

10-16-2023

## Unreimbursed Medical Expense Tax Deductions in Light of Per- and Polyfluoroalkyl Substances

Tyler Young  
tylerlyoung@outlook.com

Follow this and additional works at: <https://scholarship.law.edu/lawreview>



Part of the [Taxation-Federal Commons](#), and the [Tax Law Commons](#)

---

### Recommended Citation

Tyler Young, *Unreimbursed Medical Expense Tax Deductions in Light of Per-and Polyfluoroalkyl Substances*, 72 Cath. U. L. Rev. 509 (2023).

Available at: <https://scholarship.law.edu/lawreview/vol72/iss4/8>

This Comments is brought to you for free and open access by Catholic Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of Catholic Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

---

## Unreimbursed Medical Expense Tax Deductions in Light of Per-and Polyfluoroalkyl Substances

### Cover Page Footnote

J.D., The Catholic University of America, Columbus School of Law, 2023. The author sincerely thanks Professor Regina T. Jefferson for her extensive feedback and guidance on this paper. The author also thanks the staff and editors of the Catholic University Law Review for their assistance in preparing this comment for publication.

# UNREIMBURSED MEDICAL EXPENSE TAX DEDUCTIONS IN LIGHT OF PER-AND POLYFLUOROALKYL SUBSTANCES

*Tyler L. Young*<sup>+</sup>

*Per- and Polyfluoroalkyl Substances (PFAS) have been used in a wide variety of products due to their ability to reduce friction. However, studies have shown that exposure to PFAS may lead to harmful effects in humans. In fact, it has been called a “national emergency” in testimony before Congress. As a result, there have been efforts to limit exposure to the disease causing substances through abatement and avoidance. The Internal Revenue Code, through the unreimbursed medical expense tax deduction of I.R.C. § 213, may offer one policy solution for individuals seeking to participate in abatement activities. This comment explores the development and implementation of I.R.C. § 213, applies the interpretation and application of I.R.C. § 213 to efforts individuals can take to limit their exposure to PFAS, and makes recommendations that the Internal Revenue Service, the judiciary, and Congress could take to clarify the application of I.R.C. § 213 as it relates to the avoidance of PFAS and other disease-causing substances.*

---

<sup>+</sup> J.D., The Catholic University of America, Columbus School of Law, 2023. The author sincerely thanks Professor Regina T. Jefferson for her extensive feedback and guidance on this paper. The author also thanks the staff and editors of the *Catholic University Law Review* for their assistance in preparing this comment for publication.

INTRODUCTION .....	511
I. PRIOR LAW .....	515
A. <i>The Income Tax, Income Deductions, and Tax Credits</i> .....	515
B. <i>Introduction of Medical Care Tax Deduction</i> .....	516
C. <i>I.R.C. § 213 Administrative Regulations</i> .....	517
D. <i>I.R.C. § 213 and the Bilder Standard</i> .....	519
E. <i>I.R.C. § 213 as Applied to the Addition of Fluoride</i> .....	520
F. <i>I.R.C. § 213 and the Implementation of the Two-Part Jacobs Test</i> ....	521
G. <i>Application of I.R.C. § 213 to Lead Exposure</i> .....	522
H. <i>I.R.C. § 213 in Cases of Chemical Avoidance</i> .....	523
I. <i>I.R.C. § 213 as Applied to COVID – 19 Prevention</i> .....	525
II. ANALYSIS .....	527
A. <i>Scenario I – Individual is Currently Presenting PFAS Related Medical         Conditions</i> .....	528
B. <i>Scenario II - Individual Seeks to Prevent Future PFAS Related Medical         Conditions</i> .....	529
III. COMMENT AND PROPOSED SOLUTIONS .....	530
A. <i>Solution I – Administrative Rulemaking</i> .....	531
B. <i>Solution II – Judicial Two-Part Test Overhaul</i> .....	531
C. <i>Solution III – Congress Defining “Prevention of Disease”</i> .....	532
D. <i>Solution IV – Alternative Tax Credit Policy</i> .....	533
CONCLUSION.....	534

## INTRODUCTION

The term “national emergency” has been used by government officials testifying before Congress to describe the proliferation of Per- and Polyfluoroalkyl Substances (PFAS) throughout the world.<sup>1</sup> While some people may not even be aware of PFAS, chances are at least some forms of these substances are already inside of them, as studies show certain compounds already exist within in ninety-eight percent of Americans’ bodies.<sup>2</sup> In fact, these chemicals have spread so far that they “have been found in the bloodstreams of polar bears living in the Arctic Circle.”<sup>3</sup> These facts alone are shocking to the point that they raise the following questions: What are PFAS? How do they affect us? What can be done to protect ourselves from them?

According to the U.S. Environmental Protection Agency, PFAS “are a group of manufactured chemicals that have been used in industry and consumer products since the 1940’s . . . .”<sup>4</sup> In total, “[t]here are thousands of different [chemicals that are] PFAS.”<sup>5</sup> Some examples of common PFAS are: “Perfluorocarboxylic acids, which includes perfluorooctanoic acid (PFOA) and perfluorononanoic acid (PFNA), and Perfluorosulfonic acids, which include perfluorooctane sulfonic acid (PFOS) and perfluorohexane sulfonic acid (PFHxS)” to name a few.<sup>6</sup> Manufactures favored the use of these chemicals because of their “ability to reduce friction . . . .”<sup>7</sup> Due to this ability, these were incorporated into fire retardants, nonstick pots and pans, food wrappers to prevent grease absorption, stain resistant coatings for furniture and carpeting,

---

1. *The Devil They Knew: PFAS Contamination and the Need for Corporate Accountability: Hearing Before the Subcomm. on Environment of the Comm. on Oversight & Reform*, 116th Cong. 53 at 2 (2019) (statement of Rep. Rouda, Chairman, Subcomm. on Environment of the Comm. on Oversight & Reform) [hereinafter *PFAS Contamination Hearing*]; See generally Antonia M. Calafet et al., *Polyfluoroalkyl Chemicals in the U.S. Population: Data from the National Health and Nutrition Examination Survey (NHANES) 2003–2004 and Comparisons with NHANES 1999–2000*, 115 *ENV’T HEALTH PERSPS.* 1596, 1596–1602 (2007).

2. Calafet et al., *supra* note 1, at 1600.

3. *PFAS Contamination Hearing*, *supra* note 1, at 1.

4. *Our Current Understanding of Human Health and Environmental Risks of PFAS*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas> (Mar. 16, 2022) [hereinafter *Understanding Risks of PFAS*].

5. *Id.*

6. AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, PFAS: AN OVERVIEW OF THE SCIENCE AND GUIDANCE FOR CLINICIANS PFAS ON PER- AND POLYFLUOROALKYL SUBSTANCES 3 (2019), [hereinafter *SCIENCE AND GUIDANCE FOR CLINICIANS*]; AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, TOXICOLOGICAL PROFILE FOR PERFLUOROALKYLS 1 (2021), <https://www.atsdr.cdc.gov/toxprofiles/tp200.pdf> (“Perfluorobutanoic acid PFBA, Perfluorohexanoic acid PFHxA, Perfluoroheptanoic acid PFHpA, Perfluorooctanoic acid PFOA, Perfluorononanoic acid PFNA, Perfluorodecanoic acid PFDA, Perfluoroundecanoic acid PFUnA, Perfluorododecanoic acid PFDoDA, Perfluorobutane sulfonic acid PFBS, Perfluorohexane sulfonic acid PFHxS, Perfluorooctane sulfonic acid PFOS, Perfluorooctane sulfonamide FOSA.”) [hereinafter *TOXICOLOGICAL PROFILE FOR PERFLUOROALKYLS*].

7. *SCIENCE AND GUIDANCE FOR CLINICIANS*, *supra* note 6, at 3.

and a multitude of coatings to waterproof clothes and mattresses.<sup>8</sup>

As a result of their use in a wide variety of consumer products, the chemicals are present in our water, land, homes, and businesses.<sup>9</sup> Today, most people are exposed to PFAS through ingestion by consuming affected water and food products that have been grown in or have come in contact with contaminated soil or water.<sup>10</sup> For infants, exposure comes from contaminated objects entering their mouths, such as “[f]ormula mixed with . . . contaminated water” and breastmilk from an exposed mother.<sup>11</sup>

Exposure to these chemicals is concerning because it “is associated with an increased risk of some adverse effects on human health.”<sup>12</sup> According to the United States Agency for Toxic Substances and Disease Registry (ATSDR), these include:

Pregnancy-induced hypertension/pre-eclampsia . . . in serum hepatic enzymes, particularly alanine aminotransferase (ALT), and decreases in serum bilirubin levels . . . [i]ncreases in serum lipids, particularly total cholesterol and low-density lipoprotein (LDL) cholesterol . . . [, d]eased antibody response to vaccines . . . [,and s]mall . . . decreases in birth weight.<sup>13</sup>

In addition to these findings, “[t]he International Agency for Research on Cancer . . . and [the] EPA concluded that there was suggestive evidence of the carcinogenic potential of PFOA and PFOS in humans[,]” noting an uptick of cases in those that have been “highly exposed.”<sup>14</sup> Further, the EPA notes that exposure has been linked to prostate cancer, “[i]nterference with the body’s

8. *Id.*

9. *Understanding Risks of PFAS*, *supra* note 4 (“PFAS can be present in our water, soil, air, and food as well as in materials found in our homes or workplaces, including: Drinking water . . . . Soil and water at or near waste sites . . . . Fire extinguishing foam . . . used in training and emergency response events at airports, shipyards, military bases, firefighting training facilities, chemical plants, and refineries. Manufacturing or chemical production facilities . . . . Food – for example in fish caught from [contaminated] water . . . and dairy products from livestock exposed to PFAS. Food packaging – for example . . . fast food containers/wrappers, microwave popcorn bags, pizza boxes, and candy wrappers. Household products and dust – for example in stain and water-repellent used on carpets, upholstery, clothing, and other fabrics; cleaning products; non-stick cookware; paints, varnishes, and sealants. Personal care products – for example in certain shampoo, dental floss, and cosmetics.”).

