

*O’Donnabhain v. Commissioner*: Treatment Costs for Gender Identity Disorder Are Tax-Deductible Medical Expenses

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I. INTRODUCTION

After receiving therapy and feminizing hormones, Rhiannon G. O’Donnabhain chose to complete her gender-reassignment treatment by undergoing sex-reassignment surgery and breast augmentation.<sup>1</sup> O’Donnabhain deducted as medical expenses the \$21,741 she spent on feminizing hormones, sex-reassignment and breast augmentation surgeries, and related miscellaneous costs on her 2001 tax return.<sup>2</sup> However, the respondent disallowed these deductions, and determined a tax deficiency of \$5679.<sup>3</sup>

O’Donnabhain was born a genetic male, earned a degree in civil engineering, married a woman, and raised three children.<sup>4</sup> However, while growing up, petitioner experienced discomfort with gender and felt as though “she was a female trapped in a male body.”<sup>5</sup> O’Donnabhain sought treatment with a licensed psychotherapist who diagnosed her with gender identity disorder (GID), a condition recognized in the Diagnostic and Statistic Manual of Mental Disorders (DSM).<sup>6</sup> The petitioner successfully adapted to feminizing hormones and presenting herself as female in public; however, she still suffered anxiety over an incongruity between her male genitals and female gender identity and presentation.<sup>7</sup> Her psychotherapist recommended sex-reassignment surgery for her to complete treatment for her gender reassignment process.<sup>8</sup> The petitioner

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1. O’Donnabhain v. Comm’r, 134 T.C.M. (CCH) 4515, 4516-18 (2010).  
2. *Id.* at 4518.  
3. *Id.* at 4515.  
4. *Id.* at 4515-16.  
5. *Id.* at 4516.  
6. *Id.*  
7. *Id.* at 4517-18.  
8. *Id.* at 4518.

deducted these costs as medical deductions on her 2001 tax return, which the respondent disallowed.<sup>9</sup> The petitioner filed a claim in the United States Tax Court for redetermination of tax deficiency.<sup>10</sup> The Tax Court *held* GID is a disease for purposes of section 213 (medical deductions), hormone therapy and sex-reassignment surgery are considered appropriate treatment for GID, petitioner could deduct the costs of hormone therapy and sex-reassignment surgery as medical expenses on her 2001 tax return, but the costs of her breast augmentation surgery could not be deducted as a medical expense. *O'Donnabhain v. Commissioner*, 134 T.C.M. (CCH) 4515, 4532 (2010).

## II. BACKGROUND

Congress introduced an income tax deduction for medical expenses in 1942.<sup>11</sup> The Internal Revenue Code read:

In computing net income there shall be allowed as deductions: (x) Medical, Dental, *Etc.*, Expenses.—[E]xcept as limited under paragraph (1) or (2), expenses paid during the taxable year . . . . The term ‘medical care’, as used in this subsection, shall include amounts paid for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body.<sup>12</sup>

It was the intent of Congress to define medical care broadly, but not to allow deductions for expenses that are primarily personal expenses.<sup>13</sup> In an early case that examined the medical deduction, the Tax Court elucidated the difference between peripheral costs related to medical care and personal expenses.<sup>14</sup> The petitioner was the father of a young child who contracted deep bronchitis bordering on pneumonia after continuous health problems.<sup>15</sup> The father sent the child and her mother to a school in Arizona, where the climate was thought to aid in the treatment of the child’s health.<sup>16</sup> After a month, the mother returned to the family home in Ohio while the child stayed at the Arizona school.<sup>17</sup> The child’s health subsequently improved.<sup>18</sup> The petitioner claimed a medical deduction of

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9. *Id.*

10. *Id.* at 4515.

11. *Id.* at 4521.

12. *Id.* at 4520-21 (quoting Revenue Act of 1942, ch. 619, sec. 127(a), 56 Stat. 825 (1942)).

13. *Id.* at 4521.

14. *Stringham v. Comm’r*, 12 T.C. 580, 584 (1949).

15. *Id.* at 581.

16. *Id.* at 581-82.

17. *Id.* at 582.

