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Tax Implications on the Sale of Eggs Should the Sale of Eggs be Taxed or Merit Preferred Tax Status?

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May 2, 2015

Tax Implications on the Sale of Eggs,
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TABLE OF CONTENTS

INTRODUCTION.....	1
I. EGG DONATION HISTORY AND PROCESS.....	3
A. Egg Donation: Contract and Compensation.....	8
II. TAXATION OF THE INDIVIDUAL INCOME.....	11
A. Categorization of the Human Body as Property.....	13
B. Blood and Breast Milk.....	14
C. Taxing Human Gametes.....	16
D. Exploration of the Body as a Capital Asset.....	17
III. TAX AVOIDANCE.....	19
A. Section 104(a)(2) Loophole.....	20
1. Current Landmark Decision.....	20
B. Cost Sharing Basis, Bartering.....	24
C. Implications on Transferability.....	25
IV. SECTION 213, A “LIMITED EXCEPTION” FOR RECIPIENTS, A PROPOSAL FOR DONOR TAX PREFERECE.....	28
CONCLUSION.....	30

INTRODUCTION

The egg donation process is a mechanism that has created an alternative for infertile mothers.¹ The process of egg donation is strenuous and intrusive in nature. Yet, a majority of donors seem enticed to donate for the high compensation that follows.² In light of this compensation, there is a presumption that there is nothing quite donative about the process. Instead, the process is really a big market boom. Contracts are in place to enforce the rights of the donors, recipients and the agencies that group the two together. To answer the question of whether the sale of eggs should be taxable raises the question of what constitutes taxable gross income. Section 61³ defines income as income from whatever source derived. Section 61⁴ includes a non-exhaustive list of things that should be taxed; amongst them is gain from dealings with property. A property categorization although still taxable lends itself to the possibility of deductions and tax preferences. However, categorizing the body as property requires determining a worth in order to obtain a means to tax gain. It is my position that no good will come from categorizing eggs as property and that the sale of eggs constitutes a performance of a service. The donation of eggs is a highly profitable consensual service, thereby, lacking merit of any taxable exclusion or deduction. Tax avoidance mechanisms have been correctly refuted and

¹ Tony Nitty, “New Ruling: IRS “Can Tax Payments To Egg Donors As Income,” Forbes, (accessed 3/2/15), <http://www.forbes.com/sites/anthonymitti/2015/01/22/tax-court-amounts-received-by-egg-donor-are-taxable-income/>

² Id.

³ 26 U.S.C. § 61

⁴ Id.

only through a restructuring of section 213,⁵ is it possible to balance a fair benefit to both parties involved and stabilize the egg market.

Part One of this paper provides important background information into the history of egg donation as a recent phenomenon in the world of assisted reproduction. It outlines the egg donation process, with an emphasis on the medical procedure aspect involved with egg donation, the regulatory mediums, contract formation and compensation. After building a foundation of what the egg donation process encompasses, compensation is examined in Part Two as individual income. Section 61⁶ controls the definition of individual income; the all-inclusive language of the statute reveals that the proceeds deriving from the sale of eggs is taxable. Although this examination alone solves the question of whether eggs should be taxed, the subsequent question arises whether egg taxation implicates the sale of property. A property categorization of property allows for deductions and involves forming a basis on the worth of the body. This issue has notably become a difficult question that has not been fully examined. The lack of precedent in property categorization for eggs leads to an examination of court rulings on other bodily components such as blood and breast milk. Conjunctively, human gametes are examined for property treatment in other legal related matters. Under the light of property treatment, eggs are assessed for the potential of being categorized as a capital asset subject to further tax preferential treatment. Although categorizing eggs as property seems desirable for deductions, Part Three of this paper examines how both methods of compensation for egg donors

⁵ 26 U.S.C. § 213

⁶ Supra note 3

try to avoid taxes. Tax avoidance is examined through bartering and section 104⁷ which ultimately gained the interest of the tax court in a landmark decision this year. Further, complications of eggs as property are incurred when eggs are valued for purposes of transferability since eggs could be doubly taxed on transfer if their value exceeds estate or gift caps. Clearly there seems to be no way for egg donors to escape taxation and the property categorization poses more complications than benefits. However, under Part Four, section 213⁸ is discussed as one that provides tax benefits to applicable recipients. Under the current framework of section 213,⁹ a proposal is made that would create a balance in the taxation benefit and regulate an existing exploited market.

I. EGG DONATION: PROCESS AND HISTORY

The egg donation market targets women in their 30's and 40's who have procreation problems, including not producing enough normal eggs, malfunctioning ovaries, experiencing menopause early, and producing less readily or poor quality eggs.¹⁰ Prior to 1984, an infertile woman's only choice was adoption.¹¹ In July of 1983, the UCLA School of Medicine performed the first transfer of a fertilized egg from one human to another resulting in pregnancy.¹² On

⁷ 26 U.S.C. § 104

⁸ Supra note 5

⁹ Id.

