doubtedly, there are instances where a concern should be permitted to initiate an action where it is doing business, and there are also situations in which such suit would be disproportionately detrimental to the interests of the defendant. Coordinate use of Sections 1391(c) and 1404 will bestow the initial privilege upon the plaintiff corporation, while leaving the prevention of trials conducted in improper forums to the discretion of the court.

Interpretation of the statute herein suggested results in operation designed both to achieve just results and avoid unnecessary inconvenience to the parties involved. If Congress desired a different meaning, it thus becomes its duty to clarify the matter by amendment.

MEDICAL DEDUCTION: SCOPE AND PURPOSE

As long ago as 1848 John Stuart Mill, although not advocating progressive taxation, advanced a theory whereby amounts necessary to maintain the health of an individual would be exempt from taxation.[1] Since the federal tax system *is* a progressive one, hence inferably more responsive to ability to pay, one would imagine that an effective medical deduction would by now be embedded in the federal income tax structure. But a puzzling ambiguity has recently arisen which makes it impossible to predict the deductibility of an expenditure that might also confer incidental non-medical benefits upon the taxpayer.

The Internal Revenue Code allows the deduction of expenses for the "medical care" of the taxpayer or his dependents,[2] and rather vaguely defines that care as including "amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease or for the purpose of affecting any structure of the body."[3] Because congressional comment,

1. MILL, PRINCIPALS OF POLITICAL ECONOMY 828 (Ashley Ed. 1926).

2. The only requirement for a "dependent" is that he receive more than half his support from the taxpayer. See I.T. 4034, 1950-2 CUM. BULL. 28 (the deduction was allowed for a married daughter); I.T. 3703, 1945 CUM. BULL. 127 (the deduction was allowed for the expenses of a person making more than $500 per year, hut nevertheless receiving more than half her support from the taxpayer).

3. 26 U.S.C. §23(x). A medical expense as defined in this section would potentially include almost everything for which money could be spent. See Hodgkin, *If You Eat to Stay Healthy—Here's New Light on the Medical Deduction,* 30 TAXES 206 (1952), in which the author facetiously describes a fictitious case where the Tax Court allows the deduction of everything from whisky to cigarettes.

for the most part, does little more than repeat the statutory provisions,[4] it is of minimal aid to interpretation. The application of this law should be based on a sound understanding of the general function of income tax deductions.

Deductions fall into two primary classes, according to their purpose. A few are directed toward non-tax policies, such as the support of charitable institutions and the development of the country's resources.[5] The great majority, however, are designed to distribute the burden of taxation as equitably as possible.[6] In determining which class embraces the medical deduction it will help to recognize that income can be divided into two categories: (1) that which must be spent on necessities if a minimum standard of living is to be maintained; (2) that over which the taxpayer can exercise real discretion as to its disposition. There is a strong argument that, from an ethical point of view, only the second category of income should be subject to taxation;[7] the federal tax law attempts, although imperfectly, to effectuate this ethical concept.[8]

Exemption of small incomes from taxation is not of itself sufficient to assure a minimum standard of living, however, because necessary expenditures may vary widely within a given family from one year to the next. Small incomes become even smaller when irregular and unavoidable expenditures must be made. Necessary medical expenses lessen a person's ability to pay just as surely as would a reduction in income.[9]

The Tax Court made the same observation in L. Keever Stringham, 12 T.C. 580, 583 (1949). "As the broad and comprehensive language of this section is susceptible to a variety of conflicting interpretations, we feel impelled, in order to determine the limits of its construction, to inquire into the Congressional intent which lay behind the enactment of this legislation."

4. The only helpful statements were made by the Senate Finance Committee: "This allowance is recommended in consideration of the heavy tax burden that must be borne by individuals during the existing emergency (World War II) and of the desirability of maintaining the present high level of public health and morale." SEN. REP. No. 1631, 77th Cong., 2d Sess. 6 (1942); and Representative Henshaw: "This amendment will be a help to persons or families having to undergo unusual outlays for medical purposes in any year." 88 CONG. REC. 8469 (1942).

