

Below is sample language for an email/letter providing legal advice to a married, assigned-male couple ("Taxpayers") regarding whether there is reasonable basis to claim a medical expense deduction for assisted reproductive technology expenses for federal income tax purposes. A similar argument is available to married, assigned-female couples with respect to sperm-related expenses. And similar arguments may be available to individuals and/or married couples with intersex traits irrespective of assigned gender, depending on the facts.

If you are an attorney with an attorney-client relationship with Taxpayers, and you agree with this advice, rendering this advice can assist Taxpayers because they can show the advice to the IRS if needed to demonstrate that they were claiming the deduction under the advice of their attorney. See Treas. Reg. § 1.6664-4(b)(1) (reliance on the advice of a professional tax advisor, such an attorney, accountant, or appraiser may support a finding of reasonable cause, which is a defense against certain penalties).

Dear [Spouse 1] and [Spouse 2]:

You have asked us whether, for federal income tax purposes, you may claim a medical expense deduction for artificial reproductive technology ("ART") payments you made in tax year 20__ for:

1. Sperm donation;
2. Payments arising under surrogacy agreement and/or egg donation agreement, including for:
 - a. IVF;
 - b. Egg donation;
 - c. Surrogate and/or egg donor travel and accommodation;
 - d. The surrogate and/or egg donor's legal expenses with respect to surrogacy and/or egg donation;
 - e. Surrogacy fee;
 - f. Other surrogate or egg donor medical expenses related to the surrogacy or egg donation;
 - g. Misc. purchases (e.g., pregnancy clothes) for surrogate;
3. Your legal expenses with respect to surrogacy and/or egg donation; and
4. Your travel and accommodations related to surrogacy/birth.

Summary of Recommendations

As explained below, there is substantial authority to deduct item 1, and reasonable basis to deduct items 2-4 on your federal income tax return for tax year 20__. Because there is reasonable basis but not substantial authority to deduct items 2-4, the IRS may disallow the claim for those deductions and assert accuracy-related penalties. Accordingly, we recommend disclosing items 2-4 to mitigate against potential penalties in the event that a court agrees with the IRS.

Assumptions

This analysis assumes you meet the ____% threshold for medical expense deductions for tax year 20__.

Analysis

The Equal Protection Clause of the United States Constitution prohibits discrimination between similarly situated individuals on the basis of sex unless the discrimination is substantially related to an important government interest. *E.g.*, *Craig v. Boren*, 429 U.S. 190 (1976). Internal Revenue Code (“Code”) section 213(a) allows for the deduction of expenses “for medical care of the taxpayer, [the taxpayer’s] spouse, or a dependent. . . .” Under Code section 213(d)(1)(A), medical care is defined as amounts paid “for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body. . . .”

IRS Publication 502 sets forth the IRS’s interpretation of section 213, including with respect to ART. It states that a taxpayer may deduct medical expenses “to overcome an inability to have children” for “[p]rocedures such as in vitro fertilization (including temporary storage of eggs or sperm)” if performed “on yourself, your spouse, or your dependent. . . .” Also, according to Publication 502, expenses for pregnancy clothes are not deductible under section 213.

Despite the restriction in Publication 502 that the medical procedure must be performed on the body of the taxpayer or the taxpayer’s spouse in the ART context, the IRS applies a different rule in other contexts. Individuals with disabilities may sometimes deduct expenses for payments for someone to stand in their shoes when they are not able to perform a function of the body. *Treas. Reg. § 1.213-1(e)(1)(iii)* (allowing deduction for seeing eye dog expenses); *Rev. Rul. 64-173*, *Rev. Rul. 58-223* (allowing deduction for payments for guides and aides for students with disabilities).