10. SCIENCE AND GUIDANCE FOR CLINICIANS, *supra* note 6, at 3–4.

11. *Id.* at 4.

12. *Id.* at 7.

13. TOXICOLOGICAL PROFILE FOR PERFLUOROALKYLS, *supra* note 6, at 6 (“Although a large number of epidemiological studies have examined the potential of perfluoroalkyls to induce adverse health effects, most of the studies are cross-sectional in design and do not establish causality. Based on a number of factors (described in Section 2.1), the available epidemiological studies suggest associations between perfluoroalkyl exposure and several health outcomes; however, cause-and-effect relationships have not been established for these outcomes . . . .”).

14. *Id.* at 6–7.

natural hormones . . . [, and] [i]ncreased cholesterol levels and/or risk of obesity.”<sup>15</sup>

Due to the proliferation of PFAS and the threat that the chemicals pose to public health, there have been “calls for increased federal action and authority to prevent and mitigate . . . exposures to PFAS.”<sup>16</sup> Consequently, a search of the term “PFAS” on Congress.gov reveals that there were several pieces of legislation introduced during the 117th Congress to address the issue.<sup>17</sup> Additionally, federal agencies “ha[ve] used the authorities of the[] . . . [Toxic Substances Control Act, Safe Drinking Water Act, and Comprehensive Environmental Response, Compensation, and Liability Act] . . . to address potential risks of PFAS.”<sup>18</sup> These statutes are primarily focused on EPA’s authority to regulate the testing and reporting of the chemicals, safe drinking water standards, and the clean-up of hazardous waste sites instead of an individual’s ability to take immediate action to prevent the aforementioned medical conditions.<sup>19</sup> In August 2022, the EPA issued a Notice of Proposed Rulemaking that would list PFAS “as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)” so that “polluters [can be held] accountable for cleaning up their contamination.”<sup>20</sup>

In addition to these efforts, there are several actions that individuals can take to avoid exposure to the toxic substances.<sup>21</sup> Primarily, the recommended actions

---

15. *Understanding Risks of PFAS*, *supra* note 4.

16. DAVID M. BEARDEN ET AL., CONG. RSCH. SERV., R45986, FEDERAL ROLE IN RESPONDING TO POTENTIAL RISKS OF PER- AND POLYFLUOROALKYL SUBSTANCES 1 (2019).

17. Legislative Search Results refined by PFAS and 117 (2021-2022), CONGRESS.GOV, <https://www.congress.gov/search?q=%7B%22congress%22%3A%5B%22117%22%5D%2C%22source%22%3A%22all%22%2C%22search%22%3A%22PFAS%22%7D> (select “Congress 117” under the “Limit Your Search” bar; then search for “PFAS”) (last visited Mar. 20, 2023).

18. CONG. RSCH. SERV., *supra* note 16, at 1.

19. *Summary of the Toxic Substances Control Act*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-toxic-substances-control-act> (Oct. 4, 2022); *Overview of the Safe Drinking Water Act*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/sdwa/overview-safe-drinking-water-act> (Feb. 15, 2022); *Summary of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund)*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act> (Sept. 12, 2022).

20. *Proposed Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/superfund/proposed-designation-perfluorooctanoic-acid-pfoa-and-perfluorooctanesulfonic-acid-pfos> (Nov. 2, 2022).

21. See, e.g., Joel Keehn, *Four Ways to Avoid PFAS in Your Water*, THE GUARDIAN, (Sept. 24, 2020, 6:00 AM) <https://www.theguardian.com/us-news/2020/sep/24/four-ways-avoid-pfas-water>; *Treating PFAS In Drinking Water*, U.S. ENV’T PROT. AGENCY,

fall into two different categories, which include, one, avoiding the use of products that contain PFAS and, two, filtering the chemicals out of water sources through a permanent, professionally installed filtration system.<sup>22</sup> Both of these approaches could be costly.<sup>23</sup>

This comment argues that the Internal Revenue Code, through tax expenditures, may offer some assistance to individuals seeking to participate in abatement activities.<sup>24</sup> Tax expenditures act as a “subsidy apparatus that . . . serve[s] ends which are similar in nature to those served . . . by direct government expenditures in the form of grants, loans, interest subsidies, and federal insurance or guarantees or private loans.”<sup>25</sup> These expenditures can include “exclusions from income, exemptions, deductions, credits against tax, preferential rates of tax and deferrals of tax.”<sup>26</sup> One tax expenditure found in I.R.C. § 213, allows deductions for unreimbursed medical expenses taxpayers accrue during a taxable year, which includes any expense spent on the prevention of a disease.<sup>27</sup> Given the aforementioned health issues that have been linked to PFAS exposure, it would be reasonable to consider expenses that a taxpayer accrues limiting their exposure to the chemicals to be amounts spent on the prevention of future medical conditions. However, longstanding precedent shows that these expenses are likely accrued for the improvement of “general health,” which are non-deductible expenses.<sup>28</sup>

Since tax expenditures are used by federal policymakers as “alternatives to other policy instruments . . . [like government] spending,” it could make sense to allow deductions for taxpayers that have unreimbursed medical expenses as a

---

[https://19january2021snapshot.epa.gov/pfas/treating-pfas-drinking-water\\_.html](https://19january2021snapshot.epa.gov/pfas/treating-pfas-drinking-water_.html) (last visited Jan. 13, 2023); *10 Things You Can Do About Toxic PFAS Chemicals*, CLEAN WATER ACTION, <https://www.cleanwateraction.org/features/10-things-you-can-do-about-toxic-pfas-chemicals> (last visited Jan. 13, 2023); George Citroner, *How to Avoid 'Forever Chemicals' in Your Dinner (and Microwave Popcorn)*, HEALTHLINE (Oct. 10, 2019), <https://www.healthline.com/health-news/how-to-avoid-the-forever-chemicals-in-your-dinner-and-popcorn#First-study-to-find-food-packaging-is-source-of-exposure>.

22. See sources cited *supra* note 21 (detailing the various methods used to avoid exposure to toxic substances).

23. See Keehn, *supra* note 21; *Treating PFAS In Drinking Water*, *supra* note 21.

24. I.R.C. § 213(a) (2018); STEPHEN B. COHEN, FEDERAL INCOME TAX: A CONCEPTUAL APPROACH 212 (Regina T. Jefferson ed., draft 2d ed. 2020).

25. COHEN, *supra* note 24, at 212 (quoting STANLEY S. SURREY, PATHWAYS TO TAX REFORM 6–7 (1973)).

26. *Id.*

27. I.R.C. § 213(a), (d)(1)(A) (2018).

28. 26 C.F.R. § 1.213-1(e)(1)(ii) (2023); I.R.C. § 213(d)(1)(A); *Jacobs v. Comm’r*, 62 T.C. 813, 819 (1974); Note, *Deducting the Cost of Smoking Cessation Programs Under Internal Revenue Code Section 213*, 81 MICH. L. REV. 237, 237 (1982) [hereinafter *Deducting Smoking Cessation*].



result of avoiding exposure to disease-causing substances.<sup>29</sup> While unreimbursed expenses related to the avoidance and abatement of disease causing substances, like PFAS, are likely not deductible due to the development and application of I.R.C. § 213, federal action would likely be needed to allow tax payers to confidently utilize the tax expenditure to protect their health.

Section one of this article explores the development and implementation of I.R.C. § 213 by looking at the language of the statute, regulations, and application of the statute through case law and recent Internal Revenue Service announcements. Section two applies the interpretation and application of I.R.C. § 213 to efforts individuals take to limit their exposure to PFAS. This section concludes by noting that expenses accrued in the mitigation of PFAS are likely only deductible in limited circumstances despite the linkage between exposure to PFAS and future medical conditions. Section three makes recommendations that the Internal Revenue Service, the judiciary, and Congress could take to clarify the application of I.R.C. § 213 as it relates to the avoidance of disease-causing substances. If implemented, these recommendations could be instrumental for PFAS avoidance and for the abatement and mitigation of other disease-causing chemicals as research identifies new threats to human health.