18. *Id.*

\$1996.05, covering both transportation to Arizona and the cost of tuition for the school there.<sup>19</sup> The Commissioner, however, determined that not all of the expenses incurred from sending the daughter to school in Arizona were deductible as medical expenses.<sup>20</sup> The court held that the costs of transportation to Arizona, living expenses and the portion of the tuition which represented medical care could be deducted as a medical expense.<sup>21</sup> The court found that these expenses were primarily for the mitigation and curing of the child's illness.<sup>22</sup> However, the tuition which represented solely educational costs could not be deducted.<sup>23</sup>

In addition to determining that peripheral expenses accrued in the treatment of illness are deductible, the Tax Court has also determined that "disease" covers mental disorders as well.<sup>24</sup> In *Starrett v. Commissioner*, the petitioner suffered throughout his life from a debilitating condition of anxiety.<sup>25</sup> Starrett, who was a practicing psychiatrist, applied to the Chicago Institute for Psychoanalysis both to seek treatment and to undergo training in psychoanalysis.<sup>26</sup> Starrett was not accepted by the Institute as a student, but it recommended he undergo psychoanalysis.<sup>27</sup> He applied to undergo psychoanalysis with Dr. Rene Spitz, who was about to begin an appointment at the Institute.<sup>28</sup> The court found that the petitioner's psychoanalysis served two equal purposes: to seek medical treatment and to gain admission to the Institute.<sup>29</sup> The court held the psychoanalysis could be deducted as a medical expense because there was clear evidence that he desired to cure his anxiety problems, despite other motivating factors.<sup>30</sup> The court held that an expense cannot be disallowed simply because the treatment itself benefitted the petitioner in other ways than solely mitigating his anxiety problems.<sup>31</sup> Thus, the court has determined that section 213 clearly defines "disease" to cover mental disorders.<sup>32</sup>

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19. *Id.*

20. *Id.*

21. *Id.* at 586.

22. *Id.*

23. *Id.*

24. *See* *Fischer v. Comm'r*, 50 T.C. 164, 175 (1968); *Starrett v. Comm'r*, 41 T.C. 877, 882 (1964); *Hendrick v. Comm'r*, 35 T.C. 1223, 1237 (1961).

25. 41 T.C. at 878.

26. *Id.* at 879.

27. *Id.*

28. *Id.*

29. *Id.* at 880.

30. *Id.* at 881.

31. *Id.*

32. *Id.* at 882.

While the definition of “medical care” has historically been interpreted broadly, Congress responded to Internal Revenue Service rulings, which determined hair transplants and a facelift to constitute medical expenses under section 213, by introducing subsection (d)(9) to exclude cosmetic surgery from medical expenses.<sup>33</sup> Congress introduced this amendment to exclude medical procedures undergone for “an elective, purely cosmetic treatment.”<sup>34</sup> The section reads,

- (A) In general.—The term “medical care” does not include cosmetic surgery or other similar procedures, unless the surgery or procedure is necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease.
- (B) Cosmetic Surgery defined.—For purposes of this paragraph, the term “cosmetic surgery” means any procedure which is directed at improving the patient’s appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease.<sup>35</sup>

The court noted there were no cases of “precedential value” interpreting this exclusion under section 213(d)(9).<sup>36</sup>

While the court has interpreted that “medical care” should be construed broadly and purely cosmetic medical procedures are not deductible, given the misunderstanding around GID, this situation presents a new area for this distinction. As noted, the Tax Court has never addressed the issue of whether sex-reassignment surgery as a treatment for GID constitutes medical care, but other courts have. Seven of the U.S. courts of appeal that have addressed whether severe GID constitutes a medical need for purposes of the Eighth Amendment have held that it does.<sup>37</sup>

### III. COURT’S DECISION

In the noted case, the Tax Court followed the tradition of interpreting “medical care” broadly while recognizing that medical treatment for GID is not merely cosmetic surgery.<sup>38</sup> The court held that GID is a disease for purposes of section 213; the court held that the petitioner’s feminizing hormone therapy and sex-reassignment surgery

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33. *O’Donnabhain v. Comm’r*, 134 T.C.M. (CCH) 4515, 4522 (2010).

34. *Id.* (quoting H. Conf. Rept. 101-964, at 1031 (1990), 1991-2 C.B. 560, 562).

35. *Id.* (quoting 26 U.S.C. § 213(d)(9) (2006)).

36. *Id.*

37. *Id.* at 4526.

