and the language of the statute can be accommodated, however, by construing the statutory language, "for the purpose of affecting any structure or function of the body," to include as medical care amounts paid for non-illness and non-disease treatments such as those for the setting of broken bones or for congenital birth defects, while excluding as non-deductible all expenses not for the prevention or alleviation of a physical or mental defect.⁵⁶

52. See C. SANDS, *STATUTES AND STATUTORY CONSTRUCTION* § 21.13, at 91 (4th ed. 1972).

53. I.R.C. § 262. In *Edward A. Havey*, 12 T.C. 409, 411 (1949), the Tax Court held that the medical expense deduction must be construed in light of "the basic concept of . . . the code that personal, living, and family expenses are not deductible." This is consistent with the construction given section 162(a) on business deductions; potential business expenses such as meals, lodging and commuting expenses are held non-deductible due to the Code's provision that personal, family and living expenses are non-deductible. See, e.g., *United States v. Correll*, 389 U.S. 299 (1967).

54. S. REP. NO. 1631 at 6.

55. *Id.* 95-96.

56. Thus the non-illness and non-disease treatments for malocclusion of teeth are held deductible pursuant to section 213(e)(1)(A). Rev. Rul. 62-210, 1962-2 C.B. 89.

The Treasury Regulations provide additional support for this construction of subparagraph (A). Immediately following the provision stating that operations or treatments affecting any portion of the body will constitute section 213 medical care,⁵⁷ the Regulations warn that medical care deductions must "be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness."⁵⁸

Such a construction of subparagraph (A) is also consistent with Professor Andrews' "horizontal equity" rationale for the medical expense deduction. Expenditures for procedures which are not addressed to the prevention or remedy of a specific malady are not intermediate, involuntary expenditures. The taxpayer is not merely returned to a whole, status quo position, but rather has made a choice among expenditures of potential benefit to himself relative to other taxpayers. Such expenditures should be treated as personal consumption and included in the taxpayer's income tax base.

The determination of whether an expense is for medical care, then, will often turn upon whether the expenditure was directed toward a defect as Congress meant that term. The construction of the word defect could be a frustrating exercise in semantics. It is arguable that congenital features of appearance such as unattractive noses, moles, baldness and abnormally large or small breasts are physical defects. It is submitted, however, that such features do not constitute the "physical or mental defects" which Congress and the regulations require unless they render the taxpayer unhealthy or endanger his health in a specific way. In first enacting the medical expense deduction, Congress was interested in a deduction for expenditures for "health," not for beauty.⁵⁹ Expenditures primarily for beautification are for personal consumption and belong within the tax base. Elective cosmetic surgery, unless prescribed for specific mental or physical health reasons,⁶⁰ merely treats the appearance or beauty of a person, and thus does not serve "to prevent or alleviate a . . . defect," as Congress employed these words. Thus section 213(e)(1)(A) does not provide for the deduction of expenses for non-therapeutic cosmetic surgery, its literal language and IRS construction notwithstanding.

The horizontal equity rationale for the medical expense deduction would similarly require the non-deductibility of expenses for non-therapeutic cosmetic surgery.⁶¹ Such expenditures reflect voluntary personal gratifi-

57. See note 51 *supra* and accompanying text.

58. Treas. Reg. § 1.213-1(e)(1)(ii) (1957).

59. The Senate Finance Committee Report recommended enactment "in consideration . . . of maintaining the present high level of public health . . ." S. REP. NO. 1631 at 6.

60. See note 65 *infra* and accompanying text.

61. Professor Andrews nevertheless regards the deductibility of expenses for cosmetic surgery justifiable as a matter of administrative convenience and political reality. He states: "Taxation in particular, like politics in general, is the art of the possible." Andrews 337.

cation and should therefore be taxed within the personal consumption component of Henry Simons' ideal income tax base. One would be hard-pressed to distinguish elective expenditures for face-lifting and hair-transplanting from those clearly personal consumption expenditures for cosmetics or wigs.⁶² They are all voluntary expenditures for personal gratification, providing relative benefit to the taxpayer beyond making him whole.⁶³

Expenditures for cosmetic surgery, then, ought to be deductible only where they constitute involuntary, intermediate expenditures which, at most, return a taxpayer to a status quo, whole position.⁶⁴ Thus, surgical alterations of features which endanger or affect a person's health in a specific way, such as the removal of a mole which could become cancerous, should constitute section 213 medical care. Where substantiated mental health problems, such as a taxpayer's genuine inability to face people due to his appearance, necessitate cosmetic surgery, its costs should similarly be deductible.⁶⁵ Although purely cosmetic in nature, surgery to remove scars occasioned solely by injury should constitute section 213 medical care since such costs are involuntary, intermediate expenses, merely returning the taxpayer to a status quo position. Although many therapeutic operations also make requested appearance changes upon a congenital feature, any additional expense occasioned by the cosmetic alterations should not be deductible. Only those expenditures which are intermediate in nature should be deductible under section 213.

