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MEDICALLY NECESSITATED MEAL AND LODGING COSTS: SHOULD THEY BE DEDUCTIBLE UNDER INTERNAL REVENUE CODE SECTION 213?

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Look to your health; and if you have it, praise God, and value it next to a good conscience; for health is the second blessing that we mortals are capable of; a blessing that money cannot buy.¹

I. INTRODUCTION

Suppose that in the early spring of 1983 four taxpayers found themselves in New Mexico.² Three of the four—*A*, *B*, and *C*—flew to Albuquerque from Roanoke, Virginia. *A*, a salesman, was in town on business. *B*, a tax professor at a Virginia law school, attended a seminar on recent tax legislation. *C*, a businesswoman suffering from cancer, was sent to receive an innovative sound treatment available only to outpatients of the Galen Institute in Albuquerque.³ The fourth taxpayer, *D*, also afflicted with cancer and a resident of an Albuquerque suburb, was driven by his wife from his residence to Albuquerque for the same sonic therapy. *A* and *B* stayed in the finest hotel in town, *C* stayed at a rather spartan establishment near the Institute, and *D* stayed at home.

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***As this article goes to press H.R. 4170 discussed *infra* at text accompanying notes 159-163 has passed the House of Representatives with its provision for partial deduction of medical lodging expenses intact. 130 CONG. REC. H 2741 (April 11, 1984).

H.R. 4170 remains to be reconciled with a Senate-passed tax and deficit reduction bill, S. 2062, The Deficit Reduction Act of 1984, which does not contain a similar medical lodging deduction provision.

1. I. WALTON, *THE COMPLEAT ANGLER* (Epistle to the Reader) (Part I, Ch. 21) 1653-55.

2. The taxpayers in the example and their expenses are an amalgam of real and imagined persons and transactions. The example is presented to demonstrate the application of the medical expense deduction of § 213 of the Internal Revenue Code of 1954. Of course, an abundance of factual situations and variations is conceivable, even likely. Cf. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947) ("The imagination which can draw an income tax statute to cover the myriad transactions of a society like ours, capable of producing the necessary revenue without producing a flood of litigation, has not yet revealed itself.").

3. To eliminate the possibility that *C* might have foregone a similar treatment locally available, we assume that the Albuquerque facility is the sole provider of the sound therapy.

A and *B* attended the final game of the national collegiate basketball playoffs—*A* with his clients after finishing his business dealings, *B* with several former colleagues. Unfortunately, *A*, a Wahoo,⁴ suffered what subsequently was diagnosed as a minor heart attack when North Carolina State won the championship. After spending a week in the hospital, *A* was asked to leave so that the hospital could accommodate fans of the University of Houston (the team defeated by North Carolina State in the championship game). Although sufficiently strong to return to his hotel, *A* was still too weak to fly back to Roanoke. Thus, *A*'s wife flew to Albuquerque on the specific advice of *A*'s physician and *A* moved back to his hotel room where he was attended by his wife. *C* and *D* did not see the game; both were recovering from the effects of their sound treatments—*C* in her hotel room, *D* at his house. Apart from the cost of socializing and the travel expenses of *A*'s wife, the three Roanoke taxpayers incurred similar expenses for food, lodging and transportation.

Our four taxpayers prepare their returns for 1983. What amounts will the Internal Revenue Code (Code) allow them to deduct?

Looking first at *D*, the Albuquerque resident, we expect that the amounts paid for the cancer treatment and for driving to the Galen Institute are deductible medical expenses under section 213 of the Internal Revenue Code of 1954.⁵ We find that is the case. Then, using the maxim that personal living costs should not be met by tax-free dollars,⁶ we conclude that *D* cannot deduct his expenses for food, mortgage principal, and the like while he was at home recovering from the cancer treatment. Again, that is correct. What about the three Roanoke taxpayers? Clearly, *A* and *C* were in need of some medical attention and incurred expenses to secure necessary medical care. We might, therefore, conclude that both should be able to take advantage of section 213 and deduct the living expenses they incurred in the course of obtaining that treatment. But we would be wrong. *A*, under section 213, can deduct all or nearly all of the inpatient living expenses and hotel and meal costs incurred during the Albuquerque trip after his heart attack. *C* cannot deduct the cost of her outpatient meals and lodging at all.⁷ Yet, we cannot tell whether *C*

4. "Wahoo" refers to a student or alumnus of the University of Virginia, especially one who is a staunch supporter of its athletic teams. The 1982-83 Virginia basketball team failed to advance to the final rounds of the collegiate playoffs, losing to North Carolina State in the NCAA Regional playoffs.

5. I.R.C. § 213 (West 1983). See *infra* text accompanying notes 12-43 (history of medical expense deduction and description of deduction's operation).

6. The ban on deducting personal living costs is included in the Internal Revenue Code as § 262: "Except as otherwise expressly provided . . . no deduction shall be allowed for personal, living, or family expenses." This is not to suggest that taxpayers have not tried to deduct their personal living costs as medical expenses. See *infra* text accompanying notes 39-43; see, e.g., *Jefferson v. United States*, 32 A.F.T.R. 2d (P-H) 6053, 6054-55 (N.D. Ga. 1973) (taxpayer sought to deduct as home medical treatment, laundry cost, bath oil, skin oil, shampoo, gas and electricity costs, and pro-rated portion of rent and utilities). But see *Bye v. Commissioner*, 41 T.C.M. (P-H) ¶ 72,057 at 252 (1972) (domestic services rendered by niece to ill household member comparable to those performed in hospital).

7. See *infra* text accompanying notes 59-87.

was any less "sick" than was *A*. Nor can we say with certainty that she enjoyed her visit to Albuquerque more than *A* did. As for tax professor *B*, who had a fun-filled time in Albuquerque, most likely he can deduct all of his living costs as business expenses.⁸

What principles, if any, justify this divergent tax treatment of *A*, *B*, *C* and *D*'s similar expenses? Do reasons exist, either "inside" or "outside" the nature of a personal income tax,⁹ that would require a distinction between the status accorded to the living expenses of outpatient taxpayers *C* and *D*, inpatient taxpayer *A*, and tax professor *B*, who incurred no medical expense and had a great time in Albuquerque?

This article examines these and other questions concerning the extent to which taxpayers may deduct living costs incurred in obtaining medical care. As this article will discuss, away-from-home living expenses incurred in connection with obtaining outpatient medical care generally are not deductible, while inpatient living expenses are deductible.¹⁰ This article will attempt to demonstrate that the purported abuse that gave rise to the current rule of nondeductibility of outpatient, medically related travel expenses—vacations under the guise of medical necessity—was exaggerated. Moreover, the mechanism selected to prevent the abuse was so overbroad in its effect that the desired curbing of "medical vacations" also has resulted in the nondeductibility of nonabusive expenses paid by taxpayers who must receive medical attention away from home. In this article we further argue that the nondeductibility of away-from-home outpatient living expenses cannot be reconciled with the deductibility of purely elective cosmetic medical treatments or the liberal tax treatment granted for living expenses in the business travel context, and that the nondeductibility of medically-related outpatient travel expenses is inconsistent with national concern about the rising costs of medical care.¹¹ Finally, this article addresses several recent proposals to amend section 213 so as to restore partial or comprehensive deductibility for medically necessary travel expenses.

II. OVERVIEW OF THE MEDICAL EXPENSE DEDUCTION

Section 213(a), as amended, expressly grants a limited deduction from gross income for expenses paid during the taxable year for medical care of the taxpayer, his spouse and dependents.¹² The congressional intent underlying this deduction, however, is somewhat unclear. The legislative history of the 1954 Code provides little in the way of guidance and the sparse pronouncements concerning the predecessor to section 213, section 23(x) of the 1939 Internal Revenue Code,¹³ are cryptic at best. For instance, the Senate Finance Committee Report dealing with section 23(x) merely states:

8. See I.R.C. § 162(a)(2) (West 1983).

9. See Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 314 (1972) (discussion of "inside" and "outside" reasons for Code distinctions).

10. See *infra* Part III.

11. See *infra* Part IV.

12. I.R.C. § 213(a) (West 1983).

13. Section 23(x) was added to the Internal Revenue Code of 1939 by § 127(a) of the Revenue

This allowance is recommended in consideration of the heavy tax burden that must be borne by individuals during the existing emergency [World War II] and of the desirability of maintaining the present high level of public health and morale.¹⁴

Although not articulated in this passage, the basis for Congress' grant of the deduction well may have been the view that medical care costs, if extraordinary, go beyond mere personal expenses and must be taken into account to measure accurately a citizen's ability to pay taxes, that is, his income. Indeed, Randolph Paul, speaking on behalf of the Treasury Department in the House hearings on section 23(x), advocated the adoption of an extraordinary medical expense deduction for just such a reason.¹⁵ Unfortunately, although the legislative histories of sections 213 and 23(x) contain recurring references to "extraordinary" medical expenses,¹⁶ the legislative histories do not indicate clearly whether Congress viewed such expenses as affecting the ability to pay taxes or whether Congress instead merely sought to subsidize such expenses as an act of legislative benevolence. Later expressions of legislative intent, however, more clearly indicate an ability-to-pay rationale.¹⁷

Whatever Congress' purpose was, the existence of the medical expense deduction has engendered an ongoing debate regarding the deduction's propriety from a tax policy standpoint.¹⁸ The controversy over the deductibility of medical expenses is set within a larger theoretical effort to define the pro-

Act of 1942, Pub. L. 77-753, 56 Stat. 825 (1942). It provided in pertinent part that:

[In computing net income there shall be allowed as deductions] . . . expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent . . . of the taxpayer. The term "medical care," as used in this subsection, shall 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 (including amounts paid for accident or health insurance).

14. S. REP. 1631, 77th Cong., 2d Sess. 6 (1942).

15. *Revenue Revisions of 1942: Hearings Before the House Committee on Ways and Means*, 77th Cong., 2d Sess. 1612-13 (1942). The assumption underlying Paul's rationale was that all taxpayers incur a "normal" or "ordinary" amount of medical expenditures properly classifiable as personal consumption. Newman, *The Medical Expense Deduction: A Preliminary Postmortem*, 53 So. CAL. L. REV. 787, 789-90 (1980); Note, *Medical Expense Deductions Under Section 213 of the Internal Revenue Code of 1954: The Definition of "Medical Care,"* 7 GOLDEN GATE L. REV. 535 (1977).

16. See, e.g., H.R. REP. No. 1337, 83d Cong., 2d Sess. 30 (1954), reprinted in 1954 U.S. CODE CONG. & AD. NEWS 4025, 4055.

17. See S. REP. No. 494, Vol. I, 97th Cong., 2d Sess. 113 (1982), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 781, 881 ("The primary rationale for allowing an itemized deduction for medical expenses is that 'extraordinary' medical costs . . . reflect an economic hardship, beyond the individual's control which reduces the ability to pay Federal income tax.').

18. This controversy has arisen despite the fact that the dollars involved pale in comparison to other tax preference provisions. Examination of estimated revenue effects of various items using the tax expenditure concept shows the following estimated revenue cost of the medical expense deduction:

per base for personal income taxes.¹⁹ Both proponents and critics of the deduction have used the well-known Haig-Simons formulation²⁰—that personal income equals personal consumption plus wealth accumulation²⁰—as an analytical template. Proponents have defended the deduction as necessary for a proper measurement of income under the Haig-Simons definition. Some, however, have criticized the deduction as an unwarranted reduction in an individual's tax base for what is essentially personal consumption.²¹ Opponents further have contended that, owing to the progressive nature of the individual income tax rates, the deduction is in effect an upside-down subsidy providing a greater amount of tax savings per dollar of deduction for individuals with higher incomes than for those with lower incomes.²²

Since expenditures for medical treatment do not fall within the accumulation component of the Haig-Simons' equation,²³ deductibility by definition

Fiscal Year	1983	1984	1985	1986	1987	1988
Dollars (Millions)	3,105	2,630	3,070	3,370	3,740	4,165
Mortgage interest on owner- occupied homes	25,065	27,945	30,130	32,785	35,305	37,950
Charitable contributions	8,285	8,250	9,670	12,235	11,010	10,210

JOINT COMMITTEE ON TAXATION STAFF, SENATE FINANCE COMMITTEE & HOUSE WAYS AND MEANS COMMITTEE PAMPHLET ON ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FY 1983-1988 (Mar. 7, 1983) [hereinafter cited as STAFF ESTIMATES].

19. See generally BITTKER, GALVIN, MUSGRAVE & PECHMAN, A COMPREHENSIVE INCOME TAX BASE? A DEBATE (1968) [hereinafter cited as GALVIN]; 1 HOUSE COMM. ON WAYS & MEANS, 86TH CONG., 1ST SESS. TAX REVISION COMPENDIUM (Comm. Print 1959) [hereinafter cited as TAX COMPENDIUM]; Andrews, *supra* note 9, at 312-25; Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 Stan. L. Rev. 831 (1979).