5. The deductions referred to are found in the Internal Revenue Code, sections 23(o) and 23(ff) respectively.

6. This type of analysis was employed by the circuit court in Morrell v. Commissioner, 107 F.2d 34, 36 (3d Cir. 1939), *aff'g*, 38 B.T.A. 239 (1938).

7. "It is to be remembered that this assumption—that the best system of tax distribution requires the exemption of subsistence incomes—is based entirely upon the consideration of the ethical or moral issues involved." STRAYER, THE TAXATION OF SMALL INCOMES 67 (1939).

8. The $600 personal exemption and the subsequent exemptions for spouse and dependents are incomplete attempts to leave a bare subsistence income untaxed. See 5 MERTENS, LAW OF FEDERAL INCOME TAXATION § 32.08 (1942).

9. For an excellent discussion of these problems see STRAYER, THE TAXATION OF SMALL INCOMES c. 3 (1939).

In 1942 the Treasury Department, recognizing that these factors, particularly when aggravated by higher tax rates, would leave the average family even fewer reserves with which to support the burden of heavy medical expenses, suggested the medical deduction.[10] It was created for the direct benefit of the taxpayer, as a measure of his ability to pay, in contrast with the charitable contributions type of deduction which was evolved for the benefit of the organizations which receive the donations.[11] Judicial interpretation can either preserve or destroy this basic distinction.

In the leading case of *Edward A. Havey,*[12] Judge Van Fossan, while disallowing the deduction,[13] set out four tests for the determination of a deductible medical expense.[14] In essence they are: (1) Was it incurred at the direction or suggestion of a physician? (2) Did the treatment bear directly on the physical condition in question? (3) Could the treatment be expected to be efficacious? (4) Was the disease the proximate cause of the expenditure? Two basic requirements seem to be implied. The first and third questions probe the reasonableness of the treatment attempted. The other two demand a causal relationship between the expenditure and the disease. The material inquiry would be: Was the expense reasonably motivated by disease? In *L. Keever Stringham,*[15] the Tax Court followed an earlier Treasury Decision[16] by allowing a deduction for the expenses of a trip directly and solely undertaken to cure an acute respiratory infection. Between the *Havey*

10. In March of 1942, Mr. Randolph E. Paul, then tax consultant to the Secretary of the Treasury, spoke before the House Ways and Means Committee:

"In view of the increases in tax rates which the present situation has necessitated, we feel that in some respects these exemptions and credits are now inadequate. We, therefore suggest to the Committee that to achieve a more equitable distribution of the tax burden, it would be desirable to enact the following changes:

"1. A deduction should be allowed for medical expenses over a specified percent of net income, but limited to a maximum amount." *Hearing before Committee on Ways and Means on Revenue Revision of 1942,* 77th Cong., 2d Sess. 1611, 1612 (1942).

In a letter to the *Indiana Law Journal,* Mr. Paul said, "You are correct, therefore, in assuming that we were moved by the consideration that the higher taxes would considerably weaken the average person's ability to meet these large and unavoidable expenses. As a matter of fact the high rates intensified a situation which had existed previous to the 1942 Act."

11. 5 MERTENS, LAW OF FEDERAL INCOME TAXATION § 31.01 (1942).

12. 12 T.C. 409 (1949).

13. Petitioner's wife suffered a coronary occlusion, and after she had recovered enough to travel, the petitioner, on the advice of a physician, took her to New Jersey in the Summer and Arizona in the Winter. Petitioner had often vacationed in both places.

14. 12 T.C. 409, 412 (1949).

15. 12 T.C. 580 (1949), *aff'd,* 183 F.2d 579 (6th Cir. 1949).