B. *The Obstetrical and Related Services Rulings.*

The issue of the deductibility of elective surgical procedures also arises in relation to expenses for childbirth or its prevention. The Treasury Regulations specifically provide that obstetrical expenses are "deemed to be for the purpose of affecting any structure or function of the body and are therefore paid for medical care."⁶⁶ In two rulings, the IRS has held that legal⁶⁷

62. See note 87 *infra*.

63. Even the "tax expenditure" and "tax incentive" rationales for the deduction would not support the deductibility of non-therapeutic cosmetic surgery expenditures. It is doubtful that the government has any interest in subsidizing or encouraging expenditures for personal beautification.

64. Non-therapeutic cosmetic surgery expenses, although not deductible under section 213, may, in some cases, be deductible as business expenses pursuant to section 162(a) (for example, the face-lift expenses of an aging actress).

65. An analogous approach was taken by the I.R.S. in Rev. Rul. 62-189, 1962-2 C.B. 88, which held that expenditures for a wig are deductible as medical care expenses when prescribed by a doctor to preserve the patient's mental health.

66. Treas. Reg. § 1.213-1(e)(1)(ii) (1957).

67. The Treasury Regulations state that expenses for illegal procedures or drugs are not deductible medical care expenses. Treas. Reg. §§ 1.213-1(e)(1)(ii), 1.213-1(e)(2) (1957). Although the deductibility of illegal expenditures has not been litigated, the issue deserves brief discussion. Under the horizontal equity rationale for the allowance of deductions, the deduction of illegal expenses would be required to achieve the ideal tax base of incremental personal

vasectomies,⁶⁸ abortions⁶⁹ and sterilization procedures⁷⁰ constitute section 213 medical care, the expenses for which are deductible. These rulings, based solely upon the proposition that the procedures are "for the purpose of affecting any structure or function of the body,"⁷¹ present the same problems of construction under section 213(e)(1)(A) as do the rulings regarding cosmetic surgery. Specifically, it must be determined whether or not these expenditures, which do literally "affect" a "function of the body," are for the prevention or alleviation of a defect.

Although a pregnancy is usually voluntary, the deduction of obstetrical expenses is justified since the employment of a doctor or midwife is reasonably designed to prevent a "defect"—or physical health complication in the mother. In this sense, although the pregnancy is a matter of choice and gratification, the obstetrical expenses are very much involuntary and intermediate, at most insuring a healthy delivery. The deduction of obstetrical expenses is thus justified in the same manner as are expenses for immunizations before pleasure travel or the surgical expenses of an injured daredevil motorcyclist. All these expenses originate in voluntary activity,⁷² but are nevertheless extraordinary expenses which are intermediate in the sense that they only return the taxpayer to a status quo position relative to other taxpayers.⁷³

consumption plus accumulation. An expenditure for illegal treatment reflects a foregoing of personal consumption in the same way as does an expenditure for legal treatments.

However, the denial of the deduction for illegal expenditures is founded upon a rationale extraneous to the tax itself. The Regulation is best explained as an ascertainment of the overall congressional intent not to allow the Internal Revenue laws to benefit persons engaged in illegal activities. Thus section 162 forbids the deduction of trade or business expenses for illegal payments and fines resulting from illegal activities. *See* I.R.C. § 162(c), (f), (g). Moreover, a congressional intent to exclude illegal drugs and procedures from the section 213 definition of medical care may be inferred from the fact that Congress re-enacted the medical expense deduction provisions in 1954 fully aware of existing Treasury Regulations denying the deductibility of illegal medical expenses. *See* former Treas. Reg. 111, § 29.23(x)-1(d)(1), T.D. 5902, 1943 C.B. 119, 130. Even if the purpose of the medical expense deduction ought not be to subsidize or encourage medical expenditures, it must be recognized that one effect of the deduction is a government loss of revenue and encouragement of medical expenditure. Congress hardly desires to encourage illegal activities. It would thus seem a proper ascertainment of congressional intent, that in enacting section 213, Congress meant to deny a deduction for illegal medical expenditures.

68. Rev. Rul. 73-201, 1973-1 C.B. 140.

69. *Id.*

70. Rev. Rul. 73-603, 1973-2 C.B. 76.

71. *Id.*; Rev. Rul. 73-201, *supra* note 68.

72. There is a sense in which many physical maladies are "voluntarily" incurred. For example, one who engages in a particularly dangerous hobby or travels to disease-infested areas can reasonably foresee that certain medical problems are likely to develop. Since life is filled with risks and dangers in almost all endeavors, and since people do not seek physical harm, it is logical to view all medical expenditures as involuntary costs thrust upon persons who, very simply, would have preferred to remain healthy.

73. The deduction of obstetrical expenses is also supported under the "tax expenditure"

The deductibility of elective, non-therapeutic abortions is harder to justify.⁷⁴ Abortion procedures are not quite analogous to professional obstetrical services in that a professional delivery aids the natural pregnancy process to birth primarily for safety reasons, while an abortion is principally chosen as a voluntary, personal consumption expense of destroying an unwanted fetus which is of no danger to the mother's health. Supporting the allowance of a deduction, however, is the fact that once a fetus is conceived, the care of a trained professional, either in delivery or abortion, is necessary to prevent the occurrence of specific health complications in the mother. An expenditure for a professionally administered abortion, then, is an involuntary deductible expense "for the prevention of . . . a physical . . . defect."⁷⁵ In this light, whatever other distinctions may be made between the two, a professionally administered abortion is designed to prevent specific health problems in the same way as is a professionally supervised delivery. Thus, a pregnant woman may choose from two professional medical services: the delivery or the abortion.⁷⁶

Allowing the deduction of expenses for non-therapeutic abortions appears reasonable, moreover, since it avoids a sticky constitutional issue. In light of the constitutional right of a woman to abort a carried fetus,⁷⁷ there are equal protection considerations inherent in tax distinctions between deliveries and abortions.⁷⁸ A government decision to apply the medical expense deduction to pregnancies, but not to non-therapeutic abortions in the first trimester, would amount to a discrimination against a woman solely for choosing an abortion rather than childbirth. Such discrimination against

and "tax incentive" rationales, since Congress would presumably seek to encourage safe pregnancies and deliveries.