20. See R.M. Haig, *The Federal Income Tax* 7 (1921), reprinted in *Readings in the Economics of Taxation* 54 (R. Musgrave & C. Shoup eds. 1959); H. SIMONS, PERSONAL INCOME TAXATION 50-55 (1938). In Simons' formal presentation of the income concept, personal income is defined as: "[T]he 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." SIMONS, *supra*, at 50. The form "income equals personal consumption and accumulation" is a frequently used abbreviation. See Bittker, *Income Tax Deductions, Credits, and Subsidies For Personal Expenditures*, 16 J. L. & ECON. 193, 195-206 (1973) (brief history and explanation of Haig-Simons definition).

21. See Kelman, *supra* note 19, at 865-74.

22. See, e.g., SUTREY, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 721-22 (1970).

23. That is, unless one is prepared to argue for inclusion of medical expenses in the Haig-Simons formula as additions to "human capital value." Cf. I.R.C. § 104; Internal Revenue Code of 1939 § 22(b)(5); H. REP. NO. 767, 65TH CONG., 2D SESS. 29-30 (1918), reprinted in 1939-1 C.B. [Part II] 85, 97; 31 OP. ATTY. GEN. 304 (1918) ("The proceeds of the [insurance policy] . . . take the place of capital in human ability which was destroyed by the accident.") (opinion

must turn on whether away-from-home outpatient expenses represent personal consumption.²⁴ If these expenses are personal consumption costs, the criticisms are valid. If the expenses do not constitute personal consumption expenses, then a deduction for them is not only justifiable, but is actually essential to a proper measurement of income.

Some currently deductible section 213 expenditures, such as those for purely cosmetic elective surgery,²⁵ seemingly constitute personal consumption costs. Conversely, many commentators have concluded that medically essential, extraordinary expenditures made to put a taxpayer in a position to engage in normal personal consumption and income production do not constitute personal consumption themselves.²⁶ Instead, such expenses arguably reduce a taxpayer's current ability to pay taxes in much the same way that expenditures to repair a business asset reduce the current income generated by that asset.²⁷ Moreover, extraordinary medical expenditures lack the characteristics usually associated with personal consumption outlays. By definition, extraordinary medical expenses are rarely incurred, and usually do not involve the expression of consumer preferences and tastes as one normally envisions those concepts. Furthermore, and perhaps most importantly, their incidence places individuals involuntarily in a different position, vis-a-vis the ability to pay taxes, than the position of those with otherwise equivalent earnings who do not have such costs thrust upon them.²⁸

Rather than attempting to resolve conclusively the seemingly unresolvable—whether medical expenses represent personal consumption outlays for purposes of a fair tax system—we will assume, as many commen-

holding accident insurance proceeds not includible in gross income, delivered before passage in 1918 of statute expressly excluding such proceeds).

24. See Andrews, *supra* note 9, at 335-37; Kelman, *supra* note 19, at 859-64; *infra* text accompanying notes 40-44.

25. See Rev. Rul. 82-111, 1982-1 C.B. 48.

26. See, e.g., Andrews, *supra* note 9 at 335-43; Bittker, *Income Tax Deductions, Credits, and Subsidies for Personal Expenses*, 16 J. LAW & ECON. 193, 198-99 (1973); Jensen, *Rationale of the Medical Expense Deduction*, 7 NAT'L J. TAX 274, 283-84 (1954). Similarly, payments received by a taxpayer in the form of worker's compensation, certain health and accident insurance distributions, and personal injury damage awards do not represent taxable income, perhaps partly because they represent a replenishment of human capital. See *supra* note 23; I.R.C. § 104 (West 1983). The existence of this provision presents an equitable argument for allowing a medical expense deduction. Assume Taxpayer *A* incurs \$100 of medical expense and pays for it with \$100 of health insurance proceeds excludible under I.R.C. § 104(a)(3). If uninsured Taxpayer *B* pays for \$100 of medical expense out of his own funds, unless *B* can deduct the expenditure, *B* is in a disadvantaged position vis a vis *A*, *B* paying with taxable funds for the same expense *A* has been able to pay with non-taxable funds.

27. See *Internal Revenue Code of 1954: Hearings Before the House Committee on Ways and Means*, 83d. Cong., 1st Sess. 80 (1953) (statement of Representative Oliver P. Bolton).

28. Vertical equity requires that persons in unequal positions, with respect to their ability to pay taxes, pay different amounts of tax, reflecting in a significant way the differences in their positions. Horizontal equity mandates that persons in equal positions with respect to their ability to pay tax should pay equal amounts of tax. See Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44, 45 (1967).

tators have concluded, that medically necessary, extraordinary expenditures reduce a taxpayer's funds available for personal consumption or savings and, therefore, justifiably are deductible from the individual income tax base.²⁹ Unfortunately, section 213 and the law that has developed around it fail to draw fully and effectively the critical distinction between essential medical outlays and nonessential personal expenditures. From a policy standpoint, the deduction provision is justifiable only to the extent that its application turns on this dichotomy.

Before turning to the principal topic of this article—the nondeductibility of away-from-home, outpatient living expenses—we outline briefly the general requirements of section 213. These requirements to a large extent may be viewed as limiting deductibility to the category of medically essential expenditures that, from a policy standpoint, justifiably may be deducted. To qualify for section 213 treatment, the expenses to be deducted must exceed a certain minimum level³⁰ designed to insure their “extraordinary” nature. Moreover, the expenses must have been incurred for “medical care.” Section 213(d)(1) defines “medical care” expenses as amounts paid: “(A) for 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 . . . , or (C) for insurance covering medical care. . . .”³¹

A major difficulty in administering the deduction has been defining precisely what comes within the term “medical care.” The statutory definition is so broad that nearly any expenditure that is beneficial to one's health conceivably could be considered within the term. However, Congress clearly indicated in the Finance Committee Report accompanying the 1942 Revenue Act that it did not intend this broad reading. The Report stated that a deduc-

29. The Tax Expenditure Budget takes the contrary position that medically necessary extraordinary expenditures are not justifiably deductible. The Tax Expenditure Budget includes the medical deduction as an item of tax expenditure, indicating that medical deductions are not regarded as justifiable, since the Budget purports to detail the costs to the Federal government of deviations from a theoretically ideal income tax base. See STAFF ESTIMATES, *supra* note 18. The literature is, of course, replete with controversy over just what constitutes an ideal income tax base. See, e.g., GALVIN, *supra* note 19.

30. Code § 213(a) restricts the measure of the medical deduction to the following amounts: the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent (as defined in section 152), to the extent that such expenses exceed 5 percent of adjusted gross income. . . . I.R.C. § 213(a) (West 1983). Beginning in 1984, § 213(b) further limits the amount of the deduction by providing that the cost of medicine and drugs may be taken into account in the § 213(a) calculation only to the extent that such drugs are prescription drugs or insulin. *Id.* at § 213(b). The Tax Equity and Fiscal Responsibility Act of 1982, § 202(a), Pub. L. No. 97-248, 96 Stat. 324, 421 (1982) (TEFRA), raised the percentage amount from 3% the prior ceiling, to 5% on the ground that approximately 5% of adjusted gross income (AGI) spent on medical care is closer to “ordinary” in the present day context than is three percent. See S. REP. NO. 494, *supra* note 17, at 113.

31. I.R.C. § 213(d)(1) (West 1983).

tion was to be allowed only if the expenditure was made primarily in connection with a disease or defect.³² Even with this limitation the generally nebulous character of the terms "health" and "disease,"³³ and the wide variety of "treatments" available have required a continuous process of line-drawing

32. Specifically, the Finance Committee Report accompanying the 1942 Revenue Act stated that "[I]t is not intended . . . 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." S. REP. NO. 1631, 77th Cong., 2d Sess. 96 (1942). The present Treasury Regulations reflect this intent in their provision that "[A]n expenditure which is merely beneficial to the general health . . . is not an expenditure for medical care." Treas. Reg. § 1.213-1(e)(1)(ii) (1982).

33. For typical lexicographic treatment of the terms "health" and "disease," see *STEDMAN'S MEDICAL DICTIONARY* 403 (5th ed. 1982), which defines "disease" as:

1. Morbus; illness; sickness; an interruption, cessation, or disorder of body functions, systems, or organs.
2. A disease entity characterized usually by at least two of these criteria: a recognized etiologic agent (or agents), an identifiable group of signs and symptoms, or consistent anatomical alterations.

The more frequent approach is tautological. See, e.g., *WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY* 836, 525 (2d ed. 1976) ("health" defined as "freedom from defect, pain, or disease" and "disease" defined as "any departure from health"). These circular definitions do seem to have some basis in everyday experience. Anyone who has ever completed an employment application by inserting "health - excellent" after, say, an appendectomy, can affirm this. ("I was in pretty bad shape last week, but now I'm healthy again.") Cf. W. Manning, J. Newhouse & J. Ware, *The Status of Health in Demand Estimation; or, Beyond Excellent, Good, Fair, and Poor*, in *ECONOMIC ASPECTS OF HEALTH* 143 (Fuchs ed. 1982).

The mutual dependence of the terms "health" and "disease" has stimulated attempts at more positive definition. The foremost example is from the World Health Organization: "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." *CONSTITUTION OF THE WORLD HEALTH ORGANIZATION Preamble* (1958), quoted in H. Engelhardt, *The Concepts of Health and Disease in EVALUATION AND EXPLANATION IN THE BIOMEDICAL SCIENCES* 125 (1975). Under this definition one might question whether anyone is healthy. See also R. DUBOS, *MIRAGE OF HEALTH: UTOPIAN PROGRESS AND BIOLOGICAL CHANGE* 26 (Harper Colophon ed. 1981) ("Health and happiness are the expression of the manner in which the individual responds and adapts to the challenges that he meets in everyday life."); I. ILLICH, *MEDICAL NEMESIS* 273 (1976) ("Health . . . designates the ability to adapt to changing environments, to growing up and to aging, to healing when damaged, to suffering, and to the peaceful expectation of death."). These efforts to give more substantial meaning to the term "health" share an obvious defect—substitution of "well-being," "responds to challenges," "adapts to environment" for the referent "disease."

Thus "health" and "disease" may carry both evaluative and normative meanings, yet serve different purposes. See Engelhardt, *supra*, at 126, 139. A physician and professor of philosophy of medicine expressed the idea in this way:

[H]ealth and disease are not symmetrical concepts, nor are they things, though important confusions have arisen from conceiving of them as such. Rather, the concept of disease is a mode of analyzing certain phenomena for the purposes of diagnosis, prognosis, and therapy. The concept is in one respect pragmatic, and in many respects influenced by issues of value. Particular diseases border on questions of moral and political significance. And while there are many diseases, there is in a sense only one health—a regulative ideal of autonomy directing the physician to the patient as person, the sufferer of the illness, and the reason for all the concern and activity.

Id. at 139. See Feld, *Abortion to Aging: Problems of Definition in the Medical Expense Tax Deduction*, 58 B.U.L. REV. 165 (1978) (general discussion of how problem handled by courts and IRS).

and evolution by the Internal Revenue Service (IRS) and the courts. For example, is "alcoholism" a disease and is the cost of transportation to meetings of Alcoholics Anonymous an expense for "medical care"? The IRS has ruled affirmatively on both of these questions.³⁴ The IRS originally took the position that, because abortion was illegal, expenses of abortion were not deductible.³⁵ The IRS has since changed its position³⁶ following the United States Supreme Court's decisions favorable to the practice of abortion.³⁷ Even foreign policy may affect the boundaries of "medical care." Shortly after the United States resumed relations with the People's Republic of China, the IRS ruled that acupuncture constituted deductible medical care.³⁸

In addition to the requirement that the expense be for "medical care," the relationship between the "disease" and the "treatment" must be close enough to warrant a deduction. Expressed differently, a sufficient causal connection between the disease and the incurrence of the expense must exist for the expense to be deductible. The difficulty in this area arises from the fact that the "treatment" in many cases may involve substantial elements of personal consumption which theoretically should be obtained only with after-tax income.³⁹ For example, dancing lessons recommended by a physician to correct a person's curvature of the spine undoubtedly have a medical purpose, but also contain a large element of personal consumption. The question then becomes which element is prevalent, the medical or the personal? One case disallowed a medical expense deduction for the cost of dance instruction under circumstances similar to those just described by applying a "but for" test.⁴⁰ Under this test the taxpayer must establish that the expenditure was necessary to medical treatment and that the expenditure otherwise would not have been made.⁴¹ In the case of the dance lessons the court said the expenditure would have been made regardless of medical necessity and therefore was not

34. See Rev. Rul. 63-273, 1963-2 C.B. 112. In addition to the cost of transportation to Alcoholics Anonymous meetings, costs of meals and lodging incident to inpatient care at an alcoholism treatment facility also qualify as expenditures for "medical care." Rev. Rul. 73-325, 1973-2 C.B. 75.