16. I.T. 3786, 1946-1 CUM. BULL. 75.

decision, holding for the Commissioner, and *Stringham,* for the taxpayer, a general outline of the medical deduction was constructed along lines which served the common end of both the taxpayer and the government.[17]

The situation was not to remain clearly defined, however. In the 1951 case of *Samuel Ochs,*[18] the facts were similar to those of *Stringham* except that an intensifying cause of the illness was removed from the sick person rather than the sick person being taken from the cause.[19] On the basis of this difference, the Tax Court held for the Commissioner against the spirit of *Stringham.* The two cases were easily distinguished by the Tax Court which pointed out that in *Stringham* the daughter was sent to boarding school because of her own illness, while in *Ochs* the daughters, who were perfectly healthy, were sent away because of their mother's illness.[20] The Second Circuit, ignoring the Tax Court's finding of fact, affirmed on the strength of its own belief that the Ochs children were not removed primarily as a cure for their mother's illness, as the Tax Court had specifically found, but for their own good because their mother was unable to care for them.[21] The

17. A notable exception to this success was John L. Seymour, 14 T.C. 1111 (1950), which held a medical expense non-deductible because it was also a capital expenditure. The court did not even consider pro-rating the deduction, but said "[w]e are unable to find in the history of the statute any evidence of an intent by Congress to create an exception to the general rule that capital expenditures are not deductible as current expenses." *Id.* at 1118.

18. 17 T.C. 130 (1951), *aff'd,* 195 F.2d 692 (2d Cir. 1952).

19. The taxpayer's wife had been operated on for goiter and a carcinoma of the throat discovered. It had spread too far to be completely removed, so X-ray treatments were used after the operation. As a result of the operation Mrs. Ochs was unable to speak above a whisper. When her voice had not returned after several years, a doctor advised that the constant strain of trying to manage her two small daughters had probably prevented the return of her voice and might cause a recurrence of the cancer. He suggested that Mrs. Ochs and her daughters be separated until she could be pronounced cured. Since Mrs. Ochs was working part time, it was more economical to move the children than to move her.

20. "The facts in the *Stringham* case are distinguishable from those present in the instant case in that in the *Stringham* case the expenses incurred in sending the taxpayer's child to boarding school in Arizona were incurred because of the child's own ill health. This is not true in the instant case." Samuel Ochs, 17 T.C. 130, 134 (1951).

21. The Tax Court's finding of facts were: "Petitioner's purpose in sending the children to boarding school during the year 1946 was to alleviate his wife's pain and suffering in caring for the children by reason of her inability to speak above a whisper and to prevent recurrence of the cancer which was responsible for the condition of her voice. He also thought it would be good for the children to be away from their mother as much as possible while she was unable to speak to them above a whisper." Samuel Ochs, 17 T.C. 130, 132 (1951).

The circuit court, however, found that the facts "serve to illustrate that the expenses here were made necessary by the loss of the wife's services, and that the only

circuit court's apparent approval of the Tax Court's decision can be explained by the discrepancy in their findings of fact.[22]

The confusion within the *Ochs* case itself, however, is insignificant when compared with the confusion which it introduces into the interpretation of the medical deduction. The *Stringham* case held that travel and certain living expenses away from home are deductible if they are expended in a reasonable attempt to prevent or cure a specific disease. The *Ochs* case limits this holding by indicating that such traveling and living expenses are deductible only if it is the sick person who is doing the traveling.[23] The facts admittedly are different, but it may be doubted that there is any real distinction, for medical deduction purposes, between taking a patient from an unhealthy environment and removing an unhealthy environment from a patient. When the medical deduction is seen as a test of ability to pay, the validity of the Tax Court's distinction may be seriously questioned.[24]

Any statute stated in specific terms inevitably cannot cover future situations which fall within its purpose, although not within its language. Other jurisdictions which have a medical deduction have sacrified policy for certainty. Minnesota's legislature specified that its deduction would be allowed only if payments were for certain enumerated items, such as hospitalization, medical and dental services, and drugs.[25] The Canadian

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reason for allowing them as a deduction is that the wife also received a benefit." Ochs v. Commissioner, 195 F.2d 692, 694 (2d Cir. 1952).