74. Even the "tax expenditure" and "tax incentive" rationales for the medical expense deduction would not justify the deduction of expenditures for elective, non-therapeutic abortions. That Congress does not wish to subsidize elective abortions is illustrated by the recent enactment of the Hyde Amendment as part of the Labor-H.E.W. Appropriation Act for 1977. Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976). The amendment prohibits Medicaid reimbursement for abortions unless the woman's life would be endangered by carrying the fetus to term. Abortion was excluded as a means of family planning for which funds would be available under the Family Planning Services and Population Research Act of 1970, 42 U.S.C. § 300a-6 (1970).

75. Treas. Reg. § 1.213-1(e)(1)(ii) (1957); S. REP. NO. 1631 at 6.

76. Note the approach taken by the Third Circuit in *Doe v. Beal*, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 97 S. Ct. 2366 (1977). In describing elective abortions as medical necessities for Medicaid purposes the *Beal* court stated:

It is undoubtedly true that at the time a woman chooses to have a non-therapeutic abortion there is a greater quantum of personal freedom than at the time she has a therapeutic abortion or goes into labor. But there is also greater freedom of choice involved when one decides to have a tooth cavity filled than when one is forced to have the tooth extracted after it has abscessed.

523 F.2d at 619.

77. See *Doe v. Bolton*, 410 U.S. 179 (1973); *Doe v. Wade*, 410 U.S. 113 (1973).

78. See *Maher v. Roe*, 97 S. Ct. 2376 (1977).

the exercise of a constitutional right arguably violates the fifth amendment equal protection clause.⁷⁹

Along with obstetrical and abortion expenditures, those for sterilization and vasectomy should also be deductible. Pregnancy involves specific health risks, discomfort, and mobility restrictions and therefore specific defects are prevented by these contraceptive measures. Conceptually there may be some problem in allowing deductions for vasectomies because the only defects prevented are those which would arise in another person. This jump to allowing the deduction of expenditures to prevent a defect in another is justified, however, by the language of section 213(a)(1) which provides that the deduction is available for the "medical care of the taxpayer, his spouse, and dependents."⁸⁰ Treating vasectomies as section 213 medical care, then, is appropriate since vasectomies provide medical care to a taxpayer's spouse by preventing the defects associated with pregnancy.⁸¹ The deductibility of vasectomy expenses, moreover, appears justified by considering the following analogy: a medicine which inhibits the infectiousness of a disease, but does nothing to cure the present victim should constitute section 213 medical care because the expenditure is for the prevention of a specific disease. Such an expenditure is involuntary and intermediate in that it does not materially benefit the taxpayer relative to other taxpayers, but fulfills a medico-societal obligation to prevent the spread of a specific disease. The vasectomy serves a similar function in the prevention of pregnancy-associated defects in others.

79. The recent Supreme Court decision in *Maier v. Roe*, 97 S. Ct. 2376 (1977), holding constitutional a state's denial of Medicaid benefits for elective abortions despite the fact that the state paid for childbirth expenses, might appear on the surface to settle the issue. However, in *Maier* the Court sanctioned only a state's financial "encouragement" of childbirth over abortion. *Id.* at 2384. *Maier* explicitly reaffirmed the Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976), which forbade restrictions which unduly burden the woman's right to abort a fetus. As discussed above, the medical expense deduction is most properly viewed not as an encouragement of medical expenditures supported by government largess, but rather as a necessary adjustment to money (gross) income. In this context, the denial of the deduction for elective abortions will unduly *burden* the taxpayer paying for an abortion by causing him to be taxed on a taxable income figure greater than that which would reflect his aggregate annual consumption plus accumulation. Stated simply, a taxpayer paying for an abortion would be forced to pay higher taxes than he should ideally pay. Thus, a denial of the deduction for abortion expenses in the face of an allowance for childbirth expenses does not simply "encourage" childbirth over abortion, it acts to restrict the right to an abortion by taxing expenditures therefor.

80. I.R.C. § 213(a)(1).

81. Thus the taxpayer's obtaining a vasectomy is for his spouse's medical care. This expenditure is logically no different from his purchasing a detachable air filtration system for his wife's home in order to prevent his wife from breathing material that harms her health. Neither expenditure is for a procedure which touches the wife's body, but both expenditures act to prevent specific defects in her. The expenditure for the air filtration system would be clearly deductible. *See Rev. Rul. 55-261*, 1955-1 C.B. 307; *accord*, *Raymond Gerard*, 37 T.C. 826 (1962).