## I. PRIOR LAW

### A. *The Income Tax, Income Deductions, and Tax Credits*

Although the United States had collected income taxes prior to 1913, the ratification of the Sixteenth Amendment gave the federal government authority to collect income taxes.<sup>30</sup> The same year that the amendment was ratified, Congress passed legislation that outlined the form and function of the new federal income tax.<sup>31</sup> The newly implemented income tax sought to collect taxes on “the entire net income arising or accruing from all sources in the preceding calendar year.”<sup>32</sup> Today, there still exists an income tax, but the tax is on all taxable income that is defined as “gross income minus the deductions allowed . . .” under the code.<sup>33</sup>

---

29. *Tax Expenditures*, DEP’T OF TREASURY, <https://home.treasury.gov/policy-issues/tax-policy/tax-expenditures> (last visited Jan. 13, 2023) [hereinafter *Tax Expenditures*]; U.S. GOV’T ACCOUNTABILITY OFF., TAX EXPENDITURES: BACKGROUND AND EVALUATION CRITERIA AND QUESTIONS 1, 3 (2021), <https://www.gao.gov/assets/gao-13-167sp.pdf>.

30. Charles F. Dunbar, *The New Income Tax*, 9 Q. J. ECON. 26, 26 (1894); U.S. CONST. amend. XVI.

31. John Steele Gordon, *A Short History of the Income Tax*, WALL ST. J., Sept. 27, 2011, at A15, <https://www.wsj.com/articles/SB10001424052970204422404576594471646927038>.

32. J.S. SEIDMAN, SEIDMAN’S LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS – 1938-1861 983 (1938).

33. I.R.C. §§ 1, 63 (2018).

For individuals, a deduction “[r]educes gross income due to expenses [that they] incur” throughout the year.<sup>34</sup> Since a deduction lowers taxable income before the “marginal tax rate” is applied, “the benefit of a deduction depends on the [taxpayer’s] marginal rate.”<sup>35</sup> Due to this calculation, “deductions . . . generally provide larger tax savings to taxpayers facing higher marginal tax rates.”<sup>36</sup> Deductions operate quite differently than tax credits.<sup>37</sup> Rather than defining income, “[a] credit . . . directly reduces tax liability” after the taxable income has been multiplied “by the appropriate marginal tax rates.”<sup>38</sup> As Cohen explains, “the value of an ordinary credit does not depend on the taxpayer’s marginal tax rate, provided of course that the taxpayer has some positive tax liability.”<sup>39</sup>

### B. Introduction of Medical Care Tax Deduction

While there had been substantive changes to the tax code since its initial implementation, the Federal Revenue Act 1942 led to “many more taxpayers . . . fil[ing] returns and other income taxpayers . . . pay[ing] higher rates on larger amounts” in order to fund war preparation activities following the attack on Pearl Harbor.<sup>40</sup> While this expansion led to an increase in revenue, these measures, through the use of tax expenditures, provided assistance to individuals regarding certain personal expenses.<sup>41</sup> One example is that the legislation allowed for a deduction of medical expenses.<sup>42</sup> For the first time since the creation of the Federal income tax, taxpayers were allowed to deduct “expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent . . . “ from their personal income, so long as the total medical expense amount for the taxable year was “more than 5 percent of his net income.”<sup>43</sup> For the provision, medical care was defined as “amounts paid for the diagnosis, cure mitigation, treatment, or prevention of

---

34. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 29, at 3; COHEN, *supra* note 24, at 15.

35. COHEN, *supra* note 24, at 13, 15.

36. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 29, at 3.

37. COHEN, *supra* note 24, at 15.

38. *Id.* at 13, 15.

39. *Id.* at 15.

40. Arthur H. Kent, *The Revenue Act of 1942*, 43 COLUM. L. REV. 1, 1 (1943); Roy G. Blakey & Gladys C. Blakey, *The Federal Revenue Act of 1942*, 36 AM. POL. SCI. REV. 1069, 1071 (1942).

41. Blakey & Blakey, *supra* note 40, at 1069, 1071; *Tax Expenditures*, *supra* note 29.

42. Blakey & Blakey, *supra* note 40, at 1071.

43. Revenue Act of 1942, Pub. L. No. 753, § 127, 56 Stat. 798, 825–26 (1942); Blakey & Blakey, *supra* note 40, at 1071; Kelly Phillips Erb, *Deduct This: The History of the Medical Expenses Deduction*, FORBES (Jun. 20, 2011, 8:25 AM),

<https://www.forbes.com/sites/kellyphillipserb/2011/06/20/deduct-this-the-history-of-the-medical-expenses-deduction/?sh=8380643478c1> (“Even though the income tax had been around since the turn of the 20th century, no deduction was allowed for medical expenses until the United States Revenue Act of 1942 was signed into law by President Franklin Delano Roosevelt . . .”).

disease, or for the purpose of affecting any structure or function of the body.”<sup>44</sup> Additionally, the measure prohibited taxpayers from deducting “[p]ersonal, living, or family expenses . . .” unless they were “extraordinary medical expenses.”<sup>45</sup>

Today, taxpayers are still allowed to deduct “expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent . . .”<sup>46</sup> However, there have been minor changes to the definition of medical care.<sup>47</sup> Under the current tax law, medical care includes “the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.”<sup>48</sup> Since the passage of the provision, the total annual unreimbursed medical expense floor has fluctuated.<sup>49</sup> In recent years, the floor has risen to as high as 10 percent with the passage of the Affordable Care Act, to be lowered to 7.5 percent by the Tax Cut and Jobs Act.<sup>50</sup> Today, the total annual unreimbursed medical expense has to “exceed 7.5 percent of adjusted gross income.”<sup>51</sup> Additionally, the “extraordinary medical expenses” language does not remain.<sup>52</sup>

Unlike other government programs that offer assistance to individuals, tax expenditures, like this deduction, provide an additional benefit to taxpayers—“administrative simplicity. . .”<sup>53</sup> Under the code, “the beneficiary does not have to apply to a government office and wait for approval and payment; instead, he simply reduces his income tax . . . by including medical expenses in the taxpayers’ itemized deductions.”<sup>54</sup>

### C. I.R.C. § 213 Administrative Regulations

To help determine what types of medical expenses are deductible under the Federal Revenue Act, one can turn to the regulations issued by the Internal Revenue Service. The Internal Revenue Service issues regulations “to provide guidance for new legislation or to address issues that arise with respect to existing Internal Revenue Code sections . . . [These r]egulations interpret and

---

44. Revenue Act of 1942, Pub. L. No. 753, § 127, 56 Stat. 798, 825–26 (1942).

45. *Id.* at 826.

46. I.R.C. § 213(a) (2018).

47. Compare I.R.C. § 213(d)(1) (2018), with Revenue Act of 1942, Pub. L. No. 753, § 127, 56 Stat. 798, 825–26 (1942).

48. I.R.C. § 213(d)(1)(A) (2018).

49. Ashlea Ebeling, *Medical Expense Deduction Tax Relief Is Big Win For Seniors In Year-End Spending Package*, FORBES (Dec. 22, 2020, 11:28 AM), <https://www.forbes.com/sites/ashleaebeling/2020/12/22/medical-expense-deduction-tax-relief-is-big-win-for-seniors-in-year-end-spending-bill/?sh=49adda971b4d>.

50. *Id.*

51. Ebeling, *supra* note 49.

52. I.R.C. § 213 (2018); Revenue Act of 1942, Pub. L. No. 753, § 127, 56 Stat. 789, 825–26 (1942).

53. COHEN, *supra* note 24, at 212, 225.

54. COHEN, *supra* note 24, at 225.

give directions on complying with the law.”<sup>55</sup> With regard to medical expenses, the associated regulations state that deductions “will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness.”<sup>56</sup> While the current tax code allows deductions for medical care for the “prevention of disease,” this portion of the code is juxtaposed by the regulations that explicitly state an “expenditure which is merely beneficial to the general health of an individual . . . is not an expenditure for medical care.”<sup>57</sup> For example, the costs of a “weight reduction program,” which is recommended by a physician to improve “appearance, general health, and sense of well being,” is not deductible.<sup>58</sup> However, the costs of “participat[ing] in a weight reduction program primarily for the treatment and cure of hypertension, obesity and hearing problems that are directly related to . . . excessive weight” are deductible, because “such expenditure[s] are for the treatment of a specific illness and not merely to benefit the taxpayer’s general health.”<sup>59</sup> Additionally, while fact dependent, the cost of installing a swimming pool to prevent permanent paralysis caused by a degenerative spinal disorder is deductible.<sup>60</sup> From this logic, expenses on toothpaste, daily-multivitamins, and physical fitness items are generally considered to be accrued for the improvement of general health and not deductible.

In addition to providing clarification on the meaning of medical care, the regulations also provide guidance on the treatment of capital expenditures as they relate to medical care.<sup>61</sup> According to I.R.C. § 263, a capital expenditure is defined as any “amount paid out for new buildings . . . permanent improvements or betterments made to increase the value of any property.”<sup>62</sup> The regulations state that while “capital expenditures are generally not deductible for Federal income tax purposes,” they may be deductible in situations that “qualify as a medical expense.”<sup>63</sup> To determine if a capital expense is deductible, the Internal Revenue Service looks to the “primary purpose” of the expenditure.<sup>64</sup> If “a capital expenditure . . . is related only to the sick person and is not related to permanent improvement or betterment of property, [and] if it otherwise qualifies

---

55. *Understanding IRS Guidance – A Brief Primer*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer> (May 31, 2022) [hereinafter *Understanding IRS Guidance*].