The Tax Court found that the expenditure was made for the mother's benefit and also benefited the children, while the circuit court said that the expenditure was for the benefit of the children and also benefited the mother. This factual deviation is substantial enough to change the result and, of course, is completely irregular. See note 35 *infra.*

22. "We do not think that the decisions discussed in the opinion of the Tax Court and the briefs of the parties have any real bearing upon the issues involved in this appeal." Ochs v. Commissioner, 195 F.2d 692, 694 (2d Cir. 1952).

23. However, there might be some justification for saying that the fact that the traveling was done by someone other than the sick person raises a rebutable presumption that the expenditure was not motivated by the disease. This interpretation of the *Ochs* case would, at least, let the petitioner prove his intent.

24. Unfortunately the Supreme Court did not consider the deduction important enough to clarify, for certiorari was denied in the *Ochs* case. 21 L.W. 3094 (1952). However, a case has recently been decided in the District Court of Minnesota which seems to be at odds with the *Ochs* decision. The petitioner was disabled so that she could travel only in a private car. Her doctor advised work by way of occupational therapy, and the District Court allowed her to deduct her taxi fare to and from work as a medical expense. Misfeldt v. Kelm (D.C. Minn.), 5 C.C.H. 1952 FED. TAX REP. ¶ 9495.

25. MINN. STAT. ANN. § 290.09 (11). New York has a medical deduction which is fashioned closely after the federal law. N. Y. TAX LAW § 360.

Parliament provided that only amounts paid to certain named institutions or classes of persons could be deducted.[26] The most direct effect of the Minnesota and Canadian deductions is the support of the items and institutions named. Only imperfectly do they lessen the tax burden of medical expenses, since many of these expenses will not be included in the specific language of the law.[27] Statutes such as these are most appropriate to the charitable contributions type of deduction, which seeks the encouragement of specific institutions and activities. They are inadequate for a deduction which is an integral part of the income tax system, directed only toward its more perfect functioning.

If a statute is created to reduce tax liability in years when certain unavoidable expenses are incurred, then it should be stated in terms of those unavoidable expenses rather than in terms of specific payments which it is hoped will approximate the real purpose. While an interpretation based on specific requirements is inevitable, it should be expressed with regard to the end desired and not collateral considerations. Within the purview of the medical deduction, the popular meaning of the term "medical" is a collateral consideration, while "unavoidable expenses made necessary by disease" designates the real purpose. It is true that policy must sometimes be sacrificed for practicability, but before retreating with Canada and Minnesota to the haven of particularity, an attempt should be made to drive a test that is specific enough to insure certainty yet sufficiently flexible to embrace the real policy of the deduction.[28]

All the components of an adequate test had been implied in the pre-*Ochs* decisions, although they had never been expressed in one con-

26. The original Canadian Medical Deduction, and subsequent changes are contained in the following:
(1) Income Tax Act, 15 Geo. VI, c. 51, § 6 (1951, 2d Sess.);
(2) Income Tax Act and Income War Tax Act, 13 Geo. VI, c. 25, § 11(1) (1949, 2d Sess.);
(3) Income Tax Act, 11 & 12 Geo. VI, c. 52, § 26(6) (1948);
(4) Income War Tax Act, 10 Geo. VI, c. 55, § 4(7) (1946);
(5) Income War Tax Act, 9 & 10 Geo. VI, c. 23, § 3(2) (1945);
(6) Income War Tax Act, 8 & 9 Geo. VI, c. 43, § 4(4) (1944);
(7) Income War Tax Act, 6 & 7 Geo. VI, c. 28, § 5(6) (1942).

27. Medical science has such varied methods and is progressing so rapidly that an attempt to enumerate all the things that could be used in the cure or prevention of disease would be futile. Mr. Stringham's expense in curing his daughter's respiratory infection certainly would not have been deductible under either Minnesota or Canadian law.