IV. WHAT IS A "CURE"?

In a second group of decisions, the courts and the IRS have struggled to determine whether an incurred expense is a "cure" or "treatment" for the purposes of section 213. The decisions in this area are not only inconsistent with one another, but some may be unconstitutional as well.⁸² This section re-examines these decisions in terms of the policy goals and congressional intent behind the enactment of the medical expense deduction. In addition, this section proposes a policy-rooted analysis upon which to base the decision of whether a taxpayer's expenditure was for a treatment or cure under section 213.

Most expenses associated with common modern American medical treatment have been held by the courts and the IRS to constitute medical care expenditures deductible pursuant to section 213. Thus, expenses for services performed by a doctor or nurse, in the course of examination or treatment, including laboratory work, x-rays or hospital care are all for medical care and deductible.⁸³

Legally procured⁸⁴ medicines and drugs, whether or not requiring prescription,⁸⁵ also constitute medical care subject to a floor of one percent of gross income.⁸⁶ On the other hand, expenses for cosmetics, toiletries and sundries are personal, living expenses not includible in the "medicines and drugs" definition of medical care.⁸⁷ Similarly, food items, such as special

82. See note 131 *infra* and accompanying text.

83. Treas. Reg. § 1.213-1(e)(1)(ii) (1957):

[P]ayments for the following are payments for medical care: hospital services, nursing services (including nurses' board where paid by the taxpayer), medical, laboratory, surgical, dental and other diagnostic and healing services, x-rays, medicine and drugs . . . artificial teeth or limbs, and ambulance hire.

See generally Fisher, *supra* note 2; Skilling, *Limitations to the Medical Deduction; Problems on Reimbursement*, 29 N.Y.U. INST. FED. TAX 1359, 1362-71 (1971). For an accountant's view, see Shemo, *How to Make Sure Your Client Gets His Full Medical Expense Deduction*, 10 J. TAX. 298 (1973).

84. Treas. Reg. § 1.213-1(e)(2) (1957) provides that only "legally procured" medicines and drugs constitute medical care. The validity of the regulation has not yet been litigated. The merit of excluding expenses for illegal medical procedures of medical care is discussed in note 67 *supra*.

85. Treas. Reg. § 1.213-1(e)(2) (1957).

86. I.R.C. § 213(b). The congressional purpose for the floor is to make "it clear that expenditures for medicine and drugs (whether or not requiring a prescription) are taken into account but expenditures for toiletries and sundries are not." S. REP. 1622, *supra* note 32, at 219; H. R. REP. NO. 1337, 83d Cong., 2d Sess. A59-A60 (1954). The floor, however, penalizes the honest taxpayer who does not deduct expenses for toiletries and sundries as expenses for medical care, and, certainly, his expenses for medicines and drugs below one percent of his income are as involuntary and extraordinary as are other medical treatment expenses. The Code ought not be written to anticipate the cheater at the expense of the honest taxpayer. See Sierk, *The Medical Expense Deduction—Past, Present, and Future*, 17 MERCER L. REV. 381 (1966).

87. Treas. Reg. § 1.213-1(e)(2) (1957):

diets,⁸⁸ vitamins⁸⁹ and liquor⁹⁰ do not constitute medical care unless the item is ingested solely for the alleviation or treatment of an illness, and not merely as a nutritional substitute.⁹¹ Capital expenditures are held to constitute deductible medical care expenses if they are primarily for the medical care purposes set out in section 213(e)(1)(A),⁹² and to the extent that the capital asset does not constitute a permanent improvement in the value of the taxpayer's property.⁹³ Since capital expenditures are likely to be of a personal rather than medical nature, the courts have placed a burden upon the taxpayer to demonstrate that the asset was purchased primarily for the prevention or alleviation of a specific disease or illness.⁹⁴

A. *The Havey Test.*

Admitting that the common expenses of modern American medical care are clearly within that class of expenditures that Congress intended to reach in section 213 should not preclude the deductibility of expenses which do not fall within the mainstream of a licensed physician's services and prescriptions.⁹⁵ That a particular treatment is performed or prescribed by a licensed physician simply cannot be controlling as to the issue of whether the item or service constitutes section 213 medical care. The deductibility of

The term 'medicine and drugs' . . . shall not include toiletries or similar preparations (such as toothpaste, shaving lotion, shaving cream, etc.) nor shall it include cosmetics (such as face creams, deodorants, hand lotions, etc., or any similar preparation used for ordinary cosmetic purposes) or sundry items.

88. J. Willard Harris, 46 T.C. 672 (1966); *Doris v. Clark*, 29 T.C. 196 (1957).

89. *Princess E. L. Lingham*, 36 T.C.M. (CCH) 649 (1977). *But cf.* *Marshall J. Hammons*, 12 T.C.M. (CCH) 1318 (1953) (deductible when prescribed by a doctor).

90. Rev. Rul. 55-261, 1955-1 C.B. 307, 312.

91. In *Leo R. Cohn*, 38 T.C. 387 (1962), the Tax Court allowed a deduction for *additional charges* incurred at restaurants for the preparation of salt-free meals made necessary by the taxpayer's heart condition. *See also* Rev. Rul. 55-261, 1955-1 C.B. 307 (whiskey prescribed by a physician for the relief of angina pain resulting from heart disease may qualify as a deduction).