38. *Id.* at 4532.

constituted appropriate medical care to treat her GID; but the court held the petitioner's breast augmentation surgery did not constitute medical care under section 213.<sup>39</sup>

The court began its analysis by determining whether GID is a disease.<sup>40</sup> While both parties introduced experts to testify as to the definition of disease, the court held that the interpretation of the statutory term "disease" as used in section 213 falls under the purview of the court.<sup>41</sup> The court is to interpret this statutory term with established principles of statutory construction such as plain language meaning, legislative history, and case law precedent.<sup>42</sup>

While the court held that the interpretation of the statutory term falls under its purview, it still addressed the arguments of the parties.<sup>43</sup> The petitioner argued that GID is a recognized mental disorder which causes distress and impairment of functioning.<sup>44</sup> The respondent's expert, however, testified a mental disorder "must have a demonstrated organic or biologic origin in the individual."<sup>45</sup> The court examined precedential case law, and found there were many recognized mental disorders that did not have a known biological or organic origin in the individual.<sup>46</sup> Furthermore, the court examined legislative history and regulations to find that "mental defect" has a broader connotation than what the respondent contended.<sup>47</sup> Finally, the court found that in 1942, when Congress introduced the medical deduction, most mental disorders were not known or suspected to have a biological origin in the individual.<sup>48</sup> Thus, through an extensive review of case law, legislative history, and history of psychiatric care, the court found there is no need for an organic or biological origin in an individual for a mental defect to constitute a disease for purposes of section 213.<sup>49</sup>

Rejecting the respondent's argument of a necessary organic or biological origin, the court proceeded to determine whether GID is a disease. The court examined the psychiatric literature, and found that GID was listed in the DSM-IV, the primary diagnostic tool for the

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39. *Id.*

40. *Id.* at 4523.

41. *Id.* at 4524.

42. *Id.*

43. *Id.* at 4524-25.

44. *Id.* at 4523.

45. *Id.* at 4524.

46. *Id.* at 4525-26.

47. *Id.* at 4524-25.

48. *Id.* at 4525.

49. *Id.*

psychiatry profession.<sup>50</sup> Furthermore, the court found that GID is a debilitating condition causing serious distress which can culminate in attempts of suicide or autocastration.<sup>51</sup> Finally, the court found that seven of the U.S. courts of appeal that ruled on the issue determined that GID merits medical treatment for purposes of the Eighth Amendment in regards to the treatment of prisoners.<sup>52</sup> Thus, the court held that GID is a disease for purposes of section 213 because: (1) GID is widely recognized by the psychiatric community, (2) the potential seriousness of the condition was acknowledged by all three experts, (3) the petitioner's psychotherapist diagnosed the severity of her impairment, and (4) the agreement of the courts of appeals that GID constitutes a serious medical need for purposes of the Eighth Amendment.<sup>53</sup>

After determining that GID constitutes a mental defect for the purposes of section 213, the court addressed whether the petitioner has GID.<sup>54</sup> The respondent argued that while the petitioner may have GID, other diagnoses such as "depression or transvestic fetishism" had not been dismissed.<sup>55</sup> The court held that the court typically defers to the judgment of medical professionals who treated the patient.<sup>56</sup> Furthermore, the court found that the petitioner's psychotherapist was licensed to determine the diagnosis.<sup>57</sup> Thus, the court held the patient has GID because courts defer to medical practitioners, her medical provider diagnosed her with such, and there was no reason to doubt the diagnosis of the medical practitioner.<sup>58</sup>

After examining whether GID is a disease and whether the petitioner has GID, the court addressed the issue of whether feminizing hormones, sex-reassignment surgery and breast augmentation surgery treat the petitioner's GID.<sup>59</sup> First, the court examined the definition of "treat."<sup>60</sup> The court examined the definition of treat in three dictionaries as well as the Income Tax Regulations.<sup>61</sup> The court found that the parties did not dispute the meaning of "treat," and interpreted the term in its

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50. *Id.*

51. *Id.* at 4526.

52. *Id.*

53. *Id.* at 4527.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 4527-31.

60. *Id.* at 4527.

61. *Id.*

typical way.<sup>62</sup> While the court did not hold one specific meaning of “treat,” it did highlight representative examples from various dictionaries, such as “to care for or deal with medically or surgically,” “to seek cure or relief of,” “to deal with (a disease, patient, etc.) in order to relieve or cure.”<sup>63</sup>

