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INTERNAL REVENUE—MEDICAL DEDUCTIONS—DEDUCTIBILITY
OF EXPENSES INCURRED FOR MEALS AND LODGING ON VACATION
FOR MEDICAL PURPOSE.

Carasso v. Commissioner (2d Cir. 1961).

Commissioner v. Bilder (3d Cir. 1961).

This is a comparative analysis of two cases recently decided by the Second and Third Circuits of the United States Court of Appeals. *Commissioner v. Bilder*, 289 F. 2d 291 (3d Cir. 1961) and *Carasso v. Commissioner*, 292 F. 2d 367 (2d Cir. 1961). The fact situations are essentially the same. The personal physician of the taxpayer advises his patient that, in the light of a current illness, he should remove to a warmer climate. In conformance to this direction, the taxpayer transports himself and his family to the suggested beneficial location. Upon the subsequent filing of his income tax return, the taxpayer deducts as "medical care" expenses the total cost of transportation, of rent, and, in one case, of meals, incurred while away from home. The Commissioner of Internal Revenue thereafter disallows the claimed deductions under § 213 of the Internal Revenue Code of 1954,¹ and taxpayer resorts to the Tax Court for relief. The court determines as a matter of fact in both cases that it was imperative for the "medical care" of taxpayer that he undertake the trip in question. It is at this point that the similarity ceases and the disparity begins. The first of these cases to come before the Tax Court was *Robert M. Bilder*.² It was there determined that the deductions claimed for transportation, and for the rental costs incurred by the taxpayer, were valid. The rental expenses attributed to the members of taxpayer's family were not found to be deductible, since, in the court's view, the companionship of the family was not an essential part of the treatment prescribed. Upon petitions filed by both the taxpayer and the Commissioner, the United States Court of Appeals for the Third Circuit, with one judge dissenting, modified that decision and held that, under § 213 of the Internal Revenue Code of 1954, taxpayer was entitled to deduct all of the lodging expenses incurred by him and his family while away from home, as well as the cost of transportation incident thereto.³ Prior to the third circuit's decision, but subsequent to *Robert M. Bilder*, the Tax Court was again confronted with

1. Int. Rev. Code of 1954, § 213. Section 213(a) provides that a taxpayer may deduct the expenses paid ". . . for medical care of the taxpayer, his spouse or a dependent." Subsection (e) (1) of § 213 defines the term "medical care" 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 (including amounts paid for accident or health insurance), or (B) for transportation primarily for and essential to medical care referred to in subparagraph (A)." (Emphasis supplied).

2. 33 T.C. 155 (1959), modified, *Commissioner v. Bilder*, 289 F. 2d 291 (3d Cir. 1961).

3. *Commissioner v. Bilder*, 289 F. 2d 291 (3d Cir. 1961), cert. granted, 30 U.S.L. WEEK 3154 (U.S. Nov. 13, 1961) (No. 384).

substantially the same facts and the identical legal issue in *Max Carasso*.⁴ In that case, however, a narrower interpretation was given to § 213, and it was found that only those expenditures made by the taxpayer for transportation were deductible. The United States Court of Appeals for the Second Circuit affirmed, holding that, by virtue of § 213 of the 1954 Code, the cost of food and lodging could not be deducted as an expense for "medical care", but that deduction of expenditures for transportation was not precluded thereby.⁵

The critical provision in this analysis, and the one upon which the instant cases turn, is § 213 (e) (1) of the 1954 Code. If it were not for the addition of subparagraph (B), this section would be virtually identical in language to its predecessor in the 1939 Code, § 23 (x).⁶ The leading case under the latter section is *L. Keever Stringham*⁷ in which the Tax Court recognized that § 23 (x) was "susceptible to a variety of conflicting interpretations,"⁸ and consequently inquired into the congressional intent which lay behind the enactment of the section. The court referred to the Senate Finance Committee report⁹ to sustain its conclusion that § 23 (x) was intended to permit deductions which had formerly been regarded as "personal, living, or family expenses" by virtue of § 24 (a)¹⁰ of the 1939 Code, and which were expressly nondeductible thereunder. Section 24 (a) had been amended in 1942, at the same time § 23 (x) had been added, to provide that nondeductible items included: "(1) Personal, living, or family expenses, *except extraordinary medical expenses deductible under section 23 (x)*."¹¹ (Emphasis supplied). The court, after considering both § 23 (x) and § 24 (a) (1), concluded that it was a question of fact whether claimed medical expenses qualified as "extraordinary medical expenses" or were personal in nature and therefore nondeductible.¹² Subsequent to and in conformity with the reasoning of the *Stringham* case, the courts construed § 23 (x) so as to enable a

4. 34 T.C. 1139 (1960), *aff'd*, *Carasso v. Commissioner*, 292 F. 2d 367 (2d Cir. 1961).