92. Treas. Reg. § 1.213-1(e)(1)(iii) (1962).

93. Treas. Reg. § 1.213-1(e)(1)(iii) (1962) provides:

[A] capital expenditure which is related only to the sick person and is not related to permanent improvement or betterment of property, if it otherwise qualifies as an expenditure for medical care, shall be deductible; for example, . . . eye glasses, a seeing eye dog, artificial teeth and limbs, a wheel chair, crutches, an inclinor or an air conditioner which is detachable from the property Moreover, a capital expenditure for permanent improvement or betterment of property which would not ordinarily be for the purpose of medical care . . . may, nevertheless, qualify as a medical expense to the extent that the expenditure exceeds the increase in the value of the related property

For a general historical perspective on the posture of the courts toward the deductibility of capital expenditures for medical care, see Comment, *Deductibility of Capital Expenditures and Medical Expenses Under Section 213 of the Internal Revenue Code of 1954*, 36 U. COLO. L. REV. 365 (1964).

94. *See, e.g., Disney v. United States*, 267 F. Supp. 1 (C.D. Cal. 1967), *aff'd*, 413 F.2d 783 (9th Cir. 1969).

95. For example, see *Riach v. Frank*, 302 F.2d 374 (9th Cir. 1962), where a deduction was allowed for expenses incurred in installing a "hil-a-vator" (an elevator type device installed on a hill) without the prescription of a physician.

services pursuant to section 213 must depend upon the nature of the services rendered, and not on the experience, qualifications or title of the person rendering them.⁹⁶

To qualify as section 213 medical care, a service rendered must be in furtherance of one of the purposes set out in section 213(e)(1)(A).⁹⁷ As discussed in the previous section, Congress intended that the literal definition of section 213 medical care be read broadly,⁹⁸ so long as the treatment or service was obtained *primarily* for the prevention or alleviation of a *specific* defect or illness.⁹⁹ The IRS has thus properly held that some relatively uncommon or unusual services constitute section 213 medical care, the expenses for which are deductible. In Revenue Ruling 55-261,¹⁰⁰ the IRS held that medical care includes the services of chiropractors, osteopaths and authorized Christian Science practitioners. In Revenue Ruling 63-91,¹⁰¹ the IRS held that amounts paid unlicensed practitioners such as psychotherapists can constitute deductible expenses for medical care. The IRS has also allowed the deduction of expenses for acupuncture, alcoholism treatment¹⁰³ and drug addiction clinics.¹⁰⁴

Other decisions, however, have denied the deductibility of expenditures for what might be characterized as an uncommon or unusual means of treating a disease or defect. For example, the deductibility of expenses incurred for treatment by native Samoan doctors¹⁰⁵ and for trips to religious healing shrines¹⁰⁶ has been denied. The Tax Court has met the lack of statutory guidelines for determining what constitutes a treatment or cure with a frequently cited test first articulated in *Edward A. Havey*.¹⁰⁷ *Havey* involved a taxpayer's claimed deduction of expenses for physician-advised trips to the New Jersey coast and Arizona (these locations having been the site of many of the taxpayer's prior vacations). In ruling that the expendi-

96. See *Edward A. Havey*, 12 T.C. 409 (1949); *George B. Wendell*, 12 T.C. 161 (1949). Thus, expenses for nursing services performed by an unlicensed or untrained nurse are held to be deductible as medical care expenses under section 213. See, e.g., *Myrtle P. Dodge*, 20 T.C.M. (CCH) 1811 (1961). See also notes 107-08 *infra* and accompanying text.

97. For example, transportation services may constitute section 213 medical care expenses, but only if "primarily for and essential to" a purpose set out in subparagraph (A). See I.R.C. § 213(e)(1)(B).

98. S. REP. NO. 1631 at 6.

99. *Id.*; Treas. Reg. § 1.213-1(e)(1)(ii) (1957). See notes 39-40 *supra* and accompanying text.

100. Rev. Rul. 55-261, 1955-1 C.B. 307.

101. Rev. Rul. 63-91, 1963-1 C.B. 54.

102. Rev. Rul. 72-593, 1972-2 C.B. 180.

103. Rev. Rul. 73-325, 1973-2 C.B. 75; Rev. Rul. 63-273, 1963-2 C.B. 112.

104. Rev. Rul. 72-226, 1972-1 C.B. 96.

105. *David F. Tautolo*, 34 T.C.M. (CCH) 1198 (1975).

106. *Vincent P. Ring*, 23 T.C. 950 (1955).

107. 12 T.C. 409 (1949).

tures for the trips were non-deductible personal expenses rather than medical treatment for heart failure, the *Havey* court set out a balancing test under which future courts were to weigh the answers to the following five questions: (1) What was the taxpayer's motive or purpose for incurring the expense? (2) Was the expense incurred at the direction or suggestion of a physician? (3) Did the treatment bear directly on the claimed condition? (4) Did the treatment bear such a direct and proximate therapeutic relation to the body condition as to justify a reasonable belief that its result would be efficacious? (5) Was the treatment so proximate in time to the onset or recurrence of the condition as to make one the true occasion of the other?¹⁰⁸

The employment of the *Havey* test in later Tax Court decisions has necessarily resulted in courts making unwarranted normative judgments as to whether certain uncommon treatments and services constitute section 213 medical care. More particularly, the *Havey* test forces the courts to police the medical sciences, a task which they are unequipped to perform and which section 213 nowhere requires. The Tax Court decisions in *Vincent P. Ring*¹⁰⁹ and *David F. Tautolo*¹¹⁰ illustrate the type of normative judgments that are compelled by employing the *Havey* test to determine whether an expenditure is for a treatment or cure. A close examination of these cases demonstrates that the *Havey* test, when employed outside the particular factual situation involved in *Havey*, is an improper application of the requirements of section 213.