56. 26 C.F.R. § 1.213-1(e)(1)(ii) (2023).

57. I.R.C. § 213 (2018)(d)(1)(A); 26 C.F.R. § 1.213-1(e)(1)(ii) (2023).

58. COHEN, *supra* note 24, at 238–39 (citing Rev. Rul. 79-151, 1979-1 C.B. 116).

59. COHEN, *supra* note 24, at 239–40 (citing I.R.S. Priv. Ltr. Rul. 8004111 (Oct. 31, 1979)).

60. COHEN, *supra* note 24, at 234–38 (citing *Ferris v. Comm’r*, 582 F.2d 1112 (7th Cir. 1978); *see also Cherry v. Comm’r*, 46 T.C.M. (CCH) 470 (1983); *see generally* Rev. Proc. 2023-3, 2023-1 I.R.B. 144.

61. 26 C.F.R. § 1.213-1(e)(1)(iii) (2023).

62. I.R.C. § 263(a)(1) (2018).

63. 26 C.F.R. § 1.213-1(e)(1)(iii) (2023).

64. *Id.*

as an expenditure for medical care, [it] shall be deductible.”<sup>65</sup> The regulations state:

[A] capital expenditure for permanent improvement or betterment of property which would not ordinarily be for the purpose of medical care . . . may, nevertheless, qualify as a medical expense to the extent that the expenditure exceeds the increase in the value of the related property, if the particular expenditure is related directly to medical care.<sup>66</sup>

For example, the regulations identify that this could occur if a doctor recommends the installation of an elevator to assist with the climbing of stairs in light of a taxpayer’s wife’s diagnosed health condition.<sup>67</sup> Related to the abatement of disease-causing substances, like PFAS, capital expenditures could include the installation of a home water filtration system and removal and replacement of home fixtures, such as carpeting and pipelines, to prevent exposure to individuals that have been diagnosed with health conditions caused by PFAS.<sup>68</sup>

#### D. I.R.C. § 213 and the Bilder Standard

In addition to the guidance provided in the statute and regulations, case law provides illustrative details about the bounds of the definition for medical care and insights into the deductibility of expenses accrued for the abatement of disease-causing substances.<sup>69</sup> For example, in *Commissioner v. Bilder*, the United States Supreme Court determined that the amounts spent on “rent . . . by a taxpayer for an apartment in Florida, where he was ordered by his physician, as part of a regimen of medical treatment, to spend the winter months” were not deductible.<sup>70</sup>

Writing the majority opinion for the court, the Honorable Justice Harlan quotes legislative history that discussed the weight of a physician’s recommendation in determining if an expense is deductible.<sup>71</sup> The House and Senate Committee reports states, “if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments . . . and the travel is prescribed for reasons other than the general improvement of a patient’s health,

---

65. *Id.*

66. *Id.*

67. *Id.* (explaining that “[i]f the cost of installing the elevator is \$1,000 and the increase in the value of the residence is determined to be only \$700, the difference of \$300, which is the amount in excess of the value enhancement, is deductible as a medical expense. If, however, by reason of this expenditure, it is determined that the value of the residence has not been increased, the entire cost of installing the elevator would qualify as a medical expense.”).

68. See *infra* Section II: Analysis.

69. *Deducting Smoking Cessation*, *supra* note 28, at 237.

70. 369 U.S. 499, 499–505 (1962).

71. *Id.* at 502–03.

the cost of the transportation to Florida would be deductible . . . .”<sup>72</sup> This is contrasted with an example where “a doctor prescribed an appendectomy and the taxpayer chose to go to Florida for the operation,” and none of the expenses would be deductible.<sup>73</sup> Therefore, relying on legislative history, the *Bilder* court applied a test to determine the deductibility of medical expenses, a test that can only be satisfied when a taxpayer is executing their physician’s orders for reasons other than the improvement of general health.<sup>74</sup>

*E. I.R.C. § 213 as Applied to the Addition of Fluoride*

Following the decision in *Bilder*, the Internal Revenue Service issued *Revenue Ruling 64-267*.<sup>75</sup> This ruling addresses the deductibility of the installation and rents of a device that “add[s] fluoride at a controlled rate into the individual home water supply” for the prevention of future tooth decay.<sup>76</sup> Generally, in a Revenue Ruling, the Internal Revenue Service provides an official decision by applying all applicable tax law and regulations to a specific set of facts and publishes the decision so that individuals can better understand the application of the tax code to better prepare their tax returns.<sup>77</sup> The *Bilder* standard may have influenced the Internal Revenue Service, because they focused on the fact that the “the installation was undertaken on the advice of a dentist” and concluded that “the primary and only purpose of the installation and use of the device . . . falls within the definition of medical care [, so] the expenses incurred for the installation . . . and monthly rental charges thereon are deductible.”<sup>78</sup>

As can be seen by this Revenue Ruling applying the *Bilder* standard, an individual taxpayer may have a multitude of options to prevent future medical conditions so long as the taxpayer is pursuing the preventative care upon the advice of a medical professional and the activity is recommended for reasons other than the general improvement of health.<sup>79</sup> While the *Bilder* test remains good law, it has been honed by subsequent judicial holdings, which have led to a more restrictive interpretation of deductible preventative care expenses.<sup>80</sup>

---

72. *Id.* at 502.

73. *Id.*

74. *Id.*

75. Rev. Rul. 64-267, 1964-2 C.B. 69 at 1; *Deducting Smoking Cessation*, *supra* note 28, at 256.

76. Rev. Rul. 64-267, 1964-2 C.B. 69 at 1.

77. *Understanding IRS Guidance*, *supra* note 55 (“A revenue ruling is an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties and regulations. It is the conclusion of the IRS on how the law is applied to a specific set of facts. Revenue rulings are published in the Internal Revenue Bulletin for the information of and guidance to taxpayers, IRS personnel and tax professionals. For example, a revenue ruling may hold that taxpayers can deduct certain automobile expenses.”).

78. Rev. Rul. 64-267, 1964-2 C.B. 69 at 2.

79. *Bilder*, 369 U.S. at 502.

80. *Deducting Smoking Cessation*, *supra* note 28, at 237.

*F. I.R.C. § 213 and the Implementation of the Two-Part Jacobs Test*

In *Jacobs v. Commissioner*, the United States Tax Court provided further guidance on the determination of deductible expenses.<sup>81</sup> The case dealt with a situation where a taxpayer sought to deduct expenses associated with obtaining a divorce because “his marriage made him mentally ill, to the point where he was suicidal and that his psychiatrist told him that in order to be treatable, he had to obtain a divorce.”<sup>82</sup> In addition to this analysis, the Tax Court in *Jacobs* identifies a two-part test to determine deductibility.<sup>83</sup> The first prong of the test “is to show the present existence or imminent probability of a disease, defect, or illness—mental or physical,” and the second prong is that “the payment for which a deduction is claimed must be for goods or services directly or proximately related to the diagnosis, cure, mitigation, treatment, or prevention of the disease or illness.”<sup>84</sup>

As in *Bilder*, the court analyzed the argument that the expenses were acquired by the taxpayer upon the advice of the psychiatrist, and determined that the advice of health professional is “just another factor” for the court and the Internal Revenue Service to examine when making a determination that the expenses accrued meet the second prong of the test.<sup>85</sup> Therefore, this case weakens the influence of the *Bilder* standard and instead offers a new, distinct test to determine the deductibility of a medical expense.<sup>86</sup> In addition to this finding, the court places significance on whether the expense “would have been made even if there had been no illness” when determining if an expense meets the second prong.<sup>87</sup> Satisfying this test requires taxpayers to show that the cost of the actions are for addressing the underlying medical concern, and that the costs would not have been accrued by the taxpayer but-for the underlying medical concern.<sup>88</sup> Ultimately, the court determined that the expenses in *Jacobs* could not be deducted.<sup>89</sup> The court explained that when taxpayers would have accrued the expense without knowledge of an underlying medical condition the expense would not be deductible.<sup>90</sup>

---

81. *Id.*; *Jacobs*, 62 T.C at 817.

82. *Jacobs*, 62 T.C at 817.

83. *Deducting Smoking Cessation*, *supra* note 28, at 237; *Jacobs*, 62 T.C at 818–19.

84. *Jacobs*, 62 T.C. at 819; *see generally* *Deducting Smoking Cessation*, *supra* note 28, at 237 (adding further discussion on the development and use of the two-part test).

85. *Jacobs*, 62 T.C. at 819.

86. *Id.* at 818–19.

87. *Id.* at 819.

88. *Id.*

89. *Id.* at 820.