After its examination of the term “treat,” the court explored the typical treatment for GID within the psychiatric community.<sup>64</sup> The court found that the World Professional Association for the Treatment of Transgender Health published standards of care known as the “Benjamin standards.”<sup>65</sup> The Benjamin standards consist of a treatment of three parts for people diagnosed with GID.<sup>66</sup> The treatment entails hormone therapy, “‘real life’ experience” in which the patient presents him- or herself to the world in the gender with which s/he identifies, and sex reassignment surgery.<sup>67</sup> The court found that the Benjamin standards are essentially the standard within the psychiatric community for treating GID.<sup>68</sup> While the respondent’s expert argued that the Benjamin standards are of limited physician acceptance and are only “guidelines,” the court found that there was no “significant disagreement with the Benjamin standards in the psychiatric field.”<sup>69</sup> Furthermore, the court found that Benjamin standards are widely known within psychiatric literature and that the respondent’s expert uses them himself, corroborating their acceptance.<sup>70</sup> The court held that complete consensus within the medical community is not a necessary element to finding that a treatment for a medical defect constitutes a deduction for medical expenses under section 213.<sup>71</sup>

Finally, the court explored whether the third component of the Benjamin standards is unethical.<sup>72</sup> The court found that some doctors do not recommend sex-reassignment surgery because the cutting of healthy tissue is unethical.<sup>73</sup> However, the court found that the respondent has not

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62. *Id.*

63. *Id.* (quoting MIRIAM WEBSTER’S COLLEGIATE DICTIONARY 1333 (Miriam Webster, Inc. eds., 11th ed. 2008); WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 2015 (Barnes & Noble, Inc. ed., 2003); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2435 (Philip Babcock Cove & the Miriam Webster Editorial Staff eds., 2002).

64. *Id.* at 4527-28.

65. *Id.* at 4516.

66. *Id.* at 4517.

67. *Id.*

68. *Id.* at 4527-28.

69. *Id.* at 4528.

70. *Id.* at 4528-29.

71. *Id.* at 4529.

72. *Id.*

73. *Id.*

historically denied medical deductions on the grounds of ethics.<sup>74</sup> Thus, the court held that the question as to whether sex-reassignment surgery is ethical, as long as it is not illegal, is immaterial.<sup>75</sup> The court held that hormone therapy and sex-reassignment surgery were treatments for GID because: (1) “hormone therapy and sex reassignment surgery are well-recognized and accepted treatments for severe GID,” (2) “evidence demonstrates that hormone therapy and sex reassignment surgery . . . are undertaken by GID sufferers in an effort to alleviate the stress and suffering” and (3) “the procedures have positive results . . . in the opinion of many in the psychiatric profession, including petitioner’s *and* respondent’s experts.”<sup>76</sup>

Though the court held the petitioner’s costs for hormone therapy and sex-reassignment surgery constituted a medical expense for purposes of section 213, the court also held that the cost for breast augmentation surgery was not deductible as a medical expense.<sup>77</sup> The court identified the key test to be whether the petitioner’s breast size and shape sufficiently made her feel like a woman before undergoing breast augmentation surgery.<sup>78</sup> The court brought up that the Benjamin standards permit that a patient may undergo breast augmentation surgery if, after eighteen months of hormone therapy, she is still distressed.<sup>79</sup> The court found that there was no evidence from the patient’s psychotherapist that O’Donnabhain was suffering distress from her breast size prior to the surgery.<sup>80</sup> Furthermore, the court found the surgeon documented the petitioner’s breasts before surgery as ““approximately B cup breasts with a very nice shape.””<sup>81</sup> Thus, the court held the breast augmentation surgery does not constitute a medical expense that can be deducted under section 213 because the petitioner did not document anxiety or suffering caused by her breast size and shape, and the surgeon concluded her breasts fell within the normal range of breast size and shape.<sup>82</sup> Given these two conclusions, the court held the petitioner’s breast augmentation surgery was not treatment for GID, but fell under cosmetic surgery.<sup>83</sup>

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74. *Id.*

75. *Id.*

76. *Id.* at 4529-30.

77. *Id.* at 4530-31.

78. *Id.* at 4530.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 4530-31.

83. *Id.* at 4531.

The last component of the court's analysis is whether the treatment was medically necessary.<sup>84</sup> The respondent argued that Congress intended the medical deduction only for procedures that are medically necessary.<sup>85</sup> While the court asserted this is not a necessary component to a section 213 deduction, it nonetheless determined whether the treatment was medically necessary.<sup>86</sup> The court pointed to evidence that one of the respondent's experts acknowledged that physicians who specialize in GID consider sex-reassignment surgery to be medically necessary.<sup>87</sup> The court found that in light of the diagnosis provided by the petitioner's psychotherapist, the consensus among all three experts that GID can cause such distress as to potentially lead to attempted suicide or autocastration, and the aforementioned consensus among physicians who specialize in GID treatment, that the sex reassignment surgery was "medically necessary."<sup>88</sup>