35. See Treas. Reg. 1.213-1(e)(1)(ii) (1957); Feld, *supra* note 33, at 169-70.

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

37. See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); see also *Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983); *Planned Parenthood Assoc. v. Ashcroft*, 103 S. Ct. 2517 (1983); *Simopoulos v. Virginia*, 103 S. Ct. 2532 (1983).

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

39. See I.R.C. § 262 (West 1983); Andrews, *supra* note 9, at 337; Newman, *supra* note 15, at 788-89.

40. *Ende v. Commissioner*, 44 T.C.M. (P-H), ¶75,256 (1975); *accord Thoenes v. Commissioner*, 33 T.C. 62 (1959).

41. See *Jacobs v. Commissioner*, 62 T.C. 813, 819 (1974); Feld, *supra* note 33, at 178. In *Jacobs*, the taxpayer attempted to deduct legal fees incurred by him in obtaining a divorce. The taxpayer had been advised by a psychiatrist that the divorce was necessary to alleviate the taxpayer's clinical depression. The court denied the deduction on the ground that the taxpayer would have obtained the divorce for personal reasons regardless of medical necessity. See *Jacobs*, 62 T.C. at 819.

deductible.⁴² The problem bears obvious similarities to that of distinguishing between ordinary and necessary business expenses and personal consumption expenses under Code section 162, but there has been little if any discussion of this analogy in the decided cases.⁴³

In sum, the extraordinary amount, "medical care," and "but for" requirements constitute the primary mechanisms by which deductibility under section 213 is limited to the class of expenses—medically-essential, extraordinary expenditures—that sound tax policy dictates be treated as deductible. Still, these requirements suffer from certain deficiencies. First, as interpreted by the courts and the IRS, the limitations fail to filter out completely certain personal consumption outlays, such as the cost of purely cosmetic, elective surgery, the deduction of which is unsupported from a tax policy standpoint. A second drawback—upon which this article will now focus—is that the "medical care" requirement, as presently construed, prevents the deduction of certain expenses, specifically outpatient, away-from-home living costs, which in certain instances should be deductible.

III. THE DEDUCTIBILITY UNDER SECTION 213 OF AWAY-FROM-HOME LIVING EXPENSES

Although section 213(e) includes within "medical care" expenses certain "transportation" costs,⁴⁴ the cost of meals and lodging for persons who are away from home to obtain outpatient medical treatment generally is held to be outside of the subsection's purview and, therefore, non-deductible.⁴⁵ This interpretation follows not so much from the statute's express language, but

42. Ende, 44 T.C.M. (P-H) at 1080.

43. The analogy between § 213 medical expenses and § 162 ordinary and necessary business expenses has been discussed by several commentators. See, e.g., Feld, *supra* note 33, at 181; Newman, *supra* note 15, at 802-03; Klein, *The Deductibility of Transportation Expenses of a Combination Business and Pleasure Trip—A Conceptual Analysis*, 18 STAN. L. REV. 1099, 1101 (1966).

44. The Supreme Court has indicated in dictum that only the transportation costs of the patient may qualify for a § 213 deduction. See *Commissioner v. Bilder*, 369 U.S. 499, 502 (1962). Courts and the IRS, however, have permitted the deduction of transportation costs of family members who accompanied the patient to provide him indispensable medical care. See, e.g., *Oliver v. Commissioner*, 364 F.2d 575, 578 (8th Cir. 1966) (parties stipulated that transportation expenses of husband who accompanied ailing wife were deductible); *Carasso v. Commissioner*, 292 F.2d 367, 368 (2d Cir. 1961) (transportation expenses of patient and his spouse), *cert. denied*, 369 U.S. 874 (1962); *Rose v. Commissioner*, 52 T.C. 521, 528 (1969) (transportation expenses of patient and her mother), *aff'd*, 435 F.2d 149 (5th Cir. 1970), *cert. denied*, 402 U.S. 907 (1971); *Hunt v. Commissioner*, 41 T.C.M. (P-H) ¶72,226 (1972) (transportation costs of mother when her presence was essential to treatment of son); see also *Cohn v. Commissioner*, 38 T.C. 387, 390 (1962) (rejecting IRS determination that neither patient nor his spouse could deduct transportation costs). *But see Kelly v. Commissioner*, 440 F.2d 307, 308 n.2 (7th Cir. 1971) (discussed *infra* text accompanying notes 64-68).

45. See, e.g., *Commissioner v. Bilder*, 369 U.S. 499, 501-05 (1962); *Levine v. Commissioner*, 695 F.2d 57, 59 (2d Cir. 1982) (U.S. app. pending); *Montgomery v. Commissioner*, 428 F.2d 243, 244-45 (6th Cir. 1970); *Oliver v. Commissioner*, 364 F.2d 575, 578-79 (8th Cir. 1966).

rather from the legislative history describing the purpose behind its enactment. Before addressing in greater detail the specific rules governing the deductibility under section 213 of away-from-home living expenses, a brief discussion of the legislative purpose is in order.

As already indicated, prior to the enactment of the 1954 Code, the deduction of medical expenses was governed by section 23(x) of the Internal Revenue Code of 1939.⁴⁶ Section 23(x) expressly authorized deductions only for amounts spent for medical care, which was defined as "diagnosis, cure, mitigation, treatment, or prevention of disease." The section was construed, however, to include the cost of meals and lodging during travel primarily for and essential to medical treatment.⁴⁷ Because the concept of "travel" was interpreted broadly, taxpayers could invoke the section 23(x) deduction for food and lodging costs paid both in getting to the place of medical treatment and at the place of medical treatment.⁴⁸ As might be expected, this liberal reading of section 23(x) led to some overreaching by taxpayers. Such overreaching typically took the form of vacations disguised as medical necessities.⁴⁹ Taxpayers would travel on their doctors' orders to resort areas in sunny climates, run up large hotel bills, and attempt to deduct the entire cost of their "medication." For example, in one case the taxpayer attempted to deduct the cost of travelling, including meals and lodging, to resort hotels in New Jersey and Arizona two years after his wife had suffered a coronary occlusion. The resorts were ones he and his wife had visited in prior years. The Tax Court denied the deduction on the ground that the "treatment" was too remote from the "disease."⁵⁰

In 1954 Congress reacted to what it apparently perceived as misuse of the medical expense deduction for what were essentially vacation costs and the danger that such misuse ostensibly posed to the public fisc. Congress

46. See *supra* note 13.

47. See *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962) (citing Treas. Reg. 111, § 29.23(x)-1; I.T. 3786, 1946-1 C.B. 75; *Stringham v. Commissioner*, 12 T.C. 580 (1949), *aff'd*, 183 F.2d 579 (6th Cir. 1950)).

48. *Montgomery v. Commissioner*, 428 F.2d 243, 244 (6th Cir. 1970); see *Cohn v. Commissioner*, 38 T.C. 387, 390-91 (1962).

49. See *Kelly v. Commissioner*, 440 F.2d 307, 308 (7th Cir. 1971); *Montgomery v. Commissioner*, 428 F.2d 243, 245 (6th Cir. 1970).

50. *Havey v. Commissioner*, 12 T.C. 409 (1949). In denying the *Havey* taxpayer's deduction, the Tax Court listed several factors which have been quoted often in subsequent cases:

In determining allowability, many factors must be considered. Consideration should be accorded the motive or purpose of the taxpayer, but such factor is not alone determinative. To accord it conclusive weight would make nugatory the prohibition against allowing personal, living, or family expenses. Thus also it is important to inquire as to the origin of the expense. Was it incurred at the direction or suggestion of a physician; did the treatment bear directly on the physical condition in question; did the treatment bear such a direct or proximate therapeutic relation to the bodily condition as to justify a reasonable belief the same would be efficacious; was the treatment so proximate in time to the onset or recurrence of the disease or condition as to make one the true occasion of the other, thus eliminating expense incurred for general, as contrasted with some specific, physical improvement?

Id. at 412. See *infra* text accompanying notes 94-96.

modified the language of the medical expense provision contained in the new Code,⁵¹ former section 213(e), by changing the definition of "medical care" previously set out in section 23(x) to provide explicitly for the deductibility of "transportation costs,"⁵² but not for the wider category of travel costs.⁵³ In *Bilder v. Commissioner*,⁵⁴ the Supreme Court read this amendment to imply that Congress meant to exclude from deductible medical costs travel expenses other than transportation costs, that is, outpatient, away-from-home living costs.⁵⁵ This interpretation was based on the statute's legislative history. The House Committee Report dealing with section 213 stated: "A new definition of 'medical expense' is provided which incorporates regulations under present law and also provides for the deduction of transportation expenses for travel prescribed for health, but not the ordinary living expenses incurred during such a trip."⁵⁶ The Senate Committee Report contained similar language.⁵⁷ Moreover, both the House and Senate Reports on the 1954 Code stated:

The deduction permitted for "transportation primarily for and essential to medical care" clarifies existing law in that it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments and 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. However, if a doctor prescribed an appendectomy and the taxpayer chose to go to Florida for the operation not even his transportation costs would be deductible. The subsection is not intended otherwise to change the existing definitions of medical care, to deny the cost of ordinary ambulance transportation nor to deny the cost of food or lodging provided as part of a hospital bill.⁵⁸

51. See *Kelly v. Commissioner*, 440 F.2d 307, 308, 310 (7th Cir. 1971); *Montgomery v. Commissioner*, 428 F.2d 243, 245, 246 (6th Cir. 1976).

52. Act of Aug. 16, 1954, c.736, 68A Stat. 69 (former § 213(e) presently is codified at I.R.C. § 213(d)).

53. While the § 213 distinction between "travel" expenses and "transportation" expenses might seem somewhat unclear, the concept of "travel" is accorded a broader meaning under the Code. See, e.g., Treas. Reg. § 1.162-2(a) (1982) (deductible travel expenses under § 162 include meals and lodging at the place traveled to as well as "travel fares," i.e., transportation costs).

54. 369 U.S. 499 (1962).

55. *Id.* at 501-03 (1962). See *infra* text accompanying notes 77-87.

56. H.R. REP. No. 1337, 83d Cong., 2d Sess. 30 (1954), reprinted in 1954 U.S. CODE CONG. & AD. NEWS 4017, 4055.

57. See S. REP. No. 1622, 83d Cong., 2d Sess. 35 (1954), reprinted in 1954 U.S. CODE CONG. & AD. NEWS 4621, 4666.

58. See H.R. REP. 1337, 83d Cong., 2d Sess., A60 (1954), reprinted in 1954 U.S. CODE CONG. & AD. NEWS 4017, 4197; S. REP. No. 1622, 83d Cong., 2d Sess., 219-20 (1954), reprinted in 1954 U.S. CODE CONG. & AD. NEWS 4621, 4856.

Against this backdrop evolved the present case law and Treasury Regulations concerning the deduction of away-from-home living expenses under section 213.⁵⁹ In conformity with Congress' expressed intent, both the courts and the applicable Treasury Regulations recognize the deductibility of inpatient food and lodging costs.⁶⁰ If a person has living expenses at an establishment other than a hospital, the picture becomes somewhat more complicated. Treasury Regulation section 1.213-1(e)(1)(v) provides that a person staying in a substitute "institution" primarily to receive medical care rendered there may deduct under section 213 the cost of necessary meals and lodging at the institution.⁶¹ If, however, the taxpayer is not primarily in the institution to obtain medical care furnished there, the Treasury takes the position that the cost of living at the institution is non-deductible.⁶²

Precisely what types of establishments constitute institutions within the meaning of Regulation section 1.213-1(e)(1)(v) remains an open question. The Regulation itself states that a private establishment regularly engaged in providing medical services qualifies as an institution. The Regulation does not state, however, that only such an establishment may be an institution.⁶³ In *Kelly v. Commissioner*, the Seventh Circuit seized upon the Regulation's arguably incomplete definition to hold that a taxpayer's hotel room was an

59. The taxpayer's choice of *where* to receive medical care has been questioned in only a small number of cases. See, e.g., *Murray v. Commissioner*, 51 T.C.M. (P-H) ¶ 82,269, 1119 (1982) (no evidence that treatment taxpayer received in California was unavailable at residence in New York); *Winderman v. Commissioner*, 32 T.C. 1197, 1198 (1959) (taxpayer's confidence in physician supported finding that primary purpose of trip was physical examination at previous place of residence). If deductibility hinged on whether the taxpayer had made a reasonable decision regarding the *place* of treatment, the IRS and ultimately the courts likely would face the difficult task of evaluating taxpayer behavior in terms of cost, relative advantage of one medical institution over another, and effectiveness of treatment. Not surprisingly, perhaps, the courts have generally avoided second-guessing the taxpayer on cost. The cost of the Cadillac Suite at the hospital is just as deductible as the ten bed ward. For example, in *Ferris v. Commissioner*, the Tax Court allowed nearly the full amount claimed by the taxpayer for an elaborate swimming pool installed for medical reasons, in the face of the IRS contention that only the amount required for a bare-bones pool should be deductible. See 46 T.C.M. (P-H) ¶ 77,186 (1977); *Feld*, *supra* note 33, at 188-92.

