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Dissecting *O'Donnabhain*

By Anthony C. Infanti

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In *O'Donnabhain v. Commissioner*, a sharply divided Tax Court allowed a medical expense deduction for some costs related to sex reassignment surgery. This article examines the opinions in the case and concludes that the taxpayer's victory rings hollow.

The Tax Court recently issued its long-awaited decision in *O'Donnabhain v. Commissioner.*1 This case concerns the deductibility under section 213 of expenses that the taxpayer incurred for hormone therapy, sex reassignment surgery, and breast augmentation related to her diagnosed gender identity disorder (GID). In a reviewed decision, a sharply divided Tax Court held that the taxpayer's expenses for hormone therapy and sex reassignment surgery were deductible as medical expenses for treatment of her GID.2 In contrast, the court held that the taxpayer had failed to prove that her breast augmentation constituted medical care for her GID, rather than nondeductible cosmetic surgery designed merely to improve her appearance, because she already had normal breasts before her sex reassignment surgery as a result of hormone therapy.3

The Tax Court only rarely addresses tax issues specific to the lesbian, gay, bisexual, and transgender (LGBT) community. To date, it has been less than friendly in its dealings with openly LGBT taxpayers.4 So it is worth taking a few moments to examine and reflect on the series of opinions in *O'Donnabhain* to determine whether the decision signals a salutary shift in the Tax Court's treatment of openly LGBT taxpayers or whether O'Donnabhain's victory rings hollow.

Reading Judge Gale's opinion for the majority, the words "cautious," "clinical," and "detached" immediately come to mind. Judge Gale first provides a thorough review of all of the expert testimony in the case, a short history of the medical expense deduction, and some background regarding the enactment in 1990 of a provision disallowing deductions for specified cosmetic surgery expenses.5 Even faced with an issue of first impression,6 Judge Gale manages to cite copious amounts of case law and other authorities — both within

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2Id. at 67-69.

3Id. at 60-63.


5O'Donnabhain, 134 T.C. No. 4, at 14-30.

6Id. at 32.
COMMENTARY / VIEWPOINTS

and beyond tax law — in support of the majority’s decision that (1) GID is a “disease” within the meaning of section 213; and (2) the hormone therapy administered to, and sex reassignment surgery performed on, the taxpayer were “treatment” for that disease within the meaning of the statute. This firm and deliberate grounding in extant authority seems designed to lend the decision a feeling of natural development or inevitability, despite its admitted novelty.

Notwithstanding apparent sympathy for the taxpayer, Judge Gale’s treatment of the claimed medical expense deduction is as cold and antiseptic as the operating room where O’Donnabhain’s sex reassignment surgery took place. It seems as if Judge Gale is anticipating scrutiny either on appeal or from the public on this sensitive issue and is doing his best to cloak himself and the other judges joining the majority opinion in the mantle of the dispassionate, impartial judge. Judge Gale reinforces this impression by drawing a Solomonic distinction between the taxpayer’s deductible hormone therapy and sex reassignment surgery on one hand and her nondeductible breast augmentation on the other — disallowing the latter deduction on grounds of failure of proof that it constituted treatment for her GID. Judge Gale further reinforces this impression when he addresses — and refutes — the IRS’s argument that surgery aimed at improving a taxpayer’s appearance must be medically necessary in order to escape disallowance as cosmetic surgery under section 213(d)(9). The statute embodies no requirement of medical necessity, and this phrase appears only in passing in a Senate committee report and not at all in the House conference report relating to the enactment of section 213(d)(9). By taking on such a weak argument rather than dismissing it out of hand, Judge Gale appears to be anticipating a possible appeal.

From reading Judge Gale’s majority opinion, one might infer that the Tax Court had unanimously reached its decision. There is nary a mention in the majority opinion of the disagreement of some judges with its reasoning or conclusions or an acknowledgment of arguments made in the dissenting opinions. In fact, Judge Gale’s attempt to thoroughly prepare for appellate court scrutiny seems to have taken things too far for Judge Holmes, who concurred with the majority’s decision. Judge Holmes chides the majority for taking sides in the so-called culture wars: “But I disagree with the majority’s extensive analysis concluding that sex reassignment is the proper treatment — indeed, medically necessary at least in ‘severe’ cases — for GID. It is not essential to the holding and drafts our Court into culture wars in which tax lawyers have heretofore claimed noncombatant status.”