28. When contemplating these tests one should keep in mind the abuses which they are intended to avoid. Since the medical deduction must be broad in order to achieve its purpose, it offers an easy opportunity to evaders and tax cheats. Ordinary living expenses will be deducted because they are also beneficial to health, and regularly planned vacation trips because they happen to coincide with sickness.

cise statement.[29] A justifiable inference from these cases is that a deductible expense involves two distinct elements: (1) a specific disease,[30] either present or imminent; (2) an expense made in a *reasonable attempt* to cure or prevent that disease. The existence of a specific disease can usually be objectively determined by reference to the facts, but the second element, that of the taxpayer's motivation, is more difficult since it necessitates an appraisal of the subjective reasons for the expenditure.

The determination of the imminence of disease must, of necessity, be based upon an evaluation of the existing symptoms.[31] In the realm of acute disturbances, the necessity for prompt treatment will minimize the incidence of claims based upon fictitious ailments.[32] But when a chronic condition is involved, the increased opportunity of accommodating an indicated treatment to the patient's personal predilections will often allow the expenditure to simultaneously engender medical benefits and non-medical enjoyments.[33] It is then that the subjective element of "reasonable attempt" becomes important.

"Attempt" means exactly that; it refers to the element of motivation and demands that there be a causal connection between the disease

29. The *Havey* case gave the best single expression of the requirements: "It seems clear to us that the deduction in question may be claimed only where there is a health or body condition coming within the statutory concept and where the expense was *incurred primarily* for the prevention or alleviation of such condition. An incidental benefit is not enough." Edward A. Havey, 12 T.C. 409, 413 (1949).

30. "The Congressional intent is sufficiently evident to require the showing of the present existence or imminent probability of a disease . . . as the initial step in qualifying an expenditure as a medical expense." L. Keever Stringham, 12 T.C. 580, 584 (1949).

31. The court must decide in each case whether or not the existing symptoms are sufficient to justify treatment. The expert testimony of a physician will always be the best evidence, but other factors such as the age and condition of the patient, and the symptoms themselves will also be valuable. In Bessie Cohn, 10 T.C.M. 29 (1951), the taxpayer's age was an important factor in allowing the deduction.

32. It is interesting to note that of all the cases which have arisen over the medical deduction none have involved an acute disease. In those cases in which an acute disease has existed the deduction was always being sought for the expenses of convalescence or treating the chronic after effects. See Samuel Dobkin, 15 T.C. 886 (1950) (change of climate following coronary occlusion—deduction disallowed); Edward A. Havey, 12 T.C. 409 (1949) (expenses of change of climate following coronary occlusion disallowed); Martin W. Keller, 8 T.C.M. 685 (1949) (doctor advised change of climate because of general rundown condition—deduction disallowed).

33. Expenditures may be classified by the kind of treatment for which they are made as well as the type of disease. Acute diseases will almost always require "professional treatment" while a chronic disease may necessitate "non-professional services." "Non-professional services" raise the difficult questions. Deductibility should not hinge on the professional or non-professional nature of the measures taken, but services by non-medical personnel will properly raise a doubt in the court's mind as to the purpose of the expenditure, and it is the petitioner's task to dispel that doubt.

and the expenditure.[34] The ailment must be the inducing cause—the element without which the expenditure would not have been made[35]—rather than a contributing factor. The proportion of the expense to the taxpayer's total income[36] and any prior incurrence of the same type of expense in the absence of disease will be relevant factors.[37] As indicated, problems of motivation will be minimal where acute ailments are involved, maximal where chronic disturbances are being inspected. The unfortunate *Ochs* decision, where a chronic carcinoma was the basis of the taxpayer's claim, attests the danger of accentuation of benefits conferred. A different result would have been reached if the factual inquiry were orientated toward motivation and ignored the immaterial element of ancilary benefits.

Once the factual element of attempt is met, only the reasonablness of the effort remains to be determined. The attempted cure need not be successful, of course, and while advice of a physician will be helpful, it should not be conclusive evidence of deductibility. Nor should such advice be a prerequisite to establish the reasonableness of the attempt.[38]

The test here suggested is one well suited to bring purpose and result together. When the elements of reasonable attempt and specific or imminent disease are both present—and not unless they are present—the situation exists for which the deduction was created; it should,

34. "Although we do not feel that the bona fides of a taxpayer's motive in incurring an expense should be determinative of its deductibility, we do believe that we should accord it considerable weight." L. Keever Stringham, 12 T.C. 580, 585 (1949).