Still, the question of where to receive treatment has an important bearing on the medical expenses discussed in this article. For example, a number of medical needs cannot be met at the local hospital, clinic, or doctor's office. Sophisticated cancer treatment and organ transplants are prominent examples. Two common-sense solutions to the problem are apparent: either bring the treatment closer to the patient or bring the patient to the treatment. For instances of both see *Corporate Planes Transport Cancer Victims*, N.Y. Times, June 6, 1983 at B5, col. 2; *Cancer Therapy is Widened in Communities Across U.S.*, N.Y. Times, Aug. 2, 1983 at B8, col. 3.

60. See *Commissioner v. Bilder*, 369 U.S. 499, 502-03 (1962) (quoting H.R. REP. NO. 1337, 83d Cong., 2d Sess. A60 (1954)); *Levine v. Commissioner*, 695 F.2d 57, 59 (2d Cir. 1982); Treas. Reg. § 1.213-1(e)(1)(v) (1982). The fact that meal and lodging costs are included in a hospital bill, however, does not automatically make those costs deductible under § 213, particularly when the hospital is merely serving as a middleman that arranges outpatient living accommodations. See *Hunt v. Commissioner*, 41 T.C.M. (P-H) ¶ 72,226 (1972).

61. Treas. Reg. § 1.213-1(e)(1)(v); see also Rev. Rul. 58-481, 1958-2 C.B. 107.

62. Treas. Reg. § 1.213-1(e)(1)(v); see also Rev. Rul. 58-481, 1958-2 C.B. 107.

63. See Treas. Reg. § 1.213-1(e) (1982); see also Rev. Rul. 69-499, 1969-2 C.B. 89.

institution and, therefore, that the taxpayer's hotel bill was deductible under section 213.⁶⁴ As is often the case, the equities in *Kelly* seem to have weighed decisively in favor of a somewhat strained result.

In *Kelly*, a Wisconsin taxpayer suffered an appendicitis attack while in New York on business.⁶⁵ He was hospitalized for surgery and developed complications. Following his operation, the hospital discharged him because it needed his room. Nonetheless, Kelly's doctor advised him not to return home at that time because his wound had not yet healed fully, and because he was too weak to move without assistance. Kelly left the hospital with the aid of his wife and a nurse, and spent the following week in a hotel room. While he was in the hotel room, his wife provided him with necessary nursing care.

On appeal from a Tax Court decision denying Kelly a medical expense deduction for his hotel bill, the IRS argued that the taxpayer was not entitled to deduct his hotel bill because the hotel was not an institution.⁶⁶ Clearly, the hotel was not regularly engaged in providing medical care. Nonetheless, the *Kelly* court held that the establishment's nature was not dispositive. Rather, the court reasoned, the determination as to whether the hotel was an institution depended upon the taxpayer's condition and the nature of the services he was receiving in the establishment.⁶⁷ Since Kelly's sole reason for being in the hotel was to receive necessary medical treatment that he could no longer get at the hospital, and since such treatment was provided in the hotel room, the *Kelly* court held that the hotel was a substitute institution.⁶⁸

In *Levine v. Commissioner*,⁶⁹ the Second Circuit was presented with an opportunity to re-evaluate the *Kelly* decision's broad interpretation of "institution." Rather than doing so, the Second Circuit distinguished *Kelly* on the facts, thereby leaving the door open for taxpayers in that circuit to invoke

64. 440 F.2d 307, 311 (7th Cir. 1971). Similar to the Seventh Circuit's decision in *Kelly* are the Tax Court's decision in *Ungar v. Commissioner*, and the holding of the IRS in Rev. Rul. 69-499, 1969-2 C.B. 39. See *Ungar*, 32 T.C.M. (P-H) ¶ 63,159 (1963). In *Ungar*, a taxpayer rented a specially equipped apartment for his ill, dependent mother and engaged a nurse to render care under a doctor's supervision at the apartment. In holding that the rental expense of the apartment was deductible, the Tax Court reasoned that the rooms were retained for the purpose of providing better and less expensive medical care on the premises than was available in a hospital. See 32 T.C.M. (P-H) ¶ 63,159 (1963).

In Rev. Rul. 69-499, a mental retardate was placed in a private home near the hospital from which he had been released, and the couple who owned the home was paid to care for and supervise the patient in accordance with his doctor's orders. The IRS ruled that on the particular facts of the case, the home was an institution, and that amounts paid to maintain the patient in the home were deductible under § 213. See 1969-2 C.B. at 39-40.

65. See 440 F.2d at 307.

66. See *id.* at 311.

67. See *id.*

68. See *id.* A key factor in the *Kelly* decision seems to have been that the taxpayer would have remained in the hospital had it not been for the fact that he was discharged because of the hospital's need for the use of his room. See *id.* at 308, 310. However, the Second Circuit in a similar case, *Levine v. Commissioner*, impliedly held this factor not controlling. See 695 F.2d 57 (2d Cir. 1982); *infra* text accompanying notes 69-74.

69. See 695 F.2d 57, 60 (2d Cir. 1982).

Kelly in the future.⁷⁰ In *Levine*, the taxpayers' dependent son was a patient at the Children's Hospital of the Menninger Clinic in Topeka, Kansas. When he became too old to remain in that facility on an inpatient basis, his parents rented an apartment for him in Topeka so that he could continue to receive treatment at the Clinic. The taxpayers were forced to take this action because their son had been diagnosed as too ill to enter the Clinic's adult, inpatient living program.⁷¹

On appeal from a Tax Court decision denying them a medical deduction for the rental cost of their son's apartment, the taxpayers argued that under *Kelly* the apartment was a substitute institution.⁷² Without expressly passing on the correctness of *Kelly*, the *Levine* court held it inapplicable on the particular facts of the case. The patient in *Levine*, unlike the patient in *Kelly*, received almost no medical care on the actual premises claimed to constitute the substitute institution.⁷³ The ironic fact that the patient in *Levine* was too ill to stay in the Clinic's adult inpatient program was impliedly held to be inapposite.⁷⁴

The decision in *Kelly*, bolstered to a slight extent by *Levine*, may result in an increasing number of taxpayers being able to deduct away-from-home living costs as medical expenses in situations not normally thought of as involving inpatient care. To take advantage of *Kelly*, a taxpayer clearly must show that he is in the purported substitute institution to receive essential medical care, and that such care is in fact being rendered there.⁷⁵ Additionally, the taxpayer may have to demonstrate the unavailability of normal inpatient facilities.⁷⁶ If not for this latter requirement, taxpayers might be able to circumvent the congressional intent underlying section 213(e) by, for example, traveling to Florida on their doctors' advice to alleviate specific medical problems, checking into a hotel, and hiring a nurse to administer necessary medical care to them at the hotel.

When the taxpayer incurs living expenses at an away-from-home establishment that does not qualify as a hospital or institution, the costs normally are

70. See *id.* at 60.

71. See *id.* at 58.

72. See *id.* at 60.

73. See *id.*

74. See *id.* at 59-61.

75. See *id.*; 440 F.2d at 311. Apart from *Levine*, at least two other decisions in the Tax Court and one District Court decision have addressed the issue of what criteria the taxpayer must meet to bring an alleged substitute institution within the *Kelly* doctrine. See *Allen v. United States*, 46 A.F.T.R.2d (P-H) 5402 (D. Kan. 1980); *Murray v. Commissioner*, 51 T.C.M. (P-H) ¶ 82,269 (1982); *Volwiler v. Commissioner*, 57 T.C. 367 (1971). All three decisions rejected taxpayer efforts to characterize outpatient living accommodations as substitute institutions because no medical care was rendered at the respective places of lodging. See 46 A.F.T.R.2d at 5404; 51 T.C.M. (P-H) ¶ 82,269 at 1120; 57 T.C. at 372.

76. Although the court in *Levine* never referred to the potential requirement that normal inpatient facilities must be unavailable, the decision in *Kelly* clearly turned to some extent on the fact that *Kelly* had been forced to leave the hospital in which he was staying and go to a hotel. See *supra* note 23.

considered non-deductible outpatient expenses.⁷⁷ The leading case on this point is *Commissioner v. Bilder*.⁷⁸ In *Bilder*, the Supreme Court was confronted with a situation in which the taxpayer, upon doctor's orders, had spent the winter in Florida as part of a general regimen of medical treatments for his weak heart. The taxpayer, who was accompanied to Florida by his wife and child, claimed a medical expense deduction for the cost of his Florida apartment. The Tax Court held that the taxpayer was entitled to deduct that portion of the rental expense attributable to the taxpayer, but not to his family.⁷⁹ The Third Circuit subsequently held that the full amount of the rent was a deductible medical expense.⁸⁰

Relying on the legislative history of section 213, the Supreme Court reversed. Justice Harlan, writing for the majority, reasoned that section 213 was not clear on its face as to whether the taxpayer's rental expense was deductible, and that in the absence of such direct statutory guidance, reference to Congress' intent was mandated. That intent, the Court held, was unmistakable: away-from-home, outpatient living expenses were not to be deducted under section 213. In fact, the *Bilder* Court noted, the situation before the Court was of precisely the type that Congress had spoken of in the Committee Reports regarding the 1954 Code.⁸¹

Arguably distinguishable from the situation presented in *Bilder* is the case in which a taxpayer attempts to deduct meal and lodging costs incurred during the actual transportation phase of his trip to obtain medical treatment. This distinction finds some support in the case law. In *Montgomery v. Commissioner*, the Sixth Circuit affirmed a decision of a divided Tax Court that had permitted a taxpayer to deduct away-from-home meal and lodging costs incurred prior to the taxpayer's arrival at the place of medical treatment.⁸² In upholding the Tax Court decision, the Sixth Circuit reasoned that Congress intended only to eliminate the deduction of ordinary living expenses incurred while at the location of treatment and that expenses incurred in getting to the place of treatment were a different matter.⁸³

In summary, meal and lodging costs are deductible under section 213 if incurred in a hospital or a substitute institution.⁸⁴ Living expenses incurred during the actual transportation stage of travel to obtain medical care also may be deductible medical expenses.⁸⁵ Outpatient living expenses at the place

77. See *supra* note 5; *infra* text accompanying notes 33-38.

78. 369 U.S. 499 (1962).

79. *Bilder v. Commissioner*, 33 T.C. 155, *remanded*, 289 F.2d 291 (3d Cir. 1961), *rev'd*, 369 U.S. 499 (1962).

80. See 369 U.S. at 500-01.

81. See *id.* at 502. See *supra* text accompanying notes 55-58.

82. See 428 F.2d at 246, *aff'g*, 51 T.C. 410 (1968).

83. See *id.* at 245-46. By way of analogy to the "sleep or rest" rule of § 162, the Tax Court has held that meals taken on relatively short trips do not qualify for a business expense deduction unless medically necessary or required by the length of the trip. See *Lopkoff v. Commissioner*, 51 T.C.M. (P-H) ¶ 82,701 (1982).

84. See *supra* text accompanying notes 60-74.

85. See *supra* text accompanying notes 82-83.

of treatment, however, are not deductible under section 213.⁸⁶ Transportation costs, other than living expenses, are deductible if primarily for and essential to obtaining medical care.⁸⁷

IV. ARGUMENTS FOR BROADENING THE DEDUCTION

Had it so desired, Congress could have enacted an explicit prohibition on the deduction under section 213 of all meals and lodging. Such an all encompassing ban, however, was not what Congress intended. Instead, Congress' purpose was to foreclose the use of the medical expense deduction as a subsidy for *ordinary* living expenses and for what were essentially vacations on doctors' orders.⁸⁸ By drafting the statute as it did, however, Congress not only curtailed the deduction of ordinary living expenses incurred on medical vacations, but also restricted the ability of taxpayers to deduct extraordinary living costs necessarily incurred in obtaining away-from-home, outpatient medical care.⁸⁹

The problem with this harsh, shotgun-like solution is that it draws the line between deductibility and nondeductibility in the wrong place. Deductibility depends not upon whether the expense is an extraordinary cost necessarily incurred incidental to securing essential medical care, as opposed to an ordinary living expense or abusive vacation cost, but rather upon whether the person being treated is an inpatient or an outpatient.⁹⁰ Outpatient expenses are not necessarily coterminous with ordinary living expenses or with abusive expenses. Similarly, inpatient expenses are not necessarily nonabusive in every case.