In *Ring*, the Tax Court held that a taxpayer's expenses incurred in a trip to the Shrine of Our Lady of Lourdes in France did not constitute deductible expenditures for medical care. The taxpayer's young daughter was afflicted with a cancerous tumor in her left leg. Surgeons performed a complete resection of the child's leg bones to avoid amputation, but they could not be sure for five years whether the operation had effected a complete cure by preventing the tumor from appearing elsewhere in the child's body. The taxpayer, a devout Catholic, decided to send his daughter to the Shrine of Our Lady of Lourdes, a shrine officially recognized by the Catholic Church for the performances of miracles in the cure of physical ailments.¹¹¹ Knowledge of the recording of miracles performed at the Shrine influenced the taxpayer to have his child make the pilgrimage there. He was not sure that she would be benefited by a miracle, but believed that the

108. The test, as set out, is paraphrased from the *Havey* opinion. *Id.* at 412.

109. 23 T.C. 950 (1955).

110. 34 T.C.M. (CCH) 1198 (1975).

111. The *Ring* court found as fact:

Such recognition is not given without verification. The required conditions for recognition are registration at one of the several hospitals in Lourdes, the deposit of a certificate from the individual's home doctor, and a physical re-examination by hospital physicians to determine whether any alleged cure has occurred at the shrine.

23 T.C. at 951.

spiritual aid available there would bring some improvement of her physical condition to supplement the care rendered by the surgeon at home. Accompanied by her mother, the child travelled to Lourdes and each day attended Mass, took the Shrine's baths and participated in the candle-light procession of pilgrims.¹¹²

For a unanimous panel of sixteen judges, Judge Johnson applied the *Havey* test to hold the cost of the Lourdes pilgrimage not deductible. Although finding as fact that the spiritual aid sought at Lourdes was for the purpose of bringing about improvement in a specific physical condition,¹¹³ the *Ring* court held that "spiritual" help to alleviate a physical defect does not constitute medical care under the Code.¹¹⁴ The *Ring* court thus frankly announced a normative conclusion that spiritual aid could not constitute medical treatment.¹¹⁵

Tautolo, a memorandum decision, held that a taxpayer's expenditures in obtaining the treatment of Samoan tribal doctors did not constitute medical care costs deductible pursuant to section 213. The taxpayer's wife had suffered a massive stroke accompanied by advanced cerebral disease. The taxpayer and his wife had consulted nearly twenty physicians, all of whom considered the wife's case terminal. Both the taxpayer and his wife were originally from Samoa, and with the encouragement of their relatives, they decided to travel to Samoa to seek treatment for the wife. The couple flew to Samoa where the wife received the treatment of native Samoan doctors. The court found as fact that the taxpayer's sole motivation for making the trip was to alleviate his wife's physical condition. Samoan doctors do not attend medical school and believe in calling upon spirits and in using medicine from plants to alleviate sickness. As are all patients, the taxpayer's wife was treated with prayers and plant leaf massages.

Applying the *Havey* test in a step-by-step fashion, the *Tautolo* court concluded that the treatments received from the Samoan doctors did not constitute section 213 medical care.¹¹⁶ None of the American physicians consulted by the taxpayer recommended the trip. The treatments, the court held, were not directed to the wife's specific condition, because all patients of Samoan doctors receive the same type of treatment. Finally, the *Tautolo* court found that the taxpayer could not have held a reasonable belief that the treatment would be effective. While the taxpayer no doubt hoped to find a

112. *Id.* at 950-52.

113. *Id.* at 953.

114. *Id.* at 954.

115. *Id.* The *Ring* court nowhere mentioned or attempted to distinguish Rev. Rul. 55-261, 1955-1 C.B. 307, which holds that expenditures for treatment by a Christian Science practitioner are deductible under section 213.

116. 34 T.C.M. (CCH) at 1200.

cure in Samoa, his expectation of succeeding was at best minimal.¹¹⁷ Thus the *Havey* test mandated the court's conclusion that the Samoan treatments did not constitute medical care.

B. *Problems Under the Havey Test.*

The harsh decisions in *Ring* and *Tautolo* uncover a misreading of section 213(e)(1)(A) that is inherent in the *Havey* test. The *Havey* test mandates a normative judgment as to the *efficacy* of uncommon treatments which section 213(e)(1)(A) nowhere requires; neither does the statute require or exclude any particular *mode* of treatment as the *Ring* decision suggests. All that section 213(e)(1)(A) requires for deductibility of an expense is that it has been incurred "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,"¹¹⁸ subject to the limitation that the treatment be obtained primarily for the prevention or alleviation of a specific defect or illness.¹¹⁹

In *Tautolo*, the court, applying the third prong of the *Havey* test, held that the Samoan treatments did not bear directly on the wife's specific illness because the general nature of the treatment was the same utilized by Samoan doctors for all their patients.¹²⁰ Because the same type of treatment is applied in all cases, however, does not mean that the treatment rendered the wife was not directed toward her as the particular patient being treated. Many specific ailments can be treated with aspirin or codeine. Yet it cannot be said that a person who takes either for pain is not addressing a particular ailment presently suffered. While section 213 does require that a treatment be obtained primarily to prevent or alleviate a specific defect, it does not impose the quite different requirement that a treatment be effective with regard to only one specific ailment. The third prong requirement of the *Havey* test that the treatment "bear directly" on the claimed malady, particularly as applied in *Tautolo*, forces the courts to make a normative medical judgment not required by section 213.