35. Occasionally an expenditure will be made for more than one reason. The Treasury Department anticipated the problem by providing that the expense must be "primarily for the prevention or cure of a specific (disease)." U.S. Treas. Reg. 103, §19.23(x)-1 (1943). They seem to suggest an apportionment of the motivation; if the expense is more than fifty percent motivated by a specific disease then it is deductible. But to be consistent with its purpose the deduction eannot be allowed for an expense which would have been made regardless of disease, even though the disease was a eausal factor, because in such a situation there had been no additional burden. Rather than grapple with a quantitative analysis of the taxpayer's motivation it is simpler and more accurate to ask whether the expense would have been made in the absence of the disease. See note 37 *infra*.

36. In L. Keever Stringham, 12 T.C. 580 (1949), *aff'd*, 183 F.2d 579 (6th Cir. 1949), the great size of the expense in comparison with the taxpayer's total income was heavily relied upon to show that the expenditure would not have been made but for the disease. If the taxpayer had a very large income such evidence would be meaningless, of course.

37. Judge Frank, in his dissenting opinion in the *Ochs* case suggested this question as an objective test of the taxpayer's motivation: "Would the taxpayer, considering his income and his living standard, normally spend money in this way regardless of illness?" Ochs v. Commissioner, 195 F.2d 692, 697 (2d Cir. 1952) (dissent).

38. The fees of chiropractors (I.T. 3598, 1943 Cum. Bull. 157) and Christian Science Practitioners (Bureau letter, February 2, 1943, in 3 C.C.H. 1943 FED. TAX REP. ¶ 6175) also have been held deductible.

therefore, be allowed. Although matters of proof will never be simple, a clear understanding of what must be proven will resolve the present ambiguity so that both the courts and counselors will have a clear concept of the taxpayer's rights under the medical deduction.

PROTECTION AGAINST DOUBTFUL CLAIMS DURING PROBATE

During the probate of an estate, claims based on lost notes amounting to $29,000 were filed against the estate after their legal existence could have been destroyed by the non-claim statute[1] had the administrator acted promptly. The administrator disallowed the claims, however, and defended the estate in actions brought by the claimants. The heirs were allowed to participate in the trial, but " . . . were not parties to said actions and had no control over them. . . ."[2] After a verdict for the claimants, the administrator did not file a motion for a new trial although the heirs attempted to induce him to do so. Thereupon, the heirs themselves petitioned for a new trial, and upon its denial, they sued the administrator and recovered damages based on his inadequate protection of the estate. Victory, however, was short-lived, or at least postponed, when the appellate court reversed. The Court held that the administrator's failure to utilize the statute of non-claim did not constitute an actionable wrong, and that if the suits had been improperly defended, the heirs' remedy was to appeal rather than to collaterally attack the judgment by suing the administrator.[3]

The *Riddell* decision does more than arouse sympathy for a few possibly injured heirs. It raises the general problem of how parties interested in an estate, such as heirs or creditors,[4] can protect their interests and control the functioning of the administrator when doubtful claims are filed against the estate. This problem may arise at various

1. The statute of non-claim is a special statute of limitation in probate proceedings which requires that claims be filed within a certain period in order to be recoverable against the estate. State *ex rel.* Buder v. Brand, 305 Mo. 321, 327, 265 S.W. 989, 991 (1824). See notes 19 and 21 *infra*. For a discussion of claims which are not barred by the statute of non-claim, see Comment, 41 MICH. L. REV. 920 (1943).

2. Riddell National Bank v. Englehart, 105 N.E.2d 357, 360 (Ind. App. 1952).

3. *Id.* at 361.

4. Any person who has a claim on the estate, whether heir or creditor, is possibly endangered by the recovery of a doubtful claim by a creditor and therefore may be an interested party within the meaning of this note. Consequently, references throughout the note to "heirs" will generally be applicable to "creditors" also.