Of course, one might argue that Congress needed to draw a bright line in this area, and that the clearest demarcation available was between inpatient

86. See *supra* text accompanying notes 77-81.

87. See I.R.C. § 213(d)(1)(B) (West 1983). Transportation costs are not a deductible medical expense if they are primarily a matter of the taxpayer's own choice, comfort, or convenience. See, e.g., *Cohn v. Commissioner*, 38 T.C. 387, 390-91 (1962).

88. The Treasury Department's summary of the proposed 1954 Code stated that it would:
 . . . Permit deduction of cost of transportation necessary to health, but not *ordinary* living expenses incurred during such trip.

Overall effect of proposed changes is to liberalize and extend relief in real hardship situations due to heavy medical expense but curb deduction of *ordinary* or *luxury* living expenses in guise of medical costs.

Hearings Before the Senate Finance Committee, 83d Cong., 2d. Sess. Pt. I, 103 (1954) (statement of Marion B. Folsom, Under Secretary of the Treasury) (emphasis added).

The Senate Finance Committee Report echoed this statement:

A new definition of "medical expenses" is provided which allows the deduction of only transportation expenses prescribed for travel or health, and not the *ordinary* "living expenses incurred during such a trip." S. Rep. No. 1622, 83d Cong., 2d. Sess. 35 (1954) (emphasis added).

89. The rule of nondeductibility is the consequence of the Supreme Court's decision in *Bilder*. That the congressional intent to reach this result was far from clear is amply illustrated by the variety of opinions that the case spawned at its various stages. See *Bilder v. Commissioner*, 33 T.C. 155 (1959), *remanded*, 289 F.2d 291 (3d. Cir. 1961), *rev'd*, 369 U.S. 499 (1962).

90. See Treas. Reg. § 1.213-1(e)(1)(a) (1957).

and outpatient living costs. After all, an alternative standard, such as the legitimacy and reasonableness of the expenses sought to be deducted, would lend itself to slippery and unpredictable ad hoc analysis in the courts. In response to such a contention, however, this type of unpredictable, case-by-case analysis is exactly what the courts and the IRS have been doing for years in reviewing away-from-home business expense deductions,⁹¹ and must still do in the case of transportation which allegedly is required by medical needs.⁹² Secondly, the distinction that Congress did draw is hardly crystal clear. In fact, it indirectly has led to litigation over the murky factual issue of what constitutes a substitute institution.⁹³

Thirdly, a reading of the cases indicates that courts employing the pre-1954 law did a satisfactory job of policing abuses in the area. In several cases, the courts disallowed meal and lodging expenses claimed by the taxpayer because the expenses were considered to be too remotely connected to any specific illness of the taxpayer. For example, in the leading pre-1954 Code case of *Havey v. Commissioner*,⁹⁴ the Tax Court denied a deduction to a taxpayer and his wife for expenses of travel to and room and board while at resort hotels in New Jersey and a ranch in Arizona. The wife had suffered a coronary occlusion approximately two years prior to the expenditures and the taxpayer claimed the expenditures were necessitated by his wife's heart condition. In denying the deduction, the court stated that "[t]o be deductible as a medical expense, there must be a direct or proximate relation between the expense and the diagnosis, cure, mitigation, treatment or prevention of disease. . . ."⁹⁵ The court went on to say that "[t]he deduction in question may be claimed only where there is a health or body condition coming within the statutory concept and where the expense was *incurred primarily* for the prevention or alleviation of such condition. An incidental benefit is not enough."⁹⁶

By contrast, when the facts were compelling, the deduction was allowed. In another of the leading pre-1954 Code cases, *Stringham v. Commissioner*,⁹⁷ the taxpayer's daughter suffered a severe respiratory ailment, and after an

91. See I.R.C. § 162(a)(2) (West 1983); *United States v. Correll*, 389 U.S. 299 (1967).

92. See, e.g., *Murray v. Commissioner*, 51 T.C.M. (P-H) ¶ 82,269 (1982) (trips to California health spas by patient with fluid retention, underactive metabolism, low blood pressure, and underactive thyroid resulting in weight gain); *Mizl v. Commissioner*, 49 T.C.M. (P-H) ¶ 80,277 (1980) (around-the-world trip by angina patient).

93. See *supra* text accompanying notes 60-74.

94. 12 T.C. 409 (1949).

95. *Id.* at 412.

96. *Id.* at 413 (emphasis by the court); *accord Hoffman v. Commissioner*, 17 T.C. 1380, 1386 (1952) ("[W]here the expense of meals and lodging are involved, the line must be drawn at some point very much closer to the time of actual illness and the immediate recovery from such illness than can be found in this proceeding."). In *Hoffman*, the taxpayer had paid board and room for her son to go to college in California for the mild climate to alleviate rheumatic fever, heart disease, and arthritis. The *Hoffman* court disallowed the deduction, because the expenditures were not incurred primarily on account of the illness, but rather were primarily for the son's education.

97. 12 T.C. 580 (1949), *aff'd per curiam*, 183 F.2d 589 (6th Cir. 1950).

attack of the ailment, the child's doctor advised the taxpayer that the child had to be moved to a warmer climate. The taxpayer sent the child to Arizona where she attended school. The Tax Court allowed the full deduction for the travel and for meals and lodging while in Arizona, but disallowed any deductions for expenses attributable to educational expenses. The court found that the expenses of travel were proximately related to the child's illness and were necessitated by that illness.⁹⁸ The court recognized that "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."⁹⁹ The *Stringham* court found, however, that in this particular case, that standard had been met.¹⁰⁰ Whether the taxpayer could deduct these same expenses under the present statute is doubtful unless the school could qualify as a special school under the Treasury Regulations.¹⁰¹

In *Erickson v. Commissioner*,¹⁰² the Tax Court disallowed the expenses of looking, on a physician's advice, for a more congenial place to live. The taxpayer traveled extensively throughout the year in question in search of a suitable place to settle. The court strictly scrutinized the deductions and said, "[t]he very character of the expenses here involved, lodging, makes it reasonable to require a strong showing of the primary connection between the expense and the cure or mitigation of the disease."¹⁰³ The court found that the travel itself was not therapy and that, therefore, the attempted deduction for it was impermissible.¹⁰⁴

The pre-1954 Code medical travel cases also seem to have written into the statute, judicially, an away-from-home requirement similar to that applied in the business expense area. In *Rodgers v. Commissioner*,¹⁰⁵ the taxpayer was advised by his doctor that a stable, warm, but not hot climate would be beneficial to his condition of arteriosclerosis. Instead of moving to a warmer climate, the taxpayer decided to retain his home in St. Louis, but to go away during the winter and summer of each year. The court disallowed the cost of these trips on the ground that the taxpayer's decision was motivated by purely personal considerations, that is, his desire to continue to maintain his household in St. Louis, and that therefore the trips were not necessitated by medical reasons, but rather were undertaken for personal reasons.¹⁰⁶ This is obviously the same kind of reasoning found in business travel cases under section 162. As in those cases, it is an adequate, if not perfect, safeguard against taxpayers spending long periods in vacation-type surroundings and then

98. *Id.* at 586.

99. *Id.* at 584.

100. *Id.* at 585.

101. See Treas. Reg. § 1.213-1(e)(1)(v).

102. 23 T.C.M. (P-H) ¶ 54,303 (1954).

103. *Id.* at 963.

104. *Id.*

105. 241 F.2d 552 (8th Cir. 1957), *aff'g* 25 T.C. 254 (1955).

106. *Id.* at 554-55.

deducting their vacation costs on the ground that they need a milder climate to alleviate a medical condition. Concededly, application of the away-from-home requirement has caused some difficulty in business travel cases when the question of whether the taxpayer was away from home was a close one.¹⁰⁷ Nevertheless, by applying rules of thumb, such as the concept of a tax home, reaching appropriate results is possible in the vast majority of cases without undue difficulty or uncertainty,¹⁰⁸ even though such rules of thumb cannot cover all possible applications.

The courts have been equally scrupulous in safeguarding the currently allowed medical transportation expense¹⁰⁹ from abuse. For example, in *Foyer v. Commissioner*,¹¹⁰ the taxpayer took trips to Hawaii and Tucson, that, although beneficial to the respiratory condition of taxpayer's wife, were not recommended by a physician. They were accompanied by their daughter on the trip to Hawaii, and on their return route they visited another daughter in Oregon. The Tax Court disallowed the transportation costs of these trips, stating: "Trips such as the ones in question 'to resort areas are naturally suspect when the expenses therefor are claimed as a medical deduction, and we must carefully scrutinize the facts to make sure that the alleged medical reasons were not merely a pretext for a vacation trip.'" ¹¹¹ The court emphasized its scrutinous attitude, saying, "[t]he existence of a chronic respiratory condition ... is not a *carte blanche* authorizing travels throughout the world without medical advice of any type in search of climates offering greater relief to the condition."¹¹²

Admittedly, in a few cases under pre-1954 law, the courts seemingly failed to police the deduction adequately.¹¹³ The point, however, is not that tax-

107. See, e.g., *Rosenspan v. Commissioner*, 438 F.2d 905 (2d Cir. 1971), *cert. denied*, 404 U.S. 864, *reh. denied*, 404 U.S. 959 (1971); *Harvey v. Commissioner*, 283 F.2d 491 (9th Cir. 1960).

108. See, e.g., Rev. Rul. 75-543, 1975-2 C.B. 60.

109. See I.R.C. § 213(d)(1)(B) (West 1983).

110. 29 T.C.M. (P-H) ¶ 60,244 (1960).

111. *Id.* at 1523; *accord* *Carasso v. Commissioner*, 34 T.C. 1139, 1141 (1960), *acq.* 1961-2 C.B. 4, *aff'd*, 292 F.2d 367 (2d Cir. 1961), *cert. denied*, 369 U.S. 874 (1963).

112. 29 T.C.M. (P-H) ¶ 60,244 at 1523; *accord* *Mizl v. Commissioner*, 49 T.C.M. (P-H) ¶ 80,227 at 1010 ("The Court will not permit taxpayers to turn personal expenses into medical expenses even when the trip is partly medically motivated.").

113. In *Duff v. Commissioner*, the taxpayer traveled to Florida to alleviate a psoriasis condition. See 22 T.C.M. (P-H) ¶ 53,362 (1953). The therapy in Florida consisted of the taxpayer spending most of his time sunning himself. The court found that the taxpayer's purpose in going to Florida was solely to obtain relief from his psoriasis condition and the court allowed the deduction. Although the taxpayer was elderly and in bad physical condition, this may have been an abuse situation, since the activities on the trip consisted of the kind of thing that one typically does on a vacation. In *Watkins v. Commissioner*, the taxpayer, on the advice of a physician, traveled to Florida during the winter and early spring months to get the heat of the sun, which would dry up an inflammation at the back of his nose and throat. See 23 T.C.M. (P-H) ¶ 54,102 (1954). This inflammation was causing him to go progressively deaf. The taxpayer's wife also went to Florida on the advice of a physician to alleviate an arthritic condition. The conditions of both the taxpayer and his wife were mitigated by the trip to Florida. The court found that the taxpayers' motivation in the Florida trips was bona fide, and that their conditions were sufficiently

payers in a few cases were able to obtain the benefits of personal consumption on a tax-deductible basis. It is rather that in the greater number of cases, the courts clearly were able to distinguish instances in which medical necessity was the primary reason for the expenditure from those instances in which taxpayers were attempting to deduct personal travel in the guise of medically necessary expenditures. A reading of the cases indicates that the degree of abuse that taxpayers actually managed to perpetrate under the pre-1954 law may have been exaggerated by those who were alarmed by it.

The *Bilder*¹¹⁴ case itself was a clear example of a situation in which the expenditures were without doubt primarily medically related. The taxpayer suffered from an acute coronary condition. His trips to Florida, advised by his physician, caused him inconvenience, and also required that he be away from his law practice for considerable periods of time.¹¹⁵ There was simply no personal consumption motivation in the Florida trips. Under the pre-1954 law, his travel costs probably would have been allowable deductions. However, under the interpretation given the post-1954 law by the Supreme Court, they were disallowed. Thus, the taxpayer in *Bilder* was made to pay for the allegedly abusive deductions of taxpayers in prior years.

