

Morrissey v. United States (Taxation of ART Expenses)
December 14, 2015

A complaint has been filed in federal district court (Middle District of Florida) by a gay man who, with his committed partner of many years, conceived a child with the use of an egg donor and a surrogate. He incurred huge medical expenses in the process and sought to deduct the expenses he incurred in 2011. He did not claim the expenses on his original return, but instead filed an amended return which included the relevant expenses. That is why he is in Federal District Court rather than Tax Court. He is seeking a refund.

The IRS denied the deduction, claiming that the expenses were not “his” medical expenses, but instead were the medical expenses of the surrogate and the egg donor. They also claimed these expenses were not medically necessary because he is not infertile. ART (Assisted Reproductive Technology) expenses are allowed as a medical deduction in cases in which the taxpayers (typically husband and wife) have fertility problems. Although, to be totally accurate, the IRS has informally opined in unciteable opinion letters from 2002 and 2004 that an infertile couple who pays surrogacy expenses to enable the couple to conceive cannot deduct those expenses because they do not relate to the body of the husband or wife or a dependent, but rather to the body of the surrogate.

Some years ago a heterosexual couple challenged this position in the Tax Court. After many failed attempts, a physician determined that the wife could not bear a child successfully and suggested the engagement of a surrogate. The couple paid the fees and expenses related to the engagement of a surrogate (a healthy baby resulted from the process) and then they attempted to deduct those expenses as medical expenses. The IRS said “no.” Why? Because medical expenses must be incurred with respect to health of the taxpayer, the spouse, or legal dependents, and a surrogate is none of these things.

The couple argued back that they were paying the surrogate to relieve the wife from her inability to procreate. Strong analogies regarding medical expense deductions included payments to a note taker to relieve a deaf student from her inability to hear (deductible) and payments to a kidney donor (medical and travel expenses) which were primarily paid for the benefit of the recipient of the donated kidney, whose medical condition caused the expenses (also deductible). In the end the IRS conceded that the surrogacy expenses were also deductible. But that concession occurred in closed chambers in a settlement of the case and so there is no reported authority to support the deductibility of surrogate expenses, even in the context of an infertile heterosexual couple.

In the Morrissey complaint, the taxpayer argues that surrogacy expenses are available as medical deductions to heterosexual couples who have a fertility problem. The expenses are incurred to relieve the couple of their infertility (which typically is a medical condition). Morrissey claims

that he is similarly infertile – not because of a medical condition, but because he is a gay man in a committed relationship with another man. The IRS appears to be telling him that he doesn't need a surrogate because he could simply have sex with a woman and produce a child. Morrissey says that is impossible for a gay man in a committed relationship.

He also argues that if heterosexual couples can claim deductions because of whatever infertility problem they have, it would be unconstitutional discrimination to prevent same-sex couples from claiming similar deductions because of their inherent infertility. He cites *Obergefell* (the same-sex marriage case decided by the U.S. Supreme Court in June of 2015).

These are complicated arguments. And they may not win in court. But they do raise very important policy questions about how Assisted Reproduction Technology costs should be treated under the Tax Code, whether those costs are incurred by an opposite-sex married couple, a same-sex married couple, a heterosexual single person, or a gay or lesbian single person. There is much to think about.

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