The *Tautolo* court also applied the fourth prong of the *Havey* test and concluded that the taxpayer had no reasonable expectation that his wife's malady would be improved by the Samoan treatments.¹²¹ Again, section 213 does not require a normative conclusion as to the efficacy of a particular treatment. Moreover, such a requirement is fundamentally contrary to the view of the medical expense deduction as an aid in the determination of an

117. *Id.*

118. I.R.C. § 213(e)(1)(A).

119. Treas. Reg. § 1.213-1(e)(1)(ii) (1957). See notes 39-40 *supra* and accompanying text.

120. 34 T.C.M. (CCH) at 1200.

121. *Id.*

ideal personal income tax base. An unusual expenditure as a last resort for the alleviation of a physical malady is just as much an involuntary intermediate expense as is an expenditure for medical treatment that is reasonably likely to be efficacious. The fourth prong of the *Havey* test, if followed to its logical conclusion, would preposterously mandate the nondeductibility of all expenditures for curative treatment of terminally ill patients since no curative treatment could reasonably be believed to be efficacious in such circumstances.

Further, nowhere in the legislative history of the medical expense deduction does it appear to have been contemplated that a court would exercise normative judgments as to the *efficacy* of the treatments whose costs were claimed as a tax deduction. As made clear above, congressional concern focused upon insuring that personal, living or family expenses not be deducted as medical expenses.¹²² “Last resort” and uncommon treatments hardly constitute what are commonly thought of as personal, living or family expenses. Even more than the common medical expense, the last resort expenditure reflects a foregoing of gratifying personal consumption because of an involuntary, extraordinary need. Therefore, the last resort expenditure ought not be included in the personal consumption component of the tax base, and should result in a tax deduction for the amount expended.

The Tax Court’s decision in *Ring* was based upon the same analysis as that employed in *Tautolo*. The *Ring* decision turned solely upon the court’s normative judgment that “spiritual aid” cannot constitute section 213 medical care¹²³—even if, as was the case in *Ring*, there is an explicit finding of fact that the spiritual aid was sought for the improvement of a specific physical malady.¹²⁴

The *Ring* court was persuaded by the fact that nowhere in section 213 is the deductibility of expenses for spiritual aid affirmatively allowed.¹²⁵ Oddly, this reasoning ignores the fact that no specific modes of treatment are listed anywhere in the statute.¹²⁶ Though the Treasury Regulations list specific modes of treatment that are deductible, the wording of the regulations makes clear that the listings are not exclusive.¹²⁷

The *Ring* and *Tautolo* decisions are problematic not only in relation to the general policy underlying the allowance of a medical expense deduction,

122. See notes 37-38 *supra* and accompanying text.

123. 23 T.C. at 954. For an accountant’s discussion of the *Ring* case, see Eulenberg, *Miracles and the Medical Expense Deduction*, 11 TAX COUNS. Q. 1 (1967).

124. 23 T.C. at 953.

125. *Id.* at 954.

126. See I.R.C. § 213.

127. See Treas. Reg. § 1.213-1(e)(i), (ii) (1957). Use of the word “thus” in subpart (ii) allows the inference that the listing of treatments is by example and not exclusive.

but also because they are flatly irreconcilable with other court and IRS rulings on section 213. It is difficult to distinguish spiritual aid directed at a specific malady from treatments such as psychoanalysis and trips to warm, dry climates, the expenses for which courts have held to be deductible.¹²⁸ The IRS, which prosecuted *Ring* in the Tax Court, ironically ruled in the same year that treatment by a Christian Science practitioner constitutes section 213 medical care, the expenses for which are deductible.¹²⁹ The therapy of the Christian Science practitioner is purely spiritual.¹³⁰ It is thus impossible to reconcile this IRS ruling with *Ring* and *Tautolo*.

Allowing a medical expense deduction for the services of a Christian Science practitioner while denying the deduction for spiritual treatment pursuant to other religious tenets may, moreover, violate the establishment clause of the first amendment. The effect of the conflicting decisions is to financially favor the exercise of one religion over others in disregard of the first amendment's requirement of government neutrality toward the various religions.¹³¹ Although the establishment clause problem could be avoided by reversal of the IRS ruling allowing the deduction of expenses for Christian Science practitioners, this is not desirable. The ruling appears proper. Spiritual therapy properly constitutes section 213 medical care as defined and intended by Congress, for it is a treatment obtained primarily to prevent or alleviate a specific malady.¹³²

Ring and *Tautolo* stand out as incorrectly decided. The decisions, however, are the logical result of applying the *Havey* test. That test is faulty insofar as it requires the courts to substitute their judgment as to what treatments are medically desirable and efficacious for that of the taxpayer. Nevertheless, the decision in *Havey* itself was correct; a taxpayer should not be permitted to deduct usual vacation expenses under the guise of medical necessity. The decision denying the deduction properly turned on the personal, "non-intermediate" nature of the expense, not on its lack of efficacy. The *Havey* test, particularly its fourth prong, was no more than dicta. The question remains, however, whether there is a better test to distinguish personal expenses from section 213 medical care expenses which would not mandate the undesirable results reached under the *Havey* test.