The question ultimately is whether prevention of a perceived and likely exaggerated abuse on the part of some taxpayers outweighs the inequity of disallowing deductions in situations in which the expense primarily is related and essential to medical care. The occurrence of an occasional abuse case should not be reason for disallowing the deduction in situations in which the expenditure clearly is related to medical care. The current state of the law in this area simply cannot be justified from the standpoint of ease in policing the genuineness of medical deductions.

A more significant problem, at least from a theoretical standpoint, arises from the fact that the failure to take into account outpatient living costs necessarily incurred in obtaining extraordinary, away-from-home medical treatment results in a skewed measurement of income. The rationale for allowing a medical expense deduction is that such costs reduce a taxpayer's ability to pay and, therefore, must be accounted for in a correct measurement of income.¹¹⁶ A medical expense is considered to be largely involuntary and is

related to such trips to allow the deduction. *Id.* at 365-66. The court went on, however, to say that "if the conclusion reached . . . appears to be unduly generous, the remedy lies with the Congress." *Id.* at 366; *see also* *Embry v. Gray*, 143 F. Supp. 603 (W.D. Ky. 1956) (deduction allowed for husband's and wife's expenses, including hotel and meals, of trip to Florida taken to alleviate husband's diseased vascular and circulatory system even though wife accompanied him and he spent considerable time engaging in vacation type activities). The case may have been the classic one of the disguised vacation trip.

114. *See supra* text accompanying notes 78-81.

115. *See* 33 T.C. at 156-57; *cf.* *Levine v. Commissioner*, 695 F.2d 57, 62 (2d Cir. 1983) (Winter, J., Dissenting) ("Because both Congress and the appropriate regulatory authorities have decided that the danger to the federal fisc of slippery slope analysis outweighs an ostensibly fairer and more searching approach, we must deny the deduction.").

116. *See e.g.*, S. REP. No. 494, Vol. 1, 97th Cong., 2d Sess. 113, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 781,881.

incurred not in the course of everyday personal consumption, but rather to put a person in a position to engage in personal consumption.¹¹⁷ To the extent this rationale holds, the medical expense deduction is not only justifiable, but actually necessary in order to maintain both vertical and horizontal equity among taxpayers. It follows that if truly necessary, extraordinary travel costs incidental to medical care are not allowed to be deducted, the taxpayer's income is overstated.

In evaluating a deduction's propriety, one commentator has suggested that appropriate criteria are whether the provision contributes to an accurate measure of income, and whether the provision contributes to the basic rationale for the deduction.¹¹⁸ Under both these criteria, the present blanket disallowance of all meal and lodging expenses while obtaining away-from-home medical care, clearly fails the test. Under the first criterion, unless one believes that all medical expenditures regardless of the expenditures' origin or magnitude are personal consumption, extraordinary expenditures for travel to receive outpatient medical care which exceed the current five percent of adjusted gross income limit reduce a taxpayer's available income.¹¹⁹ With respect to the second criterion, the expressed rationale for the deduction is that extraordinary medical expenditures lower a taxpayer's ability to pay and should, therefore, be removed from the tax base.¹²⁰ To deny a deduction of expenditures for away-from-home meals and lodging necessary for medical care simply because the meals and lodging are not received in an "institution" clearly has little to do with the deduction's rationale. The rationale is based on the medical necessity of the extraordinary expenditure, not the nonmedical circumstances under which the expenditure is made nor the place in which services are received.¹²¹

Once one admits that a deduction for extraordinary medical expenses is justifiable, then equity requires a deduction for away-from-home meals and lodging necessarily incurred in obtaining essential outpatient treatment. Given the rationale of the deduction, no reason exists to differentiate away-from-home, outpatient meal and lodging expenses incurred on account of medical necessity from other expenses of a medical nature. If the former expenses are

117. *See id.*; *supra* text accompanying notes 26-28.

118. Turnier, *Evaluating Personal Deductions in an Income Tax - The Ideal*, 66 CORNELL L. REV. 262, 263 (1981).

119. Simons described income in part as "the exercise of control over the use of society's scarce resources." H. SIMONS, *PERSONAL INCOME TAXATION* 61-62 (1938). An essentially involuntary expenditure necessitated by a medical condition is difficult to fit within the idea of control. The fact that the public in general has been willing to subsidize medical expenditures directly through medicare and medicaid is some indication that most persons intuitively consider large medical expenses as reducing one's ability to control resources and hence income.

120. *See supra* note 17.

121. *Cf.* Treas. Reg. § 1.213-1(e)(v) (1982):

The extent to which expenses for care in an institution other than a hospital shall constitute medical care is primarily a question of fact which depends upon the condition of the individual and the nature of the services he receives (rather than the nature of the institution).

incurred as a direct result of illness, and if they would not have been incurred but for the illness,¹²² then they reduce the taxpayer's ability to pay as much as any other medical expense and, therefore, the former expenses are completely within the rationale and purpose of the medical expense deduction.

Furthermore, the deduction is aimed at extraordinary expenses, and travel expenses in connection with medical necessity certainly can be classified as extraordinary. A taxpayer who must travel to a distant city, stay in hotels or motels, and purchase his meals in restaurants certainly is incurring expenses beyond the ordinary needs of one's everyday existence. Of course, in this situation one's meals include some element that would have had to have been spent in any event, but the difference between the cost of restaurant-purchased meals and those consumed at home is considerable. Although it would be theoretically more accurate to allow the taxpayer to deduct only the excess of the cost of the restaurant meals over what it would have cost to eat at home, this would most likely prove to be administratively unworkable.¹²³ In sum, proper measurement of an individual's tax base requires the deductibility of away-from-home outpatient living expenses.

A second flaw in the current nondeductibility under section 213 of away-from-home outpatient living costs is the disparity between the treatment accorded away-from-home business expenses¹²⁴ and away-from-home medical expenses. Since both business and extraordinary medical expenses reduce a taxpayer's ability to pay taxes, it is anomalous to allow a deduction for away-from-home meals and lodging when necessary for business,¹²⁵ but to disallow a deduction for the same type of expenditures when they are incurred necessarily in obtaining outpatient medical care. The same problems of application arise with respect to section 162 business expense deductions as occur in connection with section 213 deductions.¹²⁶ Many business trips, especially to conventions, involve a large amount of personal consumption.¹²⁷ Also business expense

122. See *Jacobs v. Commissioner*, 62 T.C. 813, 819 (1974); *Wilks v. Commissioner*, 37 T.C.M. 1196 (P-H) ¶ 68,220 (1968); Rev. Rul. 76-79, 1976-1 C.B. 70; Rev. Rul. 75-187, 1975-1 C.B. 92; see also *Feld*, *supra* note 33, at 178-81 (discussion of application of "but for" test).

123. Prior to enactment of the predecessor of § 162, § 214 of the Revenue Act of 1921, 42 Stat. 239, a Treasury Regulation had allowed deduction of "travelling expenses, including railroad fares, and meals and lodging in an amount in excess of any expenditure ordinarily required for such expenses when at home." T.D. 3101 amending Article 292 of Regs. 45, III C.B. 191 (1920). The statute was amended at the request of the Treasury to allow full deduction for meals and lodging because administering the "excess" standard had proved unduly difficult. See *Rosenspan v. Commissioner*, 438 F.2d 905, 912 (2d Cir. 1971).

124. See I.R.C. § 162(a)(2) (West 1983).

125. In practice the standard is less than strict necessity. A business person undertaking travel connected with the business is likely to be allowed a deduction if the travel is "appropriate" and "helpful" to the business and the primary purpose of the travel is business rather than personal consumption. See *Treas. Reg. § 1.162-2*; Klein, *The Deductibility of Transportation Expenses of a Combination Business and Pleasure Trip - A Conceptual Analysis*, 18 STAN. L. REV. 1099, 1104-07 (1966); cf. *Welch v. Helvering*, 290 U.S. 111 (1933).

126. See Klein, *supra* note 125 (discussion of problems involved with applying business travel deduction).

127. See generally *id.*

deductions under section 162 allow the taxpayer to engage in consumption and deduct the consumption, when part of that consumption would have been non-deductible had the taxpayer not been away from home. Thus the same kind of potential for abuse exists with respect to the away-from-home travel expense deduction under section 162 as with respect to medical travel under section 213. But no sentiment seems to exist for completely disallowing away-from-home business travel expenses, although there might be some sentiment for limiting that deduction.¹²⁸

To place taxpayers traveling for medical necessity on a parity with those traveling for business reasons, similar standards should be applied. The abuse potential can be handled in any of several ways by the courts and IRS. In the case of the taxpayer whose physician advises living in a warm climate, but who chooses for personal reasons to maintain a home in a cold one and to travel for long periods of time to warmer climes, the away-from-home test could be applied much as it is in the section 162 area.¹²⁹ Thus, the courts could apply a test that asks whether it is reasonable for the taxpayer to remain in his present home rather than move permanently to the warmer climate.¹³⁰

A useful analogy also may be drawn to the origin of the claim test employed under Code section 212 pertaining to deductibility of legal expenses.¹³¹ Under that test, courts reviewing an attempted section 212 deduction for legal expenses look to the origin of the dispute that led to the legal expense. Similarly, a court might ask whether the origin of an attempted medical travel expense was in the taxpayer's condition, or rather, in the taxpayer's personal desire to travel to a particular place. This concept was alluded to in the *Havey* case in which the court stated that it was important "to inquire as to the origin of the expense."¹³²

A third safeguard would be to prohibit taxpayers from being allowed to deduct estimates of their medical travel expenses under the *Cohan* rule.¹³³ This could be accomplished by enacting a provision similar to that in section 274

128. See, e.g., I.R.C. § 274(c) (West 1983) (placing mild limitations on deduction for foreign travel); *id.* § 274(h) (placing limits on deductions for attendance at conventions outside the "North American area" and for attendance at conventions on cruise ships). Code §§ 274(c) and (h) certainly indicate no overwhelming tide of opinion against the business travel deduction.

129. *Cf. Rogers v. Commissioner*, 241 F.2d 552 (8th Cir. 1957) (court in § 213 situation in effect applied an away-from-home test similar to that applied under § 162); see *supra* text accompanying notes 126-128.

130. Compare *Rosenspan v. United States*, 438 F.2d 905 (2d Cir.), *cert. denied*, 404 U.S. 864, *reh'g denied*, 404 U.S. 959 (1971); with Rev. Rul. 75-432, 1975-2 C.B. 60. Perhaps a "medical home" rule could be formulated analogous to the "tax home" rule applied in business travel cases.

131. See *United States v. Gilmore*, 372 U.S. 39 (1963).

132. 12 T.C. 409, 412 (1949).

133. See *Cohan v. Commissioner*, 39 F.2d 540 (2d Cir. 1930). In *Cohan* the taxpayer was permitted a deduction based on a conservative estimate of the expenditures when he did not have records of the expenditures but the court was convinced from the factual situation that expenditures actually had been made. *Id.* at 544. Under the pre-1954 Code law, taxpayers were permitted to take medical travel deductions based on the *Cohan* rule. See, e.g., *Stringham v. Commissioner*, 12 T.C. 580, 586 (1949).

which requires detailed substantiation of certain business travel expenses.¹³⁴ In summary, harking back to the hypothetical in the introduction to this article, if the medical expense deduction is in itself a justifiable one, no good reason exists why taxpayer *B* should be allowed to deduct his away-from-home meal and lodging expense while Taxpayer *C* cannot.

Another argument in favor of allowing the deduction is that disallowance runs contrary to national medical policy. Under the current law, section 213 deductibility of away-from-home meals and lodging hinges on whether a taxpayer is an inpatient or an outpatient. The tax law, therefore, provides a tax incentive for inpatient status. At the same time, outpatient treatment is often considerably less expensive. Since government provides a large amount of the cost of medical services through the Medicare and Medicaid programs, it has a substantial interest in encouraging patients to choose the less costly means of receiving medical care.¹³⁵ It hardly makes sense for the federal government to discourage taxpayers on the one hand from using outpatient treatment, while on the other hand paying for the more expensive inpatient treatment.