To summarize the court's multicomponent analysis and holding, the court held: (1) GID is a recognized medical defect, (2) the petitioner has GID, (3) hormone therapy and sex reassignment surgery are appropriate treatment for GID, (4) the petitioner's hormone therapy and sex reassignment surgery can be deducted as medical expenses under section 213 because it served to treat the GID that the petitioner suffered from, but (4) the petitioner's breast augmentation surgery cannot be deducted as a medical expense because the petitioner did not suffer distress from the development of her breasts prior to surgery, and thus the breast augmentation was cosmetic surgery.<sup>89</sup>

#### IV. ANALYSIS

Clearly on its face, this ruling by the Tax Court is a victory for people suffering from GID who undergo hormone therapy and sex-reassignment surgery. Rather than dismissing the petitioner for electing to undergo cosmetic procedures, the court engaged in a thoughtful, thorough, and methodical analysis, demonstrating respect for the petitioner and showing sensitivity to what often is a contentious and misunderstood issue. This ruling is a victory both on financial and symbolic levels. On a financial level, this is a victory because people who suffer from GID and seek treatment are now able to deduct as a

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84. *Id.* at 4531-32.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 4532.

medical expense the costs for hormone therapy and sex reassignment surgery. In the noted case, this will save the petitioner over \$5600 on her taxes, when she already spent over \$21,000 out of her own pocket.<sup>90</sup> Given the economic marginalization that many people who suffer with GID face, this is certainly helpful.

While the financial benefit is clear, this ruling also provides a symbolic victory. This ruling is important because a major branch of the federal government has legitimized both that GID is an actual condition that people suffer from, and it is a condition whose treatment warrants viewing it as a medical expense. At a time when people who suffer from GID can be fired from their jobs in most states without recourse, experience violence in public, and are generally misunderstood, it is certainly a major victory that the Tax Court validated the suffering people with GID experience and offered one channel of relief. This case is also important because it demonstrates that the hardships that people with GID suffer are not simply big-picture issues such as access to jobs, housing, and safe streets, but it really highlights the small nooks and crannies of everyday life in which people who suffer from GID must address to maintain dignity and self-respect.

While this ruling is a great victory, it cannot be glossed over that the petitioner's breast augmentation surgery was deemed to be cosmetic surgery.<sup>91</sup> On one hand, it is disappointing that the court did not hold the breast augmentation surgery to be deductible as a medical expense. However, the court was explicit in its reasoning that this was a fact-specific ruling.<sup>92</sup> The purpose of treatment for GID is to alleviate suffering. The court found that after receiving feminizing hormones, the petitioner began to develop breasts.<sup>93</sup> Her surgeon complimented their shape and assessed them as a B cup in size.<sup>94</sup> In addition to the surgeon's recognition of her breast development, there is no record that the petitioner suffered distress from the size of her breasts in between undergoing therapy and breast augmentation surgery.<sup>95</sup> Thus, while in this case the petitioner's breast augmentation surgery was not deemed medical treatment for a disorder, the court's reasoning clearly leaves open the issue of whether a person who needs breast augmentation surgery, even after undergoing feminizing hormones, because she is suffering due

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90. *Id.* at 4515, 4518.

91. *Id.* at 4532.

92. *Id.* at 4530-31.

93. *Id.* at 4530.

94. *Id.*

95. *Id.*

to incongruity between her gender identity as a female and gender presentation, can deduct the cost of the surgery as a medical expense.

Finally, this ruling is a major victory for people who suffer from GID because it does not require individuals to admit there is something wrong with themselves mentally in order to qualify for treatment. This is the situation in which people suffering from GID are often placed: in order to receive treatment they must acknowledge they have a mental defect. (I am referring to getting medical treatment itself, not the tax deduction once a person has undergone treatment.) The great aspect of this ruling is the court does not rely on a person to admit a mental defect in order to deduct treatment for GID as a medical expense. All this ruling illustrates is that if a person is diagnosed with GID, suffers distress from the condition, and seeks medical treatment to alleviate the distress, then the costs for the medical treatments can be deducted as medical expenses under section 213.

#### V. CONCLUSION

In summary, this ruling is a major victory because the Tax Court legitimized people who suffer from GID and seek treatment necessary to alleviate the accompanied distress and suffering. Furthermore, the ruling demonstrates through the examination of a matter so mundane and routine as an annual tax return that people who suffer from GID face challenges to their dignity and self-respect in everyday life. Finally, the court does not require the petitioner to admit being mentally defective to receive tax deductions for treatment.

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