5. *Carasso v. Commissioner*, 292 F. 2d 367 (2d Cir. 1961).

6. Int. Rev. Code of 1939, § 23(x), added by ch. 619, 56 Stat. 825 (1942).

7. 12 T.C. 580 (1949), *aff'd per curiam*, *Stringham v. Commissioner*, 183 F. 2d 579 (6th Cir. 1950).

8. *Id.* at 583.

9. S. REP. No. 1631, 77th Cong., 2d Sess. 6 (1942). The fundamental purpose of § 23(x) was expressed as follows: "This allowance is recommended in consideration of the heavy tax burden that must be borne by individuals during the existing emergency and of the desirability of maintaining the present high level of public health and morale."

10. Int. Rev. Code of 1939, Ch. 1, § 24(a), 53 Stat. 16, as amended, Ch. 619, 56 Stat. 826 (1942).

11. *Ibid.*

12. The courts applied certain tests to determine into which category the claimed expense fell. These tests were summarized in Robert M. Bilder, 33 T.C. 155, 158, 159 (1959) as follows: "1. What was the purpose of the taxpayer in making the expenditures sought to be taken as a medical expense deduction? 2. Would the expenditure have been made but for the advice of a physician? 3. Did the expenditure have direct relationship to the treatment of a specific disease? 4. Was the treatment reasonably designed to effect the diagnosis, cure, mitigation or prevention of a specific disease. . . ."

taxpayer to deduct costs for such things as transportation, lodging, and meals when they were incurred *primarily* for "medical care."¹³ When the claimed deductions failed to meet this standard they were disallowed.¹⁴ The relative accord that prevailed with regard to interpreting the law in this field has become disrupted since the passage of § 213 (e) (1) (B) of the 1954 Code. Since it expressly provides for the deduction of amounts paid "for transportation primarily for and essential to medical care," the question of its effect on all other expenses has been raised. In *Carasso v. Commissioner*,¹⁵ the Second Circuit has held that only those expenses incurred for transportation were deductible. In disallowing the expenditures for hotel rooms and meals the court relied heavily upon its examination of legislative history preceding passage of § 213 (e) (1) (B). In *Commissioner v. Bilder*,¹⁶ however, the Third Circuit has rejected any consideration of legislative history. It vigorously maintains that "on its face" subparagraph (B) is clear and unambiguous, and by its explicit terms merely extends the deduction allowances for "medical expenses" to include transportation costs. It holds that the liberal construction attached to § 23 (x) as to living costs has been "reenacted" in subparagraph (A) of § 213 (e) and that that construction is in no way limited by the express allowance in subparagraph (B).

There can be no debating the proposition that if § 213 (e) had been enacted without subparagraph (B), the construction given to it would be the same as was given to § 23 (x). The wording of the two is virtually identical. However, it would seem that Congress must have had some purpose in passing subparagraph (B). If it was not to modify in some respect § 213 (1) (A), then there would appear to be no purpose for its inclusion. The court in the *Bilder* case contends that Congress' purpose was merely to extend deduction allowances for medical expenses to include transportation costs. This argument appears unsound in view of the fact that the courts had long been allowing deductions for transportation costs under § 23 (x).¹⁷ To adhere to the Third Circuit's reasoning would be to render subparagraph (B) superfluous. Yet it is upon this reasoning that the court bases its assertion that the language of (B) is not ambiguous

13. *Estate of Embry v. Gray*, 143 F. Supp. 603 (W.D. Ky. 1956), *appeal dismissed*, 244 F. 2d 718 (6th Cir. 1957) (Taxpayer entitled to deduct expense of room, meals, transportation and reasonable amount of incidental expenses for both himself and wife. Taxpayer's doctor had advised him to take a trip to Florida in company of his wife.); *Bertha M. Rodgers*, 25 T.C. 254 (1955) (costs incurred by taxpayer for travel, meals, and lodging, in conjunction with his trips from St. Louis to Tulsa to consult his eye doctor, were deductible).

14. *Samuel Dobkin*, 15 T.C. 886 (1950) (deductions were disallowed because the prescribed change in climate could have affected only the general health of the taxpayer and not his specific ailment); *Samuel Ochs*, 17 T.C. 130 (1951), *affirmed*, 195 F. 2d 692 (2d Cir. 1952), *cert. denied*, 344 U.S. 827 (1952) (the expense of sending taxpayer's children away to school so as to provide the necessary environment for the recovery of taxpayer's wife was not deductible since a positive benefit accrued to the children).

15. 292 F. 2d 367 (2d Cir. 1961).