The inequity of denying all deductions for meals and lodging related to medical travel will be exacerbated as time goes on. The increasing trend has been for patients to use outpatient facilities more and more frequently. Outpatient treatment has increased markedly since the mid 1960's.¹³⁶ As medical care, especially for serious illnesses, becomes more sophisticated a movement is bound to develop toward the use of regional facilities equipped with the most advanced technological equipment, to which patients from surrounding areas will come for treatment. This necessarily will entail in many cases the

134. I.R.C. § 274(d) (West 1983).

135. See G. Markus, Issue Brief No. IB82128, *Health Care Cost Containment: Major Issues in the 98th Congress* at CRS-1 to -7 (Library of Congress Congressional Research Service 1983). Tables 3 and 4 of this study provide the following data:

TABLE 3. Percentage distribution of personal health care expenditures, by source of funds, selected years

Year	Total	Direct	Private	Public		
		patient payments	insurance and other	Total	Federal	State & Local
1950	100%	65.5%	12.0%	22.4%	10.4%	12.0%
1960	100	54.9	23.4	21.8	9.3	12.5
1970	100	39.9	25.6	34.5	22.3	12.2
1981	100	32.1	27.6	40.4	29.3	11.1

TABLE 4. Estimated Federal outlays for Medicare and Medicaid, FY83-85 (in billions)

	FY83	FY83	FY85
Medicare	\$55.5	\$63.6	\$72.4
Medicaid	19.9	21.6	24.7
	\$75.4	\$85.2	\$97.1

136. See Price & Lundy, Issue Brief No. IB 77066, *HealthCare Expenditures and Prices* at CRS-8 (Library of Congress Congressional Research Service 1983). Table 8 of this study provides the following data with respect to the trend in outpatient treatment:

very kind of expense being discussed here.¹³⁷ As this occurs, the inequities involved in disallowing the deduction will become more acute.

Another reason for allowing the deduction of away-from-home outpatient living expenses is that they generally are not reimbursed by Medicare, Medicaid or conventional medical insurance policies.¹³⁸ Such expenses usually must be borne in their entirety by the individual patients themselves or their families, unless assistance is received from some charitable or welfare agency. The allowance of a tax deduction for away-from-home outpatient expenses would at least ameliorate, if not fully remedy, the hardships arising from inadequate health insurance.

One argument has been made in opposition to allowing the deduction is that under present budgetary circumstances, no additional expansions of the personal deductions are appropriate. In the face of mounting deficits it is argued that expansion of the personal deductions involve the unwarranted diminution of federal revenues. In fact, the recent Tax Equity and Fiscal Responsibility Act greatly reduced the medical expense deduction by raising the floor

Table 8. Admissions, patient days, and outpatient visits per 1,000 population—community hospitals

Year	Admissions	selected years 1965-1980		
		Inpatient days	Outpatient visits	Hospitals beds
1965	138	1,073	483	3.9
1970	145	1,198	662	4.2
1971	148	1,188	727	4.2
1972	149	1,174	788	4.3
1973	152	1,191	832	4.3
1974	157	1,217	901	4.4
1975	158	1,219	902	4.5
1976	160	1,224	945	4.5
1977	160	1,215	925	4.5
1978	159	1,211	933	4.5
1979	161	1,214	910	4.5
1980	160	1,211	897	4.4

137. A study of cancer patients by the Mid-Missouri Professional Standards Review Organization came to the conclusion that for cancer patients travel was a considerable part of their medical expenses. The study found further that because Medicare would reimburse them for inpatient care but not outpatient, the patients tended to opt for inpatient treatment. "In reality, what happens is that physicians are fully aware of the psycho-social-economic problems of the patients and will document the medical record to allow certification for inpatient care." D. Westhoff & T. Mangus, *Proposed Alternative Housing for Treatment of Radiation/Chemo Therapy* (Sept. 10, 1980) (federal grant application) (on file in Washington & Lee Law Review office).

138. See 42 U.S.C. § 1395x(s) (1976) (defining medical and other health services reimbursable under the medicare program). Private medical insurance contracts, like the publicly funded insurance programs, typically cover the costs of inpatient treatment and professional services provided on an outpatient basis. See 1C J. APPLEMAN & J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 707.65 (1981); O. DICKERSON, *HEALTH INSURANCE* 159-61, 165 (rev. ed. 1963); D. GREGG & V. LUCAS, *LIFE AND HEALTH INSURANCE HANDBOOK* 297-300 (3d ed. 1973).

on the deduction from three to five percent of adjusted gross income.¹³⁹

There are two answers to this objection: (1) the amount of revenue lost would be small in comparison to the medical expense deduction as a whole, and miniscule in comparison to the total federal budget;¹⁴⁰ and (2) any lost revenues could be at least partially recouped by tightening the definition of allowable expenses involving procedures that affect a structure or function of the body. As the law now stands, a taxpayer can deduct expenses that affect a structure or function of the body, even though the expenses are not medically necessary, nor even, in the minds of most persons, a medical expense.¹⁴¹ If the law were to be changed so as to require that such procedures medically be required to be deductible, the additional revenue gained from not allowing deductions for non-medically necessary procedures such as cosmetic surgery would at least in part make up for the revenue lost through allowance of the travel expense deduction.

No hard data on this potential revenue offset is readily available, so the exact fiscal effect is basically a matter of conjecture. However, some revenue would be saved by requiring that these kinds of procedures be medically necessary. This requirement, of course, would involve another difficult line-drawing task, since it could be contended in many cases that, for example, a face lift medically was required for the psychological health of the patient. However, the taxpayer must prove the necessity in such a situation, and at least some clearly unjustifiable deductions would be disallowed by amending the law in such a way. By allowing meal and lodging deductions for medical travel and disallowing deductions for cosmetic procedures which affect a structure or function of the body, the revenue lost by the former at least in part could be offset by revenue gained from the latter. Moreover, this would bring the law into closer conformity to its original rationale of providing relief against extraordinary expense caused by loss of health. Although this is not a perfect solution, a perfect solution is likely not available because of the lack of perfect information about what is and is not medically necessary.¹⁴² In this situation, the question becomes whether one is willing to accept second-best.

139. Tax Equity and Fiscal Responsibility Act of 1982, § 202, Pub. L. No. 97-248, 96 Stat. 324, 421 (1982).

140. Exact figures on the probable revenue loss from allowing a § 213 deduction for away-from-home living expenses are elusive. The House Ways and Means Committee estimated the revenue loss from a deduction limited to \$50 per night per person for lodging at only \$7 million to \$11 million per year for fiscal years 1985-1988. H.R. REP. No. 98-432, 98th Cong., 1st Sess. 280 (1983); see *infra* text accompanying notes 159-63.

141. I.R.C. § 213(d)(1)(A) (West 1983). See, e.g., *Mattes v. Commissioner*, 77 T.C. 650, 656 (1981) (hair transplant deductible); *Rev. Rul.* 82-111, 1982-1 C.B. 48 (hair transplant, electrolysis deductible); *Rev. Rul.* 76-332, 1976-2 C.B. 81 (face-lift operation deductible).

142. See Stiglitz & Boskin, *Impact of Recent Developments in Public Finance Theory on Public Policy Decisions*, 67 AM. ECON. REV. 295 (1977) [hereinafter cited as Stiglitz].

The problem of taxation in an economy such as ours is viewed as a problem of indirect control of imperfectly observable variables; the government for instance, might like to exempt "necessary" medical expenses, but finds it difficult (costly) to distinguish between these and "unnecessary" medical expenses.

A final argument which has been made in opposition to the deductibility of extraordinary, away-from-home outpatient living costs is that the medical expense deduction is a tax subsidy for the wealthy.¹⁴³ However, a large portion of the deductions for medical expenses are taken by low income groups.¹⁴⁴ The reasons for this are probably: (1) that the floor on the deduction prevents many higher-income taxpayers from having expenses in excess of the floor amount; and (2) that illness is much more likely to occur among the elderly groups who quite often are in lower income groups.

In conclusion, sound tax policy dictates that the current rules regarding away-from-home outpatient living expenses be modified so as to provide for the deductibility of such expenses if extraordinary and incurred in connection with the procurement of essential medical services.

V. CURRENT PROPOSALS

Given the harshness of the current law regarding the deductibility under section 213 of away-from-home meal and lodging costs, various proposals have surfaced for the amendment of the medical expense provision. These proposals can be divided into three categories: those that limit the deduction to minors and their accompanying parents or guardians; those that are not limited to minors and their parents, but which do place other substantial limitations on

143. The argument that the medical expense deduction is a tax subsidy for the wealthy is basically a version of the now prevalent tax expenditure concept, *i.e.*, that any "tax preference" constitutes an indirect government expenditure. The literature on this subject is so voluminous and well-known as to require no citation and a discussion is beyond the scope of this article. See Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison With Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970) (classic exposition of tax expenditure concept); Surrey and McDaniel, *The Tax Expenditure Concept: Current Developments and Emerging Issues*, 20 B.C. IND. COM. L. 225 (1979)

We have three major objections to this concept. First, as presently formulated, the measurement of forgone revenue implicitly assumes zero elasticities; the estimates of aggregate tax expenditures are correct only when one contemplates eliminating *all* deviations from taxing real economic income *simultaneously and* if the factors of production are in *perfectly inelastic supply* (which Boskin 1977 and Heckman 1974, among others, demonstrate is not the case). Further, the estimates for particular so-called tax preferences are often extremely inaccurate. For example, if the tax law allows a deduction for charitable contributions, it is not correct to argue that abolishing the deduction will increase tax revenue by (the summing over all contributors who itemize deductions) the product of the marginal tax rate and the amount currently given to charity. The amount of resources following into each such "tax expenditure" category reflects the tax treatment of that category as well as others. . . .

Second, as pointed out recently by Feldstein, government spending on an activity such as charity may decrease private spending on the commodity. . . . Third, the tax expenditure concept suffers from a further defect: the legislation implicitly assumed that the "natural" tax base is income, broadly defined; as we shall argue below, there is

one needs to know what "ought" to be taxed.

Id.

144. See Internal Revenue Service, *Statistics of Income 1980*, Individual Income Tax Returns Table 2.1 at 56.

the deduction; and those that apply standards similar to the business travel deduction. We first address the proposals in the first category.

The first of these, S. 2938, introduced in September 1982, proposed to modify section 213 to include within medical care expenses the cost of meals and lodging incurred by a child away from home to obtain medical care on an outpatient basis.¹⁴⁵ Under this proposal, the meal and lodging expenses of one parent or guardian who accompanies the child patient also would be deductible.¹⁴⁶ A House version of this bill, H.R. 2720, was introduced in April 1983 under the Title of the Medical Expense Deduction Act of 1983.¹⁴⁷ Neither bill has been reported out by its committee.

The most notable aspect of these bills is that they would provide relief only when a child, defined as anyone who has not attained age eighteen by the close of the tax year in question,¹⁴⁸ is the away-from-home patient. Persons over eighteen, or their families who support them, who have to travel out of town for medical care on an outpatient basis still will be unable to deduct their living expenses, no matter how deeply those expenses cut into their ability to pay taxes. Because of this limited coverage, the proposed bills, albeit a step in the right direction, fall short of correcting the current inequity.¹⁴⁹

145. S. 2938, 97th Cong., 2d Sess., 128 CONG. REC. S12000-01 (daily ed. Sept. 22, 1982). This bill was reintroduced in 1983 and referred to the Senate Finance Committee. S. 824, 98th Cong., 1st Sess. (1983). The bill reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. TREATMENT OF CERTAIN MEALS AND CERTAIN LODGING EXPENSES OF A PARENT AND CHILD AS MEDICAL CARE IN THE CASE OF A CHILD AWAY FROM HOME FOR PURPOSE OF RECEIVING MEDICAL CARE.

(a) IN GENERAL.—Paragraph (1) of section 213(d) of the Internal Revenue Code of 1954 (defining medical care) is amended—

(1) by striking out “or” at the end of subparagraph (B).

(2) by striking out the period at the end of subparagraph (C) and inserting in lieu thereof “, or”, and

(3) by adding at the end thereof the following new subparagraph:

“(D) for the meals and lodging of—

“(i) one parent or guardian of a child when—

“(I) such child is away from home for the purpose of receiving medical care, and

“(II) such parent or guardian is away from home and accompanies such child, and

“(ii) a child when he is away from home for the purpose of receiving medical care as an outpatient.”.

(b) CHILD DEFINED.—Subsection (d) of section 213 of such Code is amended by adding at the end thereof the following new paragraph:

“(7) The term ‘child’ means an individual who has not attained the age of 18 before the close of the taxable year.”.

146. See *supra* note 145.

147. H.R. 2720, 98th Cong., 1st Sess. (1983). The House bill follows verbatim the Senate bill. Compare *id.* with note 145, *supra*.