90. *Id.* (“While we are convinced that petitioner’s condition worsened and that, because of his marriage, he could not be successfully treated psychiatrically, we are also satisfied that he would have made the expenditures here in issue even if he had not been ill. The marriage had not worked from the beginning. Petitioner detailed for us how his wife began to attack and abuse him almost

*G. Application of I.R.C. § 213 to Lead Exposure*

The influence of these two decisions is significant in the Internal Revenue Service Revenue Ruling 79-66, where the Internal Revenue Service discusses the deductibility of expenses associated with lead, a disease-causing substance.<sup>91</sup> Here, the question before the Internal Revenue Service was whether “amounts paid . . . for the removal or elimination of lead-based paint from the surfaces of the taxpayer’s personal residence [are] deductible . . .” in a situation where a child had been diagnosed with lead poisoning.<sup>92</sup> Prior to pursuing any abatement action, the taxpayer received advice from the child’s physician and the “local health authorities required [] that the lead-based paint be removed from any painted surfaces in the house that were reachable by the child . . . or any painted surfaces that were in poor repair. . . .”<sup>93</sup>

During the legal analysis, the Internal Revenue Service makes note of Congressional hearings on lead poisoning, and concludes that “lead poisoning, its mitigation, its cure, and its prevention have been the subject of national concern,” especially for toddlers where “there is a particularly acute hazard when the child has, or has had, lead poisoning or undue lead absorption because of the chronic, recurring nature of the disease when the child is reintroduced into the hazardous environment.”<sup>94</sup> Using the information gleaned from the Congressional hearings and the facts of the matter at hand, the Internal Revenue Service tailors the eligible deductible medical expenses to “amounts paid for the scraping of the hazardous woodwork and wood surfaces of the residence that were readily accessible or reachable by the child or in poor repair. . . .”<sup>95</sup> Additionally, the Revenue Ruling concludes that improvements to the property that are within the reach of the toddler are deductible as capital expenditures, because the improvements are “related directly to medical care” as described previously in the sub-section titled “I.R.C. § 213 Administrative Regulations.”<sup>96</sup>

However, not all expenses acquired during the abatement of lead are deductible per the Revenue Ruling.<sup>97</sup> Rather, the Internal Revenue Service

---

immediately after the wedding. Even if petitioner had been emotionally sound, we believe he would have gotten a divorce, if not when he did, then shortly thereafter. Moreover, there is absolutely no evidence that petitioner’s wife would not have at some point initiated and procured a divorce. In short, we cannot say that petitioner would not have in any event incurred the expenditures in question.”).

91. Rev. Rul. 79-66, 1979-1 C.B. 114 at 1; *Deducting Smoking Cessation*, *supra* note 28, at 254.

92. Rev. Rul. 79-66, 1979-1 C.B. 114 at 1.

93. *Id.* at 1.

94. *Id.* at 2.

95. *Id.* at 3.

96. *Id.* at 3; 26 C.F.R. § 1.213-1 (2023) (“[A] capital expenditure for permanent improvement or betterment of property which would not ordinarily be for the purpose of medical care . . . may, nevertheless, qualify as a medical expense . . . if the particular expenditure is related directly to medical care.”).

97. See Rev. Rul. 79-66, 1979-1 C.B. 114, 1.



focuses on the protection of the child affected by the lead poisoning, only allowing the abatement expenses to be deducted when the abatement is beneficial to the affected child.<sup>98</sup> The Revenue Ruling explicitly prohibits the taxpayer from deducting any expenses acquired through “painting the scraped surfaces and the new wall-board surfaces.”<sup>99</sup> Further, any lead abatement that occurred beyond the reach of the toddler, or did not meet the guidance as a surface in “poor repair,” was not deductible.<sup>100</sup>

Although this Revenue Ruling was issued in 1979, its narrow holding is still applicable today.<sup>101</sup> For example, the Internal Revenue Service includes the following guidance in a 2021 publication for the preparation of 2020 tax returns:

You can include in medical expenses the cost of removing lead-based paints from surfaces in your home to prevent a child who has or had lead poisoning from eating the paint. These surfaces must be in poor repair (peeling or cracking) or within the child’s reach. The cost of repainting the scraped area isn’t a medical expense. If, instead of removing the paint, you cover the area with wallboard or paneling, treat these items as capital expenses . . . . Don’t include the cost of painting the wallboard as a medical expense.<sup>102</sup>

Notice allowable deductible expenses are primarily those accrued by a taxpayer to prevent a child from continuing the consumption of the hazardous lead rather than expenses accrued to protect and prevent the general family unit from suffering from lead poisoning in the future.<sup>103</sup>

#### H. I.R.C. § 213 in Cases of Chemical Avoidance

In a separate line of cases, the Tax Court looks at the deductibility of food and beverages costs in light of medical concerns.<sup>104</sup> One such case is *Randolph v. Commissioner*, where the taxpayer claiming the deduction discovered, through the treatment of a medical professional, that she had medical “problems [that] could be traced to an extreme sensitivity to environmental contaminants including petrochemicals, herbicides, insecticides, and phenolic compounds.”<sup>105</sup>

---

98. *Id.* at 3.

99. *Id.*

100. *Id.* at 1. “In addition, any portion of the cost of scraping or otherwise refinishing surfaces not readily accessible or reachable by the child or not in poor repair, is a nondeductible personal expense under section 262.” *Id.* at 3.

101. INTERNAL REVENUE SERVICE, DEP’T OF THE TREASURY, PUB. NO. 502, MEDICAL AND DENTAL EXPENSES (2021), <https://www.irs.gov/pub/irs-pdf/p502.pdf> [hereinafter MEDICAL AND DENTAL EXPENSES 2020 RETURNS].

102. *Id.*

103. *Id.*

104. *Randolph v. Comm’r*, 67 T.C. 481, 485 (1976); *Flemming v. Comm’r*, 41 T.C.M. (CCH) 676, 5 (1980); *Deducting Smoking Cessation*, *supra* note 28, at 254–55.

105. *Randolph*, 67 T.C. at 483; *see generally Deducting Smoking Cessation*, *supra* note 28, at 254–55 (discussing further the application of the two-part test in *Randolph*).

Exposure to such chemicals triggered an allergic reaction that caused the taxpayer to suffer an array of severe health issues.<sup>106</sup> Therefore, in light of the taxpayer's diagnosis, the physician required her to "limit her diet to uncontaminated food."<sup>107</sup> Such food had to be purchased from "health food stores," which was "approximately twice as expensive as" other "nonorganically grown and prepared foods."<sup>108</sup> Because the special food was approximately twice as expensive as that of ordinary food, the taxpayer sought to deduct around half of what she had spent.<sup>109</sup> The Internal Revenue Service initially disallowed the deduction as a personal expense.<sup>110</sup> However, citing to precedent set by *Cohn v. Commissioner*, the Tax Court concluded that "the additional expenses incurred in purchasing the Randolphs' organic food . . . [are] a deductible medical expense."<sup>111</sup>

The Tax Court dealt with a similar question in *Flemming v. Commissioner*, where the taxpayer was the spouse of an individual who was told they had cancer by a "Doctor of Dental Surgery and a Ph.D., not an M.D." who "gave [the patient] a booklet containing diet suggestions."<sup>112</sup> After consulting the booklet, the "petitioner purchased . . . health food products, B vitamins and mineral supplements, yogurt, and bottled water" for the spouse suffering from cancer.<sup>113</sup> The Internal Revenue Service did not allow the deduction upon their review of the submitted tax return, nor did the Tax Court.<sup>114</sup>

In arriving at their determination, the Tax Court pointed to two primary reasons for denying the deduction.<sup>115</sup> The first being that the petitioner "seeks to deduct the full amount of the health foods and other substances rather than simply the excess costs of these items over more plain, everyday fare."<sup>116</sup> The other was because "[t]here is absolutely no evidence as to the efficacy of such treatment . . . [because] the booklet was not in evidence, we are unable to

---

106. *Randolph*, 67 T.C. at 482–83.

107. *Id.* at 483.

108. *Id.* at 484.

109. *Id.*

110. *Id.*

111. *Id.* at 487–88 (citing *Cohn v. Comm'r* 38 T.C. 387 (1962), where a "taxpayer suffered from high blood pressure and heart failure. Because of his heart condition, taxpayer was required to maintain a salt-free diet. In order to adhere to his diet, taxpayer ate at restaurants that prepared salt-free meals for him. The restaurants charged additional amounts for preparing meals without salt. In allowing taxpayer's deduction of this additional charge . . . Here the item sought to be deducted is not the cost of the food which was taken to satisfy [the taxpayer's] ordinary nutritional needs but rather the additional charge for special preparation of salt-free food. This charge is in no sense a personal living or family expense – it is a sum paid for the mitigation, cure, or prevention of a disease. Therefore, the petitioners are entitled to deduct as a medical expense the additional charges made by restaurants to prepare salt-free meals for [the taxpayer].").

112. *Flemming v. Comm'r*, 41 T.C.M. (CCH) 676, 2 (1980).

113. *Id.* at 2–3.

114. *Id.* at 3, 9.

115. *Id.* at 7.