Even setting aside this accusation of overreaching, Judge Holmes seems altogether uncomfortable with having to decide this case. He openly laments the “crash course on transsexualism” that this case has forced on us.” Curiously, this appears to be the first use of the phrase “crash course” in a U.S. Tax Court decision. Why haven’t Tax Court judges complained before about being “forced” by a taxpayer to get a crash course in the workings of a specific business or industry or of a complex business or financial transaction? Whatever happened to celebrating tax law’s close connection with the diversity of taxpayers’ life experiences? Perhaps Judge Holmes needs to be reminded that he is paid to decide tax issues faced by all taxpayers and not only those with whom he feels comfortable.

And if anyone were leading the Tax Court into the culture wars in this case, as Judge Holmes suggests, it would be the dissenters. Judge Halpern notes in his concurring opinion that the dissenters “raise arguments in support of respondent that he did not make,” and he takes a slap at those arguments:

Clearly the issues before us are important to respondent. His opening brief is 209 pages long, and his answering brief is 72 pages long. Between them, the two briefs show a total of eight attorneys assisting the Chief Counsel, in whose name the briefs are filed. I assume that respondent made all the arguments that he thought persuasive.

In meting out criticism of the dissenters, Judge Halpern reserves his harshest words for Judge Foley’s opinion, which was joined by four other judges.

12Id. at 82 (Holmes, J., concurring). Judge Holmes seems to be unaware of the significant critical tax literature that does touch on issues related to the culture wars. See Critical Tax Theory: An Introduction (Infanti and Crawford eds., Cambridge University Press, 2009).

13Id. at 82 (Holmes, J., concurring).

14See Welch v. Helvering, 290 U.S. 111, 115 (1933). (“The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.”) Indeed, I have always found that one of the most attractive and interesting features of the tax law is that it exposes me to a variety of business, financial, and personal settings.

15Judge Holmes should heed the spirit of the advice that he gives the IRS in this case: “It is not effective advocacy to denigrate the people whose government one is representing.” O’Donnabhain, 134 T.C. No. 4, at 90 n.3 (Holmes, J., concurring). Similarly, it is not good judging to denigrate the taxpayers who come before, and fund the operations of, the Tax Court.

16Id. at 71 (Halpern, J., concurring).

17Id. at 71 n.1.

18Judge Foley concurred with the majority’s disallowance of a deduction for the expenses related to the taxpayer’s breast augmentation, but disagreed with the reasoning supporting that (Footnote continued on next page.)
who unabashedly accuses the majority of judicial activ-

ism, adopts an interpretation of the definition of cos-
metic surgery in section 213(d)(9) that deforms the plain
language of a relatively uncomplicated statutory provi-
sion. Judge Halpern accuses Judge Foley of “simply
disregarding[ing] the rules of grammar and logic in favor of
a part of the legislative history that is silent as to the
interpretative question he fashions.” It seems that Judge
Halpern has tarred Judge Foley with his own brush.

 Nonetheless, of all of the opinions in this case, I found
Judge Gustafson’s to be the most disturbing because it
demonstrates how the medicalization and pathologiza-
gion of gender identity can be manipulated to advance
stereotypical and biased views of transgender individ-
uals. In arguing that none of O’Donnabhain’s expenses
should be allowed as a deduction under section 213,
Judge Gustafson demonstrates a thinly veiled hostility
toward the patient, arising from what appear to be his precon-
ceived notions about transgender individuals. In his
opinion, Judge Gustafson only grudgingly refers to
O’Donnabhain as female: “Consistent with petitioner’s
preference, I use feminine pronouns to refer to petitioner
in her post-SRS state. However, this convention does not
reflect a conclusion that petitioner’s sex has changed
from male to female.” This latter sentence is little more
than an unseemly, gratuitous gibe.

