OFFICE OF THE CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

March 24, 2011

Number: **2011-0035**
Release Date: 6/24/2011

CONEX-110426-11

UILC: 213.00-00

Dear :

I am responding to your inquiry to Commissioner Douglas H. Shulman dated February 25, 2011. You requested that we revise published guidance to taxpayers clarifying the tax treatment of special foods purchased to treat .

Taxpayers can deduct expenses paid for medical care of the taxpayer, spouse, or dependent, to the extent the expenses exceed 7.5 percent of adjusted gross income. Section 213(a) of the Internal Revenue Code. Medical care refers to amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting a structure or function of the body. Section 213(d)(1)(A).

Taxpayers cannot deduct personal, family, or living expenses as medical care if the expenses do not fall within the section 213 definition. Section 262; section 1.213-1(e)(1)(vi) of the Income Tax Regulations. An expenditure that is merely beneficial to the general health of an individual is personal and is not for medical care. Section 1.213-1(e)(1)(ii).

A taxpayer who claims that an expense of a peculiarly personal nature is primarily for medical care must establish that fact. Among the objective factors that indicate that an otherwise personal expense is for medical care are the taxpayer's motive or purpose for making the expenditure, whether a physician has diagnosed a medical condition and recommended the item as treatment or mitigation, linkage between the treatment and the illness, treatment effectiveness, and proximity in time to the onset or recurrence of a disease. Havey v. Commissioner, 12 T.C. 409 (1949). The taxpayer also must establish that the expense would not have been paid "but for" the disease or illness. A personal expense is not deductible as medical care if the taxpayer would have paid the

expense even in the absence of a medical condition. Commissioner v. Jacobs, 62 T.C. 813 (1974).

Where an item purchased in a special form primarily for the alleviation of an illness or disease is one that is ordinarily used for personal, living, and family purposes, the excess of the cost of the special form over the normal cost of the item is an expense for medical care under section 213. See, e.g., Revenue Ruling 75-318, 1975-2 C.B. 88 (braille books and magazines); Revenue Ruling 70-606, 1970-2 C.B. 66 (automobile specially designed to accommodate wheelchair passengers).

Specifically, the excess cost of specially prepared foods designed to treat a medical condition over the cost of ordinary foods which would have been consumed but for the condition is an expense for medical care. See Randolph v. Commissioner, 67 T.C. 481 (1976); Cohn v. Commissioner, 38 T.C. 387 (1962); Von Kalb v. Commissioner, T.C. Memo. 1978-366. A taxpayer who can establish the medical purpose of the diet may deduct the excess cost if the taxpayer can prove what the taxpayer spent for the special diet and what the taxpayer would spend for food to satisfy normal nutritional needs. See Flemming v. Commissioner, T.C. Memo. 1980-583.

Therefore, if a taxpayer can establish the medical purpose of the diet, such as through a physician's diagnosis, then to the extent the cost of the food for the special diet exceeds the cost of the food that satisfies a taxpayer's normal nutritional needs if the special diet were not required, the excess cost is an expense for medical care under section 213(d). We will consider modifying the language of Publication 502, Medical and Dental Expenses, to reflect these considerations.

The IRS administers the tax law as enacted. Any change in the law would require legislative action by the Congress. I hope this information is helpful. If you have any questions, please contact , Identification Number , at .

Sincerely,

Thomas D. Moffitt
Chief, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)