148. See S. 824, 98 Cong., 1st Sess. (1983); H.R. 2720, 98 Cong., 1st Sess.

149. Of course, by restricting the deduction’s availability to situations in which the away-from-home patient is a child, the proposed bills threaten a less severe drain on the Treasury than would a proposal containing no age limitations. However, as stated above, at least some of the revenue loss resulting from an amendment of § 213 could be offset by foreclosing the deduc-

Another drawback to these bills is their failure fully to address the perceived problem that led originally to the nondeductibility of away-from-home, outpatient living expenses: the abusive deduction of vacation and pleasure trip costs. The proposed bills place no express restrictions on what type of away-from-home living costs are deductible, other than those limitations inherent in the fact that the patient must be a child and only one parent or guardian may accompany the patient. Perhaps persons under eighteen years of age are less likely than adults to take the type of medical vacations Congress saw as abusive in 1954. That is not to say, however, that some would not. More significantly, the proposals contain no explicit requirement that the parent or guardian accompanying the child patient out of town do so to contribute to the child's medical care and well being.¹⁵⁰ Under the bills in question, a parent could perhaps accompany his or her ill child to Florida, drop the child off at a hospital for a week of treatment, head for the beach, pick the child up a week later and write off the entire trip. Some requirement for a nexus between the accompanying adult's presence and the minor patient's health is necessary. These bills appear to be well-intentioned compromises. The bills recognize the inequity of the present law. However, in order to make a change politically palatable, the bills are so restricted in application that they fail to address the problem fully. They represent an improvement, but fall short of the most desirable solution.

Turning to the proposed amendments not restricting deductibility to minors and parents, but placing other restrictions on the deduction, two such proposals recently have been presented to an ABA Tax Section Subcommittee, the first reads in pertinent part as follows:

Section 213(d)(1) is amended to read as follows (with the added portions [italicized] and deleted portions in brackets): (1) The term "medical care" means amounts paid—(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. (B) *for traveling expenses (including amounts expended for meals and lodging up to but not exceeding the United States Government Employee per diem allowance for travel to the location of medical care) while away from home [for transportation] primarily for and essential to medical care as defined in subparagraph (A), provided that costs for meals and lodging shall be allowed only if the medical care requires actual medical treatment which is: (i) conducted in a hospital or other medical care*

tion's applicability to certain medical procedures, such as cosmetic surgery, that plainly constitutes optional, personal consumption. *See supra* text accompanying note 25. And although "fairness" is an elusive concept, most persons would probably agree that something is amiss when one can write off the cost of a nose job, but not necessary living expenses incurred in receiving life saving outpatient treatment away from home.

150. *See* S. 824, 98th Cong., 1st Sess. (1983); H.R.2720, 98th Cong., 1st Sess. As mentioned previously, such a nexus is currently required under case law in order for an "accompanying" family member to deduct their transportation costs.

*delivery facility licensed by the Joint Commission for the Accreditation of Hospitals; and (ii) by or under the direct supervision of a licensed physician, at the place described in subparagraph (i)(C) for expenses of the type described in subparagraph (B) incurred by adult family members primarily for the purpose of attending a patient receiving such treatment, where the adult family member's attendance is necessary and appropriate under all of the circumstances. Family member for this purpose includes only a spouse, a parent (natural or adoptive) or guardian of a minor child or a child who is physically or mentally incapacitated such as to require the presence of a family member, and a child, other descendant or guardian of a person who is physically or mentally incapacitated such as to require the presence of a family member.*¹⁵¹

This proposal (Proposal I) has several positive features. First, and perhaps foremost, the proposal does not limit the deductibility of outpatient meal and lodging costs under section 213 to cases where the patient is a minor. Second, while H.R. 2720 and S. 2938 provide for the deductibility only of meal and lodging expenses incurred by an accompanying parent or guardian, this suggested amendment would permit a broader class of accompanying persons to deduct their living expenses in cases where they could show that their presence was necessary and appropriate.¹⁵²

Third, the proposal contains certain specific limitations designed to prevent the type of abusive vacation deductions Congress sought to foreclose in 1954. More particularly, the proposed amendment would put a ceiling on the allowable amount of deductible meal and lodging expenses. The away-from-home patient's meal and lodging deduction would be limited to the amount of the United States Government Employee per diem travel allowance for the place traveled to.¹⁵³ The living expenses of accompanying family members, if any, would be subject to the same limitation. Moreover, the possibilities for abuse further are limited by the requirements that the deduction be allowed only if the medical care requires actual medical treatment which is (1) conducted in a duly licensed hospital or other medical care delivery facility, and

151. Letter from John A. Townsend to George Middleton, Jr., Chairman, Subcommittee on Non-Business and Other Deductions of the Committee on General Income Tax Problems, American Bar Association Section of Taxation, at 2 (May 3, 1983) (on file in the Washington & Lee Law Review office). These are proposals only and have not yet received official sanction from any ABA group.

152. See *supra* text accompanying note 151.

153. See *id.* One interesting question raised by this proposal is whether the per diem limitation would apply to inpatient, as well as outpatient, meal and lodging costs. Pursuant to current law, of course, inpatient living costs are fully deductible under the theory that they constitute direct medical expenses under § 213(d)(1)(A). See *supra* text accompanying note 60. If Congress adopted the proposal without commenting on this problem, however, it might be argued by the IRS that the inclusion of travel expenses under § 213(d)(1)(B) evidenced an intent to withdraw inpatient living costs from subsection (d)(1)(A) and subject them to the per diem ceilings also. Although this is a tenuous argument, clarification is needed.

(2) by or under the direct supervision of a licensed physician at the place to which the travel is undertaken.¹⁵⁴ Under this proposal, therefore, the "medical care" would have to be conducted in a hospital or similar facility, and would have to be under the supervision of a licensed physician. This proposal would avoid the problem of the person who travels to a desirable area at the advice of a physician at home or at his own initiative, and does not receive treatment at some medical facility but rather receives poolside or golf course medication. Interestingly enough, however, this provision might result in the taxpayer in *Bilder* still being denied the deduction, because in that case, although the taxpayer chose the place of residence in Florida to be near a qualified hospital, his treatment at the hospital was not the principal reason for his being in Florida.

A similar, but somewhat more restrictive proposal presented to the ABA Subcommittee states in pertinent part that:

Section 213(d)(1) is amended to read as follows (with the added portions [italized] and deleted portions in brackets): (1) The term "medical care" means amounts paid—(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease or for the purpose of affecting any structure or function of the body. (B) *for traveling expenses (including amounts expended for meals and lodging for a minor or incapacitated person plus one adult to whom such person is a dependent as defined in Section 152, up to but not exceeding the United States Government Employee per diem allowance for travel to and at the location of medical care) while away from home* [for transportation] primarily for and essential to medical care as defined in subparagraph (A), *provided that costs for meals and lodging shall be allowed only if the medical care for the dependent requires actual medical treatment which is: (i) conducted in a hospital or other medical care delivery facility licensed by the Joint Commission for the Accreditation of Hospitals; and(ii) by or under the direct supervision of a licensed physician, at the place described in subparagraph (1)*¹⁵⁵

This proposal (Proposal 2) includes the same per diem, location of treatment, and nature of treatment limitations set out in the previously discussed Proposal 1. Despite this similarity, however, the second proposal is less satisfactory than is the first. Unlike Proposal 1, Proposal 2 would limit the class of those who could deduct away-from-home outpatient living expenses under section 213 to minors, incapacitated persons, and one accompanying adult if that adult could claim the patient as a dependent under Code section 152.¹⁵⁶ No definition of "incapacitated" is provided. Moreover, the requirement that

154. See *supra* text accompanying note 151.

155. Letter from John A. Townsend to George Middleton, Jr., at 5 (May 3, 1983) (on file in the Washington & Lee Law Review office).

156. See *id.*

the accompanying adult be able to claim the away-from-home patient as a dependent seemingly would prohibit spouses from deducting living costs incurred by them in accompanying their incapacitated spouses out of town.¹⁵⁷ This blanket prohibition would be ill-advised since, as in *Kelly*,¹⁵⁸ the services of a spouse may be necessary to the medical treatment and care of the away-from-home patient.

Finally, using the dependency relationship between accompanying adults and patients perhaps would result in easier administrative analysis of whether the adult's presence was essential. Nonetheless, no guarantee exists that just because the accompanying adult can claim the patient as a dependent, the adult's presence is in any way necessary for the patient's care. The dependency test alone, therefore, may lead to abusive deductions by accompanying adults who travel not to provide medical care but to "get away from it all." The requirement does not adequately address the relevant standard of medical necessity.

The most recent Congressional proposal introduced in July 1983 (Proposal 3), originated as H.R. 3593. It originally provided in pertinent part as follows:

(2) Amounts Paid for Certain Lodging Away From Home Treated as Paid for Medical Care.—Amounts paid for lodging (not lavish or extravagant under the circumstances) while away from home primarily for and essential to medical care referred to in paragraph (1)(A) shall be treated as amounts paid for medical care if—(A) the medical care referred to in paragraph (1)(A) is provided by a physician in—(i) a licensed hospital, or(ii) a nationally or regionally recognized medical care facility substantially all the services provided by which are medical care services, and (B) there is no significant element of personal pleasure, recreation, or vacation in the travel away from home.¹⁵⁹

Proposal 3 had several advantages over the other proposals. The proposal was not restricted in its application to minors and contained safeguards against taxpayer abuse as strong as, if not stronger than, those requirements relating to section 162 deductions. Deductible expenses could not be lavish, and had to be incurred in connection with medical care received from a physician at a hospital or other widely recognized facility. Moreover, no significant element of personal pleasure or vacation could be present in the away-from-home travel. While the proposed amendment said nothing about the expenses of essential persons accompanying the out-of-town patient to provide medical care, the sponsors of the bill intended:

that determinations about the deductibility of lodging for person[s] accompa-

157. See IRC § 152(a)(9) (West 1983).

158. See 440 F.2d at 308.

159. H.R. 3593, 98th Cong., 1st Sess. (July 19, 1983) (styled the Stark-Conable bill after its sponsors).

nying the patient . . . be based on the standards applied under present law for transportation.¹⁶⁰

Some degree of substantiation also was contemplated.¹⁶¹ The principal drawback of this proposal was that it limited deductibility to lodging expense only, thereby retaining the present law with respect to nondeductibility of meal expenses.

This bill ultimately emerged in modified form from committee as part of the proposed Tax Reform Act of 1983, an omnibus bill proposed by the Ways Means Committee at the end of the first session of the ninety-eighth Congress.¹⁶² The provisions were the same as the original version except that a cap of fifty dollars per each eligible person per night was placed on the amount of the deduction. However, a legislative impasse at the end of the first session of the ninety-eighth Congress resulted in a House vote not to take up the omnibus bill for consideration.¹⁶³ It is to be hoped that this bill ultimately will meet with success in Congress, but with an allowance for deduction of meals and a higher cap on the amount of the deduction.

In conclusion, of the current proposals just discussed, ABA Proposal 1 and H.R. 3593 as incorporated in H.R. 4170 provide the most satisfactory responses to the current inequity under section 213. They would allow patients, whether or not minors or incapacitated, to deduct away-from-home living costs incurred in connection with the receipt of essential medical care. At the same time, they contain certain limitations that would insure that the outpatient living costs are necessary and reasonable under the circumstances, thereby going a long way toward precluding the abusive medical vacation deductions Congress intended to prohibit in 1954. Lastly, they recognize (explicitly in the case of Proposal 1 and implicitly in the case of H.R. 3593 as incorporated in H.R. 4170), as does Code section 162 in an analogous area,¹⁶⁴ that expenses incurred by an accompanying family member whose presence is essential also should be deductible.

Provisions such as these, if enacted, would go far toward correcting the medical vacation abuse which seems to have been the principal reason for denying deduction for meal and lodging expense in the first place. These provisions, however, would not eliminate all abuses. The elimination of all taxpayer abuse with respect to any provision in the tax law is virtually impossible. Nonetheless, in this situation, to settle for that which appears to be second-best is appropriate in the absence of an optimal resolution. Since it is possible to eliminate most abuse through a strict delineation of the circumstances in

160. See 129 CONG. REC. H5268 (July 19, 1983).

161. *Id.* "The IRS may require reasonable substantiation by taxpayers of the reasons for and nature of the travel away from home, the medical care received and the activities undertaken during the travel and treatment. It is expected that the nature of the substantiation required will be reasonable in relation to the nature and size of the deductions involved." *Id.*

162. H.R. 4170, 98th Cong., 1st Sess. § 491 (1983).

163. 129 CONG. REC. H10223-H10236 (Nov. 17, 1983).

164. See Treas. Reg. § 1.162-2(c); *United States v. Disney*, 413 F.2d 783 (9th Cir. 1969) (business expense deduction permitted for spouse's attendance when bona fide business purpose).

which the deduction will be allowable, and since circumstances clearly exist in which the deduction is not only justifiable, but actually necessitated by sound tax policy, to allow such a limited deduction is better than to allow none at all.¹⁶⁵

165. See Stiglitz, *supra* note 142, 295 (1977); *cf.* Klein, *supra* note 125, at 1102-03.

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FOURTH CIRCUIT REVIEW

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