128. David E. Starret, 41 T.C. 877 (1964) (psychoanalysis); L. Keever Stringham, 12 T.C. 580 (1949), *aff'd per curiam sub nom.* Commissioner v. Stringham, 183 F.2d 579 (6th Cir. 1950) (warm climates).

129. Rev. Rul. 55-261, 1955-1 C.B. 307.

130. See S. GOTTSCHALK, THE EMERGENCE OF CHRISTIAN SCIENCE IN AMERICAN RELIGIOUS LIFE 216-17, 226-30 (1973).

131. See *School District v. Schempp*, 374 U.S. 203, 222 (1963), where the Court emphasized the need for governmental neutrality with respect to religion, stating that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

132. S. REP. NO. 1631 at 6. See text accompanying note 55 *supra*.

C. *The Preferred Jacobs Approach.*

The Tax Court's decision in *Joel H. Jacobs*¹³³ suggests the proper test. To constitute a deductible medical care expense, the taxpayer must prove that the expenditure would not have been incurred *but for* the treatment of a specific malady.¹³⁴ The employment of the "but for" test would mandate the same result reached by the Tax Court under the facts in *Havey*, but would not require the unwarranted normative conclusions regarding the propriety and efficacy of uncommon treatments. Expenditures would thus be scrutinized as follows: (1) Was the taxpayer or his dependent suffering from the existence or probability of a disease, defect, or illness—mental or physical? (2) Was the expenditure for the purpose of the diagnosis, cure, mitigation, treatment, or prevention of the specific disease, defect, or illness? (3) Would the expenditure not have been made by the taxpayer were it not for the diagnosis, cure, mitigation, treatment, or prevention of the malady?

If affirmative answers are given to these three questions then a section 213 medical care expense deduction should be allowed. The factors highlighted in the *Havey* test, such as the taxpayer's motive or the effect of the expenditure on the malady, may be relevant, as a matter of common sense analysis, to answer these questions, but the *Havey* factors need not be weighed in every case, and should be conclusive only if they suggest an answer to the "but for" test of *Jacobs*.

The "but for" test embodies Professor Andrews' rationale for the medical expense deduction by limiting the deduction to those expenses of a taxpayer that are intermediate and involuntary, at most meant to return the taxpayer to a "whole" position of good health. Those expenditures which a taxpayer would make regardless of the threat or existence of a malady should be treated as a taxpayer's personal consumption and included in his tax base. The *Jacobs* "but for" test, moreover, would yield the identical result reached by the Tax Court in *Havey* while mandating opposite, more palatable results in *Ring* and *Tautolo*, *Havey's* misguided progeny. The "but for" test allows the deduction of expenses for uncommon treatments where they are obtained for the purpose of addressing a specific malady and would not have been obtained were it not for the existence or threat of such malady. Certainly, the expenditures in *Ring* and *Tautolo* fulfill the *Jacobs* test requirements, while the claimed deduction in *Havey* ought to have been

133. 62 T.C. 813 (1974). The *Jacobs* court held that expenses for obtaining a divorce, even though in the interest of the taxpayer's mental health, did not constitute deductible medical care expenses pursuant to section 213, in that the expenses were personal since the divorce would have been obtained regardless of the taxpayer's mental condition.

134. *Id.* at 819.

denied since the taxpayer's expenditures for trips to the beach and to Arizona would have been made regardless of the existence of a malady.

There is no evidence whatever that Congress intended that expenditures for uncommon or unpopular treatments be non-deductible under section 213. Nor does Professor Andrews' rationale for the allowance of deductions consider the common or uncommon nature of a treatment. Whether or not the *Havey* test could possibly be applied in a manner consistent with the reading of section 213 propounded herein, its *present* application suggests that the test's ambiguous language will continue to produce anomalous results. Except as a compilation of possible common sense areas of relevant inquiry, the *Havey* test should be abandoned in favor of the *Jacobs* analysis suggested above.

V. CONCLUSION

Although the congressional intent supporting the enactment of the medical expense deduction remains largely unclear, the only policy rationale which justifies the continued allowance of the deduction is the horizontal equity rationale posited by Professor Andrews. Any court or Service decision concerning section 213 medical care should thus be firmly rooted in the horizontal equity rationale. The review of court and IRS rulings presented in this Note suggests the dangers of applying the medical expense deduction in a manner which is blind to its policy function within the personal income taxation scheme as a whole. It is hoped that tax planning, litigation and decision-making concerning what constitutes medical care under section 213 will be directed away from talismanic notions of what is medical and toward a more policy-rooted analysis of whether an expenditure is involuntarily incurred as a result of a specific defect *but for* the existence of which no expenditure would have been made.