With respect to ART, under the IRS’s position, if at least one spouse in a married couple has a uterus and ovaries, and the couple is unable to reproduce, it may be possible for either spouse to deduct medical, legal, travel, and accommodation expenses related to IVF, egg donation, pregnancy, and childbirth. *See, e.g.*, Private Letter Ruling (“PLR”) 200318017 (cisgender woman allowed deduction for medical and legal expenses she paid for a third party to donate eggs to be implanted in her uterus). By contrast, in PLR 202114001, the IRS determined that cisgender, gay male spouses could deduct sperm donation and sperm freezing expenses but not medical or legal expenses related to egg retrieval, IVF, surrogacy, and birth. In making this determination, the IRS relied on three cases: *Magdalin v. Comm’r*, T.C. Memo 2008-293, *aff’d without published opinion*, 2009 U.S. App. LEXIS 28966 (1st Cir. Dec. 17, 2009) (non-sperm ART deduction denied to single, cisgender male); *Longino v. Commissioner*, T.C. Memo 2013-90, *aff’d* 593 Fed. Appx. 965 (11th Cir. 2014) (non-sperm ART deduction denied to single, cisgender male); and *Morrissey v. United States*, 871 F.3d 1260 (11th Cir. 2017) (non-sperm ART deduction denied to unmarried, cisgender male in committed relationship with another cisgender male).

Applying these principles:

1. There is substantial authority for you to claim a deduction for item 1 on your income tax return. You may simply deduct those expenses.
2. There is not substantial authority for you to deduct items 2-4. Nevertheless, you may deduct those expenses because there is reasonable basis to take the position that the expenses are deductible under the following rationale:
 - a. All of the expenses arguably fall within the scope of the statute because they affect your ability to reproduce, which is a function of the body.
 - b. The IRS’s interpretation of section 213 arguably discriminates based on sex because it treats you differently from similarly situated taxpayers, *i.e.*, other

married couples, because neither of you have a uterus or ovaries. (Regardless of whether *Magdalin*, *Longino*, and *Morrissey* were correctly decided, they are arguably distinguishable because they concerned taxpayers who were not married).

- c. Denying you a deduction granted to married couples with at least one spouse who has a uterus is arguably not substantially related to an important government interest.
 - d. Accordingly, the IRS's position arguably violates Equal Protection.
 - e. The statute should arguably be interpreted to allow the deduction so as to avoid the Equal Protection violation.
 - f. If so, you arguably should be allowed the same ART deductions that any other married couple may take.
 - g. Because, for you, such expenses necessarily involve a surrogate/egg donor, and because payments for someone to stand in the shoes of the taxpayer are allowed in other section 213 contexts, the deduction, if allowable, arguably must include surrogacy/egg donation expenses.
 - h. Because all payments to the surrogate/egg donor are part of the cost of obtaining the surrogate/egg donor, they arguable all should be allowed since, but-for those payments, the surrogate/egg donor would not agree to the surrogacy/egg donation, which would affect your ability to reproduce.
3. Under this rationale, there is reasonable basis to claim a deduction with respect to items 2-4.

Disclosure Recommended

Although there is reasonable basis to take the position above, the IRS may disallow the deduction for items 2-4. If so, the IRS would impose an assessment for additional tax (the tax you would have owed if you had not taken the deduction), plus interest. While the IRS could also impose accuracy-related penalties, filing the attached Form 8275, *Disclosure Statement*, with your federal income tax return should mitigate against that possibility.

Please let us know if you have any questions.

Thank you,

[Signature line]

Attachments

Disclosure Statement

Do not use this form to disclose items or positions that are contrary to Treasury regulations. Instead, use Form 8275-R, Regulation Disclosure Statement.

► Information about Form 8275 and its separate instructions is at www.irs.gov/form8275.

► Attach to your tax return.

Name(s) shown on return

Identifying number shown on return

If Form 8275 relates to an information return for a foreign entity (for example, Form 5471), enter:

Name of foreign entity ►

Employer identification number, if any ►

Reference ID number (see instructions) ►

Part I General Information (see instructions)