116. *Id.* at 7.

determine whether the foods actually purchased were those recommended by the booklet as a cure for ‘cancer.’”<sup>117</sup> Rather, the Tax Court determined the petitioner purchased the items with the intent of “maintain[ing] . . . [the individual’s] general health,” which is not deductible.<sup>118</sup>

### *I. I.R.C. § 213 as Applied to COVID – 19 Prevention*

With over 6.7 million deaths throughout the world due to COVID-19, it would be remiss not to discuss how the Internal Revenue Service treats costs accrued by taxpayers in attempts to protect themselves from the deadly virus.<sup>119</sup> Needless to say, the pandemic caused an increase in consumer demand for personal protective equipment to prevent the spread of the virus.<sup>120</sup> This response by the Internal Revenue Service gives insights into how it may respond to future public health emergencies.

In light of the amounts that people spent on personal protective equipment, the Internal Revenue Service issued *Announcement 2021-7* in March 2021, which provided guidance on the handling of personal protective equipment with regard to I.R.C. § 213.<sup>121</sup>

According to the Internal Revenue Service, “[a]n announcement is a public pronouncement that has only immediate or short-term value . . . [that is] used to summarize the law or regulations without making any substantive interpretation . . . .”<sup>122</sup> Announcements cover a wide variety of issues from describing changes to the Internal Revenue Service’s administrative processes to providing guidance to assist hurricane victims by allowing “easier access to victims’ funds held in workplace retirement plans and in IRAs.”<sup>123</sup>

---

117. *Id.* at 8.

118. *Id.* at 9; I.R.C. § 213 (2018); 26 C.F.R. § 1.213-1 (2023).

119. *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/> (last visited Jan. 12, 2023).

120. International Finance Corporation [IFC], *Covid-19 PPE Demand and Supply Perspectives*, at 56–57 (Dec. 2020), [https://www.ifc.org/wps/wcm/connect/1d32e536-76cc-4023-9430-1333d6b92cc6/210402\\_FCDO\\_GlobalPPE\\_Final+report\\_v14updated\\_gja.pdf?MOD=AJPERES&CVID=nyiUnTU](https://www.ifc.org/wps/wcm/connect/1d32e536-76cc-4023-9430-1333d6b92cc6/210402_FCDO_GlobalPPE_Final+report_v14updated_gja.pdf?MOD=AJPERES&CVID=nyiUnTU); *Coronavirus Disease 2019 (COVID-19): Symptoms & Causes*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963>.

121. Press Release, Internal Revenue Serv., *Face Masks and Other Personal Protective Equipment to Prevent the Spread of COVID-19 are Tax Deductible* (Mar. 26, 2021), <https://www.irs.gov/newsroom/face-masks-and-other-personal-protective-equipment-to-prevent-the-spread-of-covid-19-are-tax-deductible> [hereinafter *IRS PPE News Release*].

122. *Understanding IRS Guidance*, note 55 (“An announcement is a public pronouncement that has only immediate or short-term value. For example, announcements can be used to summarize the law or regulations without making any substantive interpretation; to state what regulations will say when they are certain to be published in the immediate future; or to notify taxpayers of the existence of an approaching deadline.”).

123. *Announcements*, INTERNAL REVENUE SERV., <https://www.irs.gov/retirement-plans/announcements> (May 17, 2022).

Writing for the “Office of Associate Chief Counsel (Income Tax and Accounting),” of the Internal Revenue Service, Ms. Amy S. Wei, “notifie[d] taxpayers that amounts paid for personal protective equipment, such as masks, hand sanitizer and sanitizing wipes, for the primary purpose of preventing the spread of the Coronavirus Disease 2019 (COVID-19 PPE) are treated as amounts paid for medical care under § 213(d) of the Internal Revenue Code.”<sup>124</sup>

Although, the text of I.R.C. § 213 does allow for expenses to be deducted for the prevention of disease, as can be seen from the aforementioned cases and revenue rulings, preventative activities have more recently only been deductible when they meet the two-part *Jacobs* test.<sup>125</sup> While *Announcement 2021–7* says that the expenses are deductible for “the primary purpose of preventing the spread of the Coronavirus Disease,” which likely satisfies the second prong of the two-part deductibility test in *Jacobs*, it does not directly reference imminence, which is the first prong of the test.<sup>126</sup> Without additional information, taxpayers are left to deduce that a global pandemic is sufficient to satisfy the imminence requirement.

Turning to the discussion in *Bilder* regarding physician advice, the notice does not contain any reference to individuals receiving guidance from their physician, nor does it cite to any guidance from public health professionals.<sup>127</sup> While it is just one factor in determining if an expense is deductible, taxpayers are left to wonder if individual guidance from a medical professional is necessary when the problem is resulting in widespread harm to individuals throughout the world.<sup>128</sup> Perhaps, the guidance spread through Federal and State health organizations acts as a stand in for the medical advice necessary to satisfy the *Bilder* standard.<sup>129</sup> While these theories are not supported by any guidance, it is

---

124. I.R.S. Announcement 2021–7, 2021-15 I.R.B. 1061 [hereinafter IRS PPE Announcement]; IRS PPE News Release, *supra* note 121.

125. I.R.C. § 213 (2018); *Jacobs* 62 T.C at 819; *Deducting Smoking Cessation*, *supra* note 28, at 237.

126. IRS PPE Announcement, *supra* note 124; IRS PPE News Release, *supra* note 121; *Jacobs* 62 T.C. at 819; *Deducting Smoking Cessation*, *supra* note 28, at 237.

127. *Comm’r v. Bilder*, 369 U.S. 499, 502 (1962); IRS PPE Announcement, *supra* note 124; IRS PPE News Release, *supra* note 121.

128. *Jacobs*, 62 T.C at 819; WORLD HEALTH ORG., *supra* note 119.

129. Jacqueline Howard, *Should You Wear a Mask? US Health Officials Re-examine Guidance Amid Coronavirus Crisis*, CNN (Mar. 31, 2020, 6:30 PM),

<https://www.cnn.com/2020/03/31/health/coronavirus-masks-experts-debate/index.html>;

Quint Forgey, *Fauci: Mask-Wearing Recommendation Under “Very Serious Consideration”*, POLITICO (Mar. 31, 2020, 2:34 PM),

<https://www.politico.com/news/2020/03/31/fauci-mask-recommendation-coronavirus-157476>;

Colin Dwyer & Allison Aubrey, *CDC Now Recommends Americans Consider Wearing Cloth Face Coverings in Public*, NPR (Apr. 3, 2020, 5:49 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/03/826219824/president-trump-says-cdc-now-recommends-americans-wear-cloth-masks-in-public>;

*How to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (Jan. 26, 2023); *Bilder*, 369 U.S. at 502.

likely that decisionmakers considered a multitude of factors and perspectives when crafting the policy in response to the COVID-19 public health crisis.

Nevertheless, it is important to note that COVID-19 presented the world with extenuating circumstances. However, *Announcement 2021–7* presents a very broad, less restrictive application of I.R.C. § 213 than what has been rendered in the aforementioned cases and revenue rulings. Looking forward, *Announcement 2021–7* may influence the Internal Revenue Service’s response to other public health crises.

## II. ANALYSIS

As noted in the introduction of this article, PFAS exposure has been linked to several detrimental health conditions, but there are a couple of ways to limit exposure to the substances.<sup>130</sup> An individual can limit their exposure to PFAS in their everyday life by avoiding the use of nonstick cookware, dental floss with PFAS, and “stain resistant coatings.”<sup>131</sup> Especially for individuals that have children spending a significant amount of time crawling and playing on the ground, the replacement of carpeting manufactured with PFAS is a plausible self-help approach.<sup>132</sup> Depending upon the use of the aforementioned items and presence of PFAS, the cost of ridding them from the home could be significant.

Regarding the abatement of PFAS in water, there are specialized water filtration systems that can remove PFAS.<sup>133</sup> The New Hampshire Department of Environmental Services (NHDES) discovered that the only

treatment systems proven to be effective at removing PFAS to non-detectable Levels . . . have consisted of the following components connected in a series: [f]ive-micron particulate filter for pre-filtering; [t]wo GAC treatment vessels . . . in series with a test port installed after the lead treatment unit . . . ; [f]ive-micron particulate filter for post-filtering; [t]otalizer meter; [u]ltra-violet treatment system and associated controllers if untreated water from the well exhibits bacteria contamination; and [c]onnection to the household plumbing.<sup>134</sup>

As NHDES notes, “the water treatment system . . . is not generally sold as a single off-the-shelf product[, but r]ather, professionals specializing in water

---

130. TOXICOLOGICAL PROFILE FOR PERFLUOROALKYLS, *supra* note 6, at 6; BEARDEN ET AL., *supra* note 16, at 6.

131. CLEAN WATER ACTION, *supra* note 21; *Citroner*, *supra* note 21.

132. *Study: PFAS In Carpets a Major Exposure Source for Children: Schools, Families Should Replace Carpets as Industry Moves Away from PFAS*, IND. UNIV. BLOOMINGTON (Apr. 28, 2020), <https://newsarchive.oneill.indiana.edu/archive/2020/04282020-venier.html>.

133. N.H. DEP’T OF ENV’T SERV’S, DWGB-3-25, PER- AND POLYFLUROALKYL SUBSTANCES (PFAS) IN NEW HAMPSHIRE WELL WATER (2020), <https://www.dhhs.nh.gov/sites/g/files/ehbemt341/files/documents/dwgb-3-25.pdf> [hereinafter NH PFAS INVESTIGATION].