¹⁰ New York State Task Force on Life and the Law and Advisory Group on Assisted Reproductive Technologies, "Thinking of Becoming an Egg Donor?," Health New York, (accessed 4/22/15), <https://www.health.ny.gov/publications/1127.pdf>

¹¹ IRMS Reproductive Medicine at Saint Barnabas, "A little history of Egg Donation...," Advanced IVF and Egg Donation in New Jersey, (accessed 5/1/15), <http://www.sbivf.com/egg-donation/>

¹² Id.

February 3, 1984, the first egg donation produced human was born.¹³ This change in reproductive technology gave rise to a new mechanism for infertile women to become pregnant. This mechanism afforded women the experience of carrying a child and giving birth. The market of egg donations created a unique situation where the recipient would be the birth mother but not the genetic mother.¹⁴ Perhaps this allowed for a more intimate connection to be built at the outset from carrying a child instead of obtaining a child by adoption. The Center for Disease Control in the United States has recorded 47,000 live births to date via this mechanism.¹⁵

In this process, the egg donation companies and egg brokers aggressively pursue donors to fill their donor database to appear expansive for their prospective clients. Egg donation companies promise to cover all medical expenses and provide all the medical treatment and usually compensate less than the price limitations set by the American Society for Reproductive Technology.¹⁶ Brokers, on the other hand, do not cover the associated medical expenses and offer illusive high amounts for donors with desired traits.¹⁷ Both lure their prospective donors with the idea of compensation for a good deed. Since one of the many desired traits is intelligence, ads are often placed in Ivy League schools.¹⁸ Ads also appear online to reach a

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Egg Donation, Inc., “Medical Information,” Egg Donation, Inc., (accessed 2/27/15), <https://www.eggdonor.com/donors/medical-information/>

¹⁷ See NYS Task Force on Life and Law, *supra* note 10

¹⁸ Melinda Henneberger, “The ultimate Easter egg hunt: ‘Ivy League couple’ seeks donor with ‘highest scores’,” Washington Post, (accessed 4/2/15), <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/03/21/the-ultimate-easter-egg-hunt-ivy-league-couple-seeks-donor-with-highest-percentile-scores/>

widespread audience and curiously enough, ads can appear as a result of a web search inquiring about getting out of debt by egg donation.

Companies such as Egg Donation, Inc., and Growing Generations through their websites provide informative overviews of the step by step process of egg donations. These companies attempt to provide an unbiased interpretation of the process similar to the one described by the New York Department of Health's handbook "Thinking of Becoming an Egg Donor."¹⁹ In order to become an egg donor, a woman needs to be a 21-32 year old nonsmoker with no history of cancer, infertility or mental disorders.²⁰ The reasoning for the lower age requirement is based on the age one can be legally bound to a contract and the upper limit reflects the fact that older women do not respond well to fertility drugs.²¹ If selected, an applicant hoping to become an egg donor will be interviewed over the telephone and assigned to fill out a formal application.²² Guidelines have been put in place by the American Society for Reproductive Medicine suggesting that a woman should not donate her eggs if she has a serious psychological disorder, abuses drugs or alcohol, uses psychoactive medicines, has significant stress, is in an unstable relationship, has been physically abused, or is not capable of understanding the process.²³ In an effort to comply with these guidelines, if an applicant is chosen to move along in the process, she will undergo medical screening involving a pelvic exam, blood tests and an ultrasound.²⁴

¹⁹ See NYS Task Force on Life and Law, *supra* note 10

²⁰ *Id.*

²¹ Egg Donation, Inc., "Educational Information," Egg Donation Inc., (accessed 2/27/15) <https://www.eggdonor.com/donors/educational-information/>

²² *Id.*

²³ A.S.M.R., "Third-party Reproduction: Sperm, egg, and embryo donation and surrogacy," A.S.M.R., (accessed 4/14/15), https://www.asrm.org/BOOKLET_Third-party_Reproduction/

²⁴ Egg Donation Inc., *supra* note 21

Different programs will conduct unannounced drug tests during the screening and donation process.²⁵ The psychological examination requires egg donors to confront complex ethical, emotional, and social issues in order to make a determination that the donor is mentally fit and understands the nature of her current actions.²⁶ If a donor is rejected, the reasoning behind the rejection will not be revealed to spare the person any hard feelings.²⁷

If a donor passes the aforementioned tests, she will be placed on a company's website for the view of all interested recipients.²⁸ Although the donor's identity will not be given, important information of the donor will be on display.²⁹ Recipients usually seek donors with matching looks and some require that donors undergo an intelligence test.³⁰ Donors may have essays on file that allow recipients a broader analysis of who their donor is. If a donor is selected by a recipient, the agency will reach out to the donor and begin the procedure.³¹

The procedure begins with the donor receiving medication to halt her ovaries from normal function which allows control over the donor's response to fertility drugs.³² Medications, in the form of vaccines to be injected under the skin into the muscle, are provided for home

²⁵ Growing Generations Inc., "The Egg Donation Process," Growing Generations Inc., (accessed 3/11/15), <http://www.growinggenerations.com/egg-donor-program/egg-donors/program-overview/>

²⁶ Egg Donation Inc., *supra* note 21

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Richard Sherbahn, M.D., "How to Choose an Egg Donor," Advanced Fertility Center of Chicago, (accessed 4/2/15), <http://www.advancedfertility.com/egg-donor-matching.htm>