 As Judge Halpern points out, “Judge Gustafson can-
not fathom that someone with a healthy male body who
believes he is female is not sick of mind.” It is worth
quoting Judge Gustafson at length to get a flavor of his
opinion:

 The medical consensus as described in the record of
this case . . . can be reconciled only with option 1:
Petitioner’s male body was healthy, and his mind
was disordered in its female self-perception. GID is
in the jurisdiction of the psychiatric profession —
the doctors of the mind — and is listed in that
profession’s definitive catalog of “Mental Disor-
ders.” When a patient presents with a healthy male
body and a professed subjective sense of being
female, the medical profession does not treat his
body as an anomaly, as if it were infected by the
disease of an alien maleness. Rather, his male body
is taken as a given, and the patient becomes a
psychiatric patient because of his disordered feel-
ing that he is female. The majority concludes that
GID is a “serious mental disorder” — i.e., a disease
in petitioner’s mind — and I accept that conclusion.

 A procedure that changes the patient’s healthy male
body (in fact, that disables his healthy male body)
and leaves his mind unchanged (i.e., with the
continuing misperception that he is female) has not
treated his mental disease. On the contrary, that
procedure has given up on the mental disease, has
capitulated to the mental disease, has arguably
even changed sides and joined forces with the
mental disease. In any event, the procedure did not
(in the words of Hovey v. Commissioner, 12 T.C. at
412) “bear directly on the ** condition in ques-
tion,” did not “deal with” the disease (per Web-
ner’s), did not “treat” the mental disease that the
therapist diagnosed. Rather, the procedure changed
only petitioner’s healthy body and undertook to
“mitigate[el]” the effects of the mental disease.

 In this passage, Judge Gustafson seems to be displace-
ning O’Donnabhain’s own sense of self — not to mention
the judgment of her doctors — and substituting for it his
own preconceived notions about her condition. Because
there was nothing “objectively” wrong with
O’Donnabhain’s male body, Judge Gustafson believes
that she must have merely been suffering from a delu-
sion, as he suggests in an earlier footnote. Thus, instead
of being permitted to undergo surgery that would allow
O’Donnabhain to become “content with [her] delu-
sion,” she presumably should have been forced to
undergo therapy designed to make her content with the
male body that Judge Gustafson deems to have been
more than satisfactory. His disdainful opinion stands in
stark contrast to Judge Gale’s cautious opinion and
remarkable efforts to appear detached and impartial
in this case.

 In the end, O’Donnabhain walked out of the Tax Court
with a qualified win, having obtained a decision allowing
a deduction for at least a portion of her expenses under
section 213. However, with a majority that treaded ever
so cautiously out of an apparent fear of being accused of
judicial activism, and dissenters who shamelessly at-
tempted to foist activist readings of the statute onto the
court, it will be difficult for LGBT taxpayers to walk away
from reading these opinions harboring any hope that
they will get a hearing in the Tax Court that is unaffected
by their sexual orientation or gender identity.

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**VIEWPOINTS**

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19ld. at 111 n.1 (Foley, J., concurring in part and dissent-
ing in part). He presumably dissented from the remainder of
the majority opinion.

20 ld. at 111. (“In allowing deductions relating to petitioner’s
expenses, the majority has performed, on congressional intent,
interpretive surgery even more extensive than the surgical
procedures at issue — and respondent has dutifully assisted.
This judicial transformation of section 213(d)(9) is more than
cosmetic.”)

21Compare, e.g., section 213(d)(9)(B) (defining cosmetic sur-
gery), with section 304 (governing the tax treatment of redemp-
tions through affiliated corporations).

22O’Donnabhain, 134 T.C. No. 4, at 79 (Halpern, J., concur-
ring).

23ld. at 119 n.2 (Gustafson, J., concurring in part and dissent-
ing in part).

24ld. at 137-138 (Gustafson, J., concurring in part and dissent-
ing in part) (citation omitted).

25ld. at 132 n.9.

26ld.