16. 289 F. 2d 291 (3d Cir. 1961).

17. *E.g.*, *Estate of Embry v. Gray*, 143 F. Supp. 603 (W.D. Ky. 1956).

and therefore in no need of further examination. It would seem that the precise meaning of the language in subparagraph (B) is, at least, doubtful and that it is necessary to investigate beyond the words expressed therein. When a statute is ambiguous on its face, and even where there is no apparent ambiguity, it has been held that a review of legislative history is permissible as a guide to proper interpretation.¹⁸ The Senate and House Committee reports preceding the enactment of § 213 reveal the unmistakable intent of Congress. "The deduction permitted for 'transportation primarily for and essential to medical care' clarifies existing law in that it impliedly excludes deduction of any meals and lodging while away from home receiving medical treatment."¹⁹ These reports go on to anticipate a sample fact situation substantially the same as those in the instant cases and to explicitly state that expenses for meals and lodging are not deductible.²⁰ The Senate report said further: "A *new* definition of 'medical expenses' is provided which allows the deduction of *only* transportation expenses for travel prescribed for health, *and not the ordinary living expenses incurred during such a trip.*"²¹ (Emphasis supplied). In a strained effort to avoid the impact of this language, the court in the *Bilder* case reasoned that its literal meaning must be sacrificed in the face of the broad public policy of the 1954 Code. In defining this public policy the court reverted to a 1942 Congressional Report²² and adopted the language it employed to outline the purpose of §23 (x).²³ However, since § 23 (x) is no longer law, the validity of ascribing its purpose to § 213 in the guise of a "broad public policy" is dubious. It would seem more reasonable to attach greater significance to evidence reflecting upon the purpose of the provision presently in effect, § 213. The weight of that evidence strongly supports the Commissioner's contention that subparagraph (B) narrows the scope of the medical deduction so as to preclude expenditures for lodging and meals.²⁴ A *new* definition was surely intended to be provided. And, as the dissenting judge in the *Bilder* case observes, if this intention is to be ignored, it must be because what Congress actually said

18. In *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943), it was said: "But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on 'superficial examination.'" See also *United States v. American Trucking Ass'n*, 310 U.S. 534, 543-44 (1940).

19. H.R. REP. No. 1337, 83d Cong., 2d Sess. 260 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 219 (1954).

20. *Ibid.*, "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.*"

21. S. REP. No. 1622, 83d Cong., 2d Sess. 35 (1954).

22. S. REP. No. 1631, 77th Cong., 2d Sess. 6 (1942).

23. *Ibid.* "... the desirability of maintaining the present high level of public health and morale."

24. Taxpayer in *Bilder* made no claim with respect to food expense and therefore the question of the allowability of deducting that item is not an issue in that case.

in the statute is clearly contrary to what it meant. Further credence is given the Commissioner's interpretation by § 262 of the 1954 Code,²⁵ which states: "Except as otherwise provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." By virtue of this section, when a taxpayer seeks to claim living expenses under the 1954 Code, *he* has the burden of showing where such expenses are "expressly" included among the deductible items related to medical care. There is in fact no such express provision. Although it was emphasized in *Carasso*, the court in *Bilder* overlooked this fact which apparently weakens its statutory interpretation.²⁶

The significance of the instant cases can not yet be fully appreciated. It is clear that a definite area of disagreement exists with respect to the deduction of living expenses for medical care. The finding in the *Bilder* case that the taxpayer may deduct the rental costs incurred by his entire family would not seem to be unreasonable if it is conceded that rental costs should be deductible at all. The real point in issue is the construction given to the Internal Revenue Code, and in particular to § 213. The third circuit's insistence upon shaping its reasoning so as to reach an end in obvious conflict with the intent of the lawmakers will either generate a continuing reaction or create a judicial impression. It will either cause Congress to enunciate more explicitly its intent in the language of the statute, or, assuming no further judicial retreat, it will establish a precedent of lasting benefit to taxpayers. It is also clear, in light of the divergent views of the Second and Third Circuit's, that the way is now open for a Supreme Court ruling, which could permanently resolve the issue and lay the dispute to rest.²⁷

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25. Section 262 of the Internal Revenue Code of 1954 replaced § 24(a)(1) of the 1939 Code.

26. See also § 162(a)(2) of the 1954 Code, which allows the deduction of "traveling expenses" incurred in trade or business, "including the entire amount expended for meals and lodging while away from home." The use of the phrase "traveling expenses" in conjunction with food and lodging expenses would seem to imply that where the latter expenses are not expressly mentioned, they are intended to be excluded.

27. The Supreme Court has granted certiorari in the *Bilder* case. See *supra*, note 3.