134. *Id.*

treatment and plumbing of these systems specifically design, obtain the components for, and construct the water system.”<sup>135</sup> Even in their advice, NHDES recommends that individuals consider “the cost of testing the treatment system and maintaining and replacing [its] components. . . .”<sup>136</sup>

It is clear that either option to mitigate the presence of PFAS in the home will be costly to the individual, even after considering that some of the avoidance costs could be capital expenditures in situations where individuals make improvements to their homes by replacing PFAS coated carpeting or installing the described water filtration system.<sup>137</sup> As discussed in preceding and succeeding sections, these costs may or may not be deductible depending upon the facts of each circumstance.<sup>138</sup> In the guidance on the deductibility of lead abatement expenses, capital expenditures are deductible when the individual has experienced lead paint poisoning and the activity directly abates lead, but are not when the individual has not experienced lead paint poisoning or the activity extends beyond direct abatement.<sup>139</sup> Applying this logic to PFAS, an individual with a health condition linked to PFAS may be able to deduct the expense of removing flooring that contains the substance, but an individual without a PFAS related health condition would likely not be able to deduct the expense of installing new flooring.

Given the law and regulations surrounding the issue, the deductibility of expenses accrued to avoid PFAS exposure will be fact specific. Therefore, this analysis has been broken up into two distinct sections.<sup>140</sup> The first section will analyze a hypothetical scenario where an individual has been exposed to PFAS, is exhibiting related health conditions, and is seeking to deduct expenses related to PFAS avoidance. The second section will analyze a scenario where an individual is seeking to avoid PFAS due to concerns for preventative purposes.

*A. Scenario I – Individual is Currently Presenting PFAS Related Medical Conditions*

When an individual has been exposed to PFAS and presents diagnosed health conditions that are linked to exposure, the expenses accrued are likely deductible. Assuming that a physician would advise an individual to avoid exposure to PFAS since exposure caused the diagnosed medical conditions, the individual seeking the deduction would likely be able to satisfy both the *Bilder*

---

135. *Id.*

136. *Id.*

137. See 26 C.F.R. § 1.213-1 (2023); I.R.C. § 263 (2018).

138. 26 C.F.R. § 1.213-1 (2023); see *infra* Section II: Analysis: Subsection A – Subsection B.

139. See MEDICAL AND DENTAL EXPENSES 2020 RETURNS, *supra* note 101 at 6.

140. While there are countless scenarios, the following were chosen to highlight the distinctive application of the tax code to scenarios where the expenses were accrued to address an existing medical condition as opposed to preventative purposes.

standard and the two-part *Jacobs* test described above.<sup>141</sup>

Further, this scenario resembles that presented in Internal Revenue Service *Revenue Ruling 79-66*, where an individual was able to deduct expenses to address the presence of lead paint in a home to prevent repeat exposure.<sup>142</sup> Additionally, the precedent set in *Randolph*, would allow the taxpayer to deduct the excess costs associated with acquiring food and products that are free of PFAS should the items cost more than those that contain PFAS.<sup>143</sup> A taxpayer in this scenario would likely benefit from the deduction offered by I.R.C. § 213, as court opinions and revenue rulings make clear this is the type of scenario the provision is intended to address.

*B. Scenario II - Individual Seeks to Prevent Future PFAS Related Medical Conditions*

Alternatively, in a circumstance where an individual is merely seeking to limit exposure for the prevention of future medical issues, the expenses will likely be non-deductible. While the individual may satisfy the *Bilder* standard, they would be unable to satisfy the *Jacobs* test.

Under the *Bilder* standard, the individual would need to obtain an order from a physician deduct these expenses, assuming that they would be “prescribed for reasons other than the general improvement of a patient’s health.”<sup>144</sup>

Further, the actions taken by this taxpayer would be like those of *Revenue Ruling 64-267*, where the taxpayer took action to add fluoride to their water because the dentist informed them of its dental health benefits.<sup>145</sup> Unlike that situation, here the taxpayer would be removing a substance from their home to prevent future medical issues. However, the standards in these instances have been overshadowed by the more recent *Jacobs* test.

Under *Jacobs*, the individual would be unable to satisfy the two-prong test. As noted above, the first prong of the test requires the taxpayer “to show the present existence or imminent probability of a disease, defect, or illness—mental or physical.”<sup>146</sup> Since a taxpayer would be acting for the prevention of future disease, they would be unable to prove that the expenses accrued would be for the prevention of an imminent disease.<sup>147</sup> Additionally, the taxpayer would be unlikely to benefit from *Revenue Ruling 79-66* because they, or a member of their household, have not suffered diagnosed medical conditions related to PFAS.<sup>148</sup> Instead, the Internal Revenue Service would likely treat the situation

---

141. *Comm’r v. Bilder*, 369 U.S. 499, 502 (1962); *Jacobs v. Comm’r*, 62 T.C. 813, 819 (1974); *Deducting Smoking Cessation*, *supra* note 28, at 237.

142. Rev. Rul. 79-66, 1979-1 C.B. 114 at 1.

143. *Randolph v. Comm’r*, 67 T.C. 481, 487–88 (1976).

144. *Bilder*, 369 U.S. at 502.

145. Rev. Rul. 64-267, 1964-2 C.B. 69 at 1.

146. *Jacobs*, 62 T.C. at 818; *Deducting Smoking Cessation*, *supra* note 28, at 237.

147. TOXICOLOGICAL PROFILE FOR PERFLUOROALKYLS, *supra* note 6, at 6.

148. Rev. Rul. 79-66, 1979-1 C.B. 114 at 1.

much like they did in *Fleming* by concluding that the expenses accrued were for the taxpayer's general health and therefore non-deductible.<sup>149</sup>

While announcements only have short-term, limited applicability, the taxpayer may be able to point to Internal Revenue Service *Announcement 2021–7* as a persuasive authority by drawing comparisons between the overwhelming spread and detrimental effects of COVID-19 to the overwhelming spread and detrimental health effects of PFAS that have been described by state and federal health organizations.<sup>150</sup> While *Announcement 2021–7* was a policy decision crafted in response to the COVID-19 health crisis, the taxpayer could further highlight the fact that the announcement did not specify that the individual had to contract COVID-19, be more susceptible to its harmful health effects, or receive medical advice in order to deduct the costs of the personal protective equipment.<sup>151</sup> Ultimately, the Internal Revenue Service will likely distinguish the situation from that of COVID-19 due to the imminence of health issues associated with exposure to COVID-19 as opposed to PFAS in light of prior case law and regulations that emphasize imminence.<sup>152</sup>

### III. COMMENT AND PROPOSED SOLUTIONS

But should this determination be in question? After all, the deductions were once praised for the simplicity of allowing taxpayers to simply deduct unreimbursed expenses accrued while addressing health related issues.<sup>153</sup> If studies conducted by state and federal agencies have concluded that several harmful diseases are linked to PFAS exposure, policymakers may conclude that expenses accrued by avoiding the harmful substance should be deductible under a tax provision designed to allow taxpayers to deduct “amounts paid for the . . . prevention of disease . . . .”<sup>154</sup> To address this concern and to maintain administrative simplicity there are four proposed solutions that could, if pursued individually or concurrently, provide further guidance on the tax treatment of

---

149. *Flemming v. Comm’r*, 41 T.C.M. (CCH) 676 (1980).

150. *Understanding IRS Guidance*, *supra* note 55 (“An announcement is a public pronouncement that has only immediate or short-term value. For example, announcements can be used to summarize the law or regulations without making any substantive interpretation; to state what regulations will say when they are certain to be published in the immediate future; or to notify taxpayers of the existence of an approaching deadline.”); IRS PPE Announcement, *supra* note 124; IRS PPE News Release, *supra* note 121; TOXICOLOGICAL PROFILE FOR PERFLUOROALKYLS, *supra* note 6, at 6; NH PFAS INVESTIGATION, *supra* note 133, at 1.

151. IRS PPE Announcement, *supra* note 124; IRS PPE News Release, *supra* note 121.

152. *Jacobs v. Comm’r*, 62 T.C. 813, 818 (1974) (“The first hurdle which must be cleared to qualify a particular expense for deduction as a ‘medical care’ expense is to show the present existence or imminent probability of a disease, defect, or illness—mental or physical.”); *Deducting Smoking Cessation*, *supra* note 28, at 237.

153. COHEN, *supra* note 24, at 225.

154. Revenue Act of 1942, Pub. L. No. 753, § 127, 56 Stat. 798, 825–26.



the abatement of disease-causing substances.<sup>155</sup>

#### A. *Solution I – Administrative Rulemaking*

As described above, the Internal Revenue Service issues several “common forms of guidance,” which include regulations, revenue rulings, and announcements to help individuals navigate and better understand the application of the code.<sup>156</sup> Like the Internal Revenue Service did with dealing with personal protective equipment acquired in response to COVID-19, they could offer guidance so that taxpayers can plan and prepare their tax returns.

