

## Exceptional Expenses

### Reduction of formal obligations of proof for the recognition of medical expenses

The German Bundesfinanzhof (Federal Finance Court), by way of its rulings of November 11, 2010, VI R 17/09 (DStR 2011, 115) and VI R 18/09 (not published), has changed its long-standing case-law concerning the **formal obligations of proof** with regard to tax-deductibility of medical expenses as exceptional expenses.

Formerly, medical expenses were approved for tax purposes as exceptional expenses only if the medical necessity of treatment was proven via a **prior assessment by a public health officer** (Amtsarzt). Henceforth, approval for tax purposes will no more be refused solely and alone on the grounds of a missing prior assessment.

Proof of existing medical expenses can now be undertaken by **all** procedurally permissible means of evidence, whereby there are no separate formal or time requirements. That means that an **assessment by an independent medical officer** (Vertrauensarzt) (for example a general practitioner (Hausarzt)) can suffice as proof of the medical necessity of a treatment.

#### Take note:

An assessment by an independent medical officer, in finance court proceedings, does generally **not carry the same evidentiary value** as a prior assessment by a public health officer. The Bundesfinanzhof has explicitly pointed out that an assessment by an independent medical officer must be regarded solely as a so-called **argument by a party** with restricted evidentiary value.

In case a prior assessment by a public health officer has not been presented to the court, the financial court will regularly call in a court-appointed expert. Since the taxable person is still under the obligation to **prove** the medical necessity of the treatment to the satisfaction of the court, they also carry the risk that, potentially, the expert might not be able to reliably assert the medical indication for the contentious treatment - e. g. a dolphin therapy - in retrospect. In such cases, the respective medical expenses will not be recognized as exceptional expenses; a tax deduction is hence **ruled out**.

As such, a prior assessment by a public health officer is still **advisable**. The safest way to clarify the medical necessity of medical expenses in a **legally reliable** manner is to conduct independent evidentiary proceedings. This, however, will incur additional costs. Such evidentiary proceedings can assert the medical necessity in a legally reliable manner before proceedings and irrespective of those proceedings. The duration of such proceedings is short, yet expensive, since all costs for the expert must be paid in advance.

Whoever cannot decide in favor of this safest procedure, should, especially in consultation with the attending physician, make sure that all documentation for medical necessity is extensive and well supported by evidence.

The changed case-law, in principle, is effective **immediately**. As far as medical costs have been expended in 2010, these can be applied toward the income tax return for **2010**.

At present, however, the reaction of the tax authorities to the changed case law of the Bundesfinanzhof is not yet predictable. In particular, it remains open to question, what the requirements will be with regard to the contents of an assessment by a public health officer. **Tax approval will depend heavily on the respective circumstances of each individual case.**

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