(a) Rev. Rul., Rev. Proc., etc.	(b) Item or Group of Items	(c) Detailed Description of Items	(d) Form or Schedule	(e) Line No.	(f) Amount
1 Pub. 502	Medical	In vitro fertilization, prenatal care, childbirth, egg donation	Sch. A	1	\$\$\$\$
2 Pub. 502	Legal	Legal fees for taxpayers, egg donor, and surrogate	Sch. A	1	\$\$\$\$
3 Pub. 502	Travel	Taxpayer travel expenses for birth, egg donor travel, surrogate travel	Sch. A	1	\$\$\$\$
4 Pub. 502	Accommod.	Taxpayer accommodations for birth, egg donor accommodations, surrogate accommodations	Sch. A	1	\$\$\$\$
5 Pub. 502	Misc.	Other payments required under surrogacy contract	Sch. A	1	\$\$\$\$
6					

Part II Detailed Explanation (see instructions)

1 Please see attached.

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Part III Information About Pass-Through Entity. To be completed by partners, shareholders, beneficiaries, or residual interest holders.

Complete this part only if you are making adequate disclosure for a pass-through item.

Note: A pass-through entity is a partnership, S corporation, estate, trust, regulated investment company (RIC), real estate investment trust (REIT), or real estate mortgage investment conduit (REMIC).

1 Name, address, and ZIP code of pass-through entity	2 Identifying number of pass-through entity
	3 Tax year of pass-through entity / / to / /
	4 Internal Revenue Service Center where the pass-through entity filed its return

This image shows a single sheet of white paper with horizontal dashed lines. The lines are evenly spaced and run across the width of the page, providing a guide for handwriting or typing. There are no margins, text, or other markings on the paper.

Taxpayers: [Names]
Taxpayer ID: [xxx-xx-xxxx]

[If the taxpayers are filing separate returns, edit accordingly.]

Taxpayers [name and name] (individually "Taxpayer," collectively, "Taxpayers") are a married couple who are unable to reproduce because they are both cisgender males [change as needed]. Taxpayers are deducting certain medical expenses under Internal Revenue Code section 213 because, in conformance with the Equal Protection Clause of the U.S. Constitution, section 213 allows all married couples to deduct expenses affecting the bodily function of reproduction to the same extent, regardless of sex.

Because other married couples that are unable to reproduce are able to deduct in vitro fertilization ("IVF"), egg donation, pregnancy, and birth expenses, Taxpayers also are entitled to deduct such expenses. To find otherwise would discriminate against Taxpayers because of sex (*i.e.*, because neither taxpayer has a uterus or ovaries). The Equal Protection Clause prohibits discrimination on the basis of sex unless substantially related to an important government interest. There is no important government interest substantially related to allowing these deductions for other married couples but not for Taxpayers.

Because neither Taxpayer has a uterus or ovaries, they are unable to undergo IVF, egg donation, pregnancy, and birth themselves. The Internal Revenue Service allows deductions for other medical expenses when the expense pays for someone to stand in the Taxpayer's place to perform a function of the body (*e.g.*, payments for seeing eye dogs (Treas. Reg. § 1.213-1(e)(1)(iii)) and payments for guides and aides at school for students with disabilities (Rev. Rul. 64-173, Rev. Rul. 58-223)). Taxpayers are therefore deducting all of the expenses paid in tax year 20__ that arose under their surrogacy and egg donation agreements, as well as other reproduction-related expenses:

1. Payments required under surrogacy agreement:
 - a. IVF expenses: \$__
 - b. Prenatal care expenses: \$__
 - c. Birth expenses: \$__
 - d. Surrogate's legal expenses: \$__
 - e. Surrogate's travel expenses: \$__
 - f. Surrogate's accommodation expenses: \$__
 - g. Surrogacy fee: \$__
 - h. Pregnancy clothes: \$__
 - i. [Other: \$__]
2. Payments required under egg donation agreement:
 - a. Egg donation expenses: \$__
 - b. Egg donor's legal expenses: \$__
 - c. Egg donor's travel expenses: \$__
 - d. Egg donor's accommodation expenses: \$__
 - e. [Other: \$__]
3. Taxpayers' legal expenses with respect to surrogacy and egg donation: \$__
4. Taxpayers' travel related to surrogacy/egg donation/birth: \$__
5. Taxpayers' accommodations related to surrogacy/egg donation/birth: \$__

Taxpayers reported these expenses on Schedule A, line 1 of their Form 1040, U.S. Individual Income Tax Return, for tax year 20__.