While an announcement, like *Announcement 2021–7*, may have been appropriate for the immediate tax year, due to its short-term applicability, the issuance of a regulation may be more appropriate in this scenario. This is because disease-causing substances, like PFAS, can have a very long half-life, so individuals will likely be dealing with disease-causing substances for lengthy periods of time.<sup>157</sup> The proposed regulation could state that the abatement, mitigation, and avoidance of disease-causing substances is within the definition of medical care.<sup>158</sup> A regulation crafted in this manner would allow individuals to address PFAS, and other disease-causing substances.

Limits on deductions could range from the capital expenditure limitations discussed above to only allowing taxpayers to deduct expenses when they are removing the disease-causing substances from areas that their family comes into contact with, similar to the limit in place for lead paint abatement.<sup>159</sup>

#### B. *Solution II – Judicial Two-Part Test Overhaul*

Even though the article *Deducting the Cost of Smoking Cessation Programs Under Internal Revenue Code Section 213* was published in 1982, the judicial test proposed by the article is still relevant.<sup>160</sup> The suggestion is as follows:

A further two-step test, similar to that employed in treatment situations . . . (1) The expenditure is necessary if the taxpayer hopes to avoid a specific disease; and (2) But for the likelihood of disease, there are no other significant reasons for the particular taxpayer to incur the expense.<sup>161</sup>

---

155. While there are other policy alternatives to address PFAS, including through tax policy, the following four were chosen to highlight potential solutions under I.R.C. § 213 (2018).

156. *Understanding IRS Guidance*, *supra* note 55, at 1–2.

157. *See Id.*

158. I.R.C. § 213 (2018); 26 C.F.R. § 1.213-1 (2023).

159. 26 C.F.R. § 1.213-1 (2023); MEDICAL AND DENTAL EXPENSES 2020 RETURNS, *supra* note 101, at 2.

160. *Deducting Smoking Cessation*, *supra* note 28, at 254.

161. *Id.*

This test does not contain an imminence requirement, which exists in the *Jacobs* test.<sup>162</sup> Therefore, taxpayers would only have to “demonstrate[] the threatened onset of a specific disease, and that the expenses incurred related directly and proximately to the prevention of that illness.”<sup>163</sup>

Like smoking, PFAS exposure is linked to several specific, diagnosable diseases, which could be prevented should an individual limit their exposure to the substances, and satisfy the first part of the test.<sup>164</sup> Further, the activities would satisfy the second part of the proposed test because without any medical risks, there would not be a reason to avoid PFAS exposure.<sup>165</sup> The elimination of the imminence requirement would allow those that accrued unreimbursed expenses related to the avoidance of disease-causing substances to deduct the expenses.

### C. Solution III – Congress Defining “Prevention of Disease”

While the current tax code defines medical care for the purposes of the tax provision as “the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,” Congressional action is needed to clarify the extent to which the tax code should assist in the “prevention of disease.”<sup>166</sup>

As seen in the prior law section of this paper, the Tax Court and the Internal Revenue Service have been conservative in allowing attempts to preempt detrimental health conditions.<sup>167</sup> Therefore, like the above administrative rulemaking suggestion, Congress could address the issue and make clear that the abatement, mitigation, and avoidance of disease-causing substances fall within the definition of prevention of disease.

After all, there has been increased congressional attention given to this matter due to the significant number of bills introduced into Congress.<sup>168</sup> In fact, the hearing record of the United States House of Representatives Committee on Oversight and Reform Subcommittee on Environment reflects the fact that “the EPA’s assistant administrator for the Office of Water, David Ross, agreed that PFAS contamination was, quote, ‘a national emergency.’”<sup>169</sup>

Since this is a national emergency and the contaminants cause such harm to the public, Congress could take action to give individual taxpayers the confidence to utilize the deductions.

---

162. *Deducting Smoking Cessation*, *supra* note 28, at 254–55; *Jacobs v. Comm’r*, 62 T.C. 813, 818 (1974).

163. *Deducting Smoking Cessation*, *supra* note 28, at 255 (discussing the reason for the elimination of the imminence requirement and rebuttals to concerns raised about its elimination).

164. *Id.* at 257.

165. *Id.*

166. I.R.C. § 213 (2018).

167. *See supra* Section I.

168. PFAS, *supra* note 17.

169. *PFAS Contamination Hearing*, *supra* note 1, at 2.

#### D. Solution IV – Alternative Tax Credit Policy

While I.R.C. § 213 offers individuals tax deductions, it might be a wise policy choice to implement a tax credit. Relying upon the earlier description of a tax credit, a deduction could mean more for individuals in a higher tax bracket than it would for those at a lower tax bracket, where as a credit is a dollar-for-dollar reduction of liability effecting taxpayers equally.<sup>170</sup> This is crucial since it has been stated that “communities of color and low-income communities are more likely to bear the economic and biological burden” of PFAS.<sup>171</sup>

Additionally, the concept of providing tax credits for the abatement of toxic materials for public health reasons has been noticed by some United States Senators and Representatives, which resulted in introduced “legislation [that] would create tax credits worth up to \$4,000 to cover half the cost of abating lead hazards in paint, pipes, or soil . . . to offset costs for removing lead from houses built before lead-based paint was banned for residential use in 1978”<sup>172</sup>

Unlike the deduction, a credit, like the one referenced above, would have a definite, maximum benefit which, depending upon the individual taxpayer’s circumstance, may stifle the amount an individual can receive in the pursuit of PFAS abatement, mitigation, and avoidance.<sup>173</sup> Additionally, the maximum benefit of a credit can be limited to an individual’s existing tax liability if it is nonrefundable, but the concern could be addressed by creating a refundable tax credit that would allow the individual tax payer to receive a refund if the amount of the credit is more than the taxes owed to the government.<sup>174</sup> Alternatively, I.R.C. § 213 has a floor that a taxpayer has to meet before they can deduct any expense, so depending upon how much the abatement, mitigation, or avoidance measures cost, the credit could mean more if the expenses accrued are below or

---

170. COHEN, *supra* note 24, at 15; *Briefing Book: What are Tax Credits and How Do They Differ From Tax Deductions?*, TAX POL’Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-are-tax-credits-and-how-do-they-differ-tax-deductions> (May 2020).

171. Genna Reed, *PFAS Contamination is an Equity Issue, and President Trump’s EPA Is Failing to Fix It*, UNION OF CONCERNED SCIENTISTS: THE EQUATION (Oct. 30, 2019, 8:49 AM) <https://blog.ucsusa.org/genna-reed/pfas-contamination-is-an-equity-issue-president-trumps-epa-is-failing-to-fix-it/>.

172. Press Release, United States Senator Sheldon Whitehouse, With Major infrastructure Legislation on the Horizon, Whitehouse, Schumer, Cohen, McKinley Introduce Bipartisan Tax Credit to Protect Children from Home Lead Hazards (Apr. 29, 2021) <https://www.whitehouse.senate.gov/news/release/with-major-infrastructure-legislation-on-the-horizon-whitehouse-schumer-cohen-and-mckinley-introduce-bipartisan-tax-credit-to-protect-children-from-home-lead-hazards>.

173. *Compare* I.R.C. § 213 (2018), with Press Release, United States Senator Sheldon Whitehouse, With Major infrastructure Legislation on the Horizon, Whitehouse, Schumer, Cohen, McKinley Introduce Bipartisan Tax Credit to Protect Children from Home Lead Hazards (Apr. 29, 2021) <https://www.whitehouse.senate.gov/news/release/with-major-infrastructure-legislation-on-the-horizon-whitehouse-schumer-cohen-and-mckinley-introduce-bipartisan-tax-credit-to-protect-children-from-home-lead-hazards>.

174. COHEN, *supra* note 24, at 14.

minimally above the floor set by the code.<sup>175</sup> Nevertheless, a similar piece of legislation directed at any chemical linked to a disease could give individuals encouragement to invest in avoidance and abatement efforts.

#### CONCLUSION

It is clear that there is a national public health emergency caused by the proliferation of PFAS.<sup>176</sup> The substances once prized by manufactures for their ability to reduce friction, today have been linked to an array of adverse health effects on humans.<sup>177</sup> While I.R.C. § 213 offers the promise of a tax deduction for taxpayers that accrue unreimbursed expenses in the pursuit of disease prevention, expenses related to the avoidance and abatement of disease causing substances, like PFAS, are likely not deductible due to the development and application of I.R.C. § 213. Therefore, as a public health matter, administrative, judicial, and congressional action can be taken to clarify that expenses accrued during the abatement, mitigation, and avoidance of disease-causing chemicals are deductible. This action would likely give taxpayers the confidence to rely on an administratively simple program and partake in the avoidance of disease-causing chemicals.<sup>178</sup>

---

175. I.R.C. § 213 (2018).

176. *PFAS Contamination Hearing*, *supra* note 1, at 2.

177. SCIENCE AND GUIDANCE FOR CLINICIANS, *supra* note 6, at 3; *PFAS Contamination Hearing*, *supra* note 1, at 2; TOXICOLOGICAL PROFILE FOR PERFLUOROALKYLS, *supra* note 6, at 6.

178. *See* COHEN, *supra* note 24, at 225.