³¹ Shady Grove Fertility, "3 Tips to Make Your Donor Profile Shine," Shady Grove Fertility, (accessed 4/2/15), <http://www.shadygrovefertility.com/3-tips-make-your-donor-profile-shine>

³² Egg Donation Inc., *supra* note 21

administration for a period of three weeks.³³ The drugs parallel hormones but in much higher doses and are meant to stimulate egg production.³⁴ The medications cause hot flashes, fatigue, sleep problems, vaginal dryness, mood swings, vision problems, soreness, redness, bruising, tender breasts, fluid retention, ovarian hyper stimulation syndrome, blood clots, kidney failure, built up fluid in the lungs, and shock.³⁵ Progress will be monitored via frequent blood tests and ultrasounds. When the time is right, the donor will receive one final injection to prepare for retrieval.³⁶ Removing the eggs involves a minor surgical procedure lasting 30 minutes called transvaginal ovarian aspiration.³⁷ Using suction, the egg and liquid inside each follicle are removed.³⁸ After the procedure, the donor will be under sedatives and painkillers and is required to return to the clinic for one or two checkups and to meet with a counselor.³⁹

The formalities of the medical practice require that a doctor obtain informed consent before treating the donor.⁴⁰ Before giving informed consent, it is recommended that a donor must understand what is involved in the procedure, what is generally accepted as safe by fertility specialists, innovative techniques, the program's expertise, and risk of all medications and procedures.⁴¹ Women may undergo this procedure more than once, however companies are reluctant to allow a woman to undergo many procedures since the long term impact is still unknown. The American Society for Reproductive Medicine and State Health Department limits

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ Id.

⁴⁰ See NYS Task Force on Life and Law, *supra* note 10

⁴¹ Id.

the number of children created by the same donor to prevent genetic half siblings from having relationships and potential offspring. There has been a recent movement for registries on a national and international level to prevent these unwanted occurrences.⁴²

A. Egg Donation: Contracts and Compensation

Two contracts are in place when it comes to egg donations. The initial contract is the one established by the program and entered into by the donor.⁴³ This contract details the donor's responsibilities and those of the program.⁴⁴ A donor may be required to meet with a program lawyer to have the contract explained. However, since the lawyer is hired by the program, a donor may also seek independent legal advice.⁴⁵ Most contracts have a confidentiality clause expressing how much information the recipient will know about the donor.⁴⁶ If the donation results in the birth of a baby, the program needs to keep certain information about the donor on file by state law.⁴⁷ The information released to the child will be limited by the donor's consent.⁴⁸ The second contract is one between the donor and the recipient of the egg and it details parental rights and responsibilities liberating the donor from any legal and financial responsibility over

⁴² Naomi R. Cahn, G.W. Law Scholarly Commons, "Necessary Subjects: The Need for Mandatory National Donor Gamete Registry," GWU Legal Studies Research Paper No.: 402 (2008)

⁴³ Reproductive Law Center, "Explain how and egg donation agreement is prepared," Reproductive Law Center, (accessed 3/17/15) http://www.rlcd.com/egg_donation_faqs.html

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.

the child.⁴⁹ The contract will be evidence of the recipient's clear intent to become the legal parent.⁵⁰

Egg donations can be charitable, although they only represent a small portion of the market as a whole. A typical type of charitable egg donation derives from the "known" donors who are usually helping friends of the family.⁵¹ The state places limitations on "known" donors precluding them from donating to their bosses due to a presumption of undue influence.⁵² "Known" donors face expected complexities based on a possible change in relationship status with the recipient and with the child. The state requires "known" donors to undergo the same medical and psychological screening as an anonymous donor.⁵³

There are two types of compensation for egg donors. One method involves a monetary compensation and the other involves a cost sharing mechanism.⁵⁴ Monetary compensation is said to be for the donor's time and inconvenience of going through the treatment. An egg donor's compensation may also include reimbursement for missed wages, travel expenses, communication expenses, gasoline and childcare.⁵⁵ The American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology state that the payments to

⁴⁹ Id.

⁵⁰ Id.

⁵¹ I.H.R., "For Recipients: Working With a Known Egg Donor," I.H.R., (accessed 4/2/15), <http://www.ihr.com/infertility/egg-donation/working-with-known-egg-donor.html>

⁵² Shady Grove Fertility, "Using a Known Egg Donor," Shady Grove Fertility, (accessed 4/2/15), http://www.shadygrovefertility.com/donor_ask

⁵³ Id.

⁵⁴ A.S.R.M., "Financial compensation for oocyte donors," A.S.R.M., (accessed 3/15/15) [https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/financial_incentives.pdf\(2007\)](https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/financial_incentives.pdf(2007))

⁵⁵ I.H.R., "Egg Donor Payment, I.H.R., (accessed 4/2/15)," <https://www.ihr.com/infertility/egg-donation/for-egg-donors/egg-donor-compensation-pay.html>

donors in excess of \$5,000 require justification and sums above \$10,000 are not considered ethical.⁵⁶ A survey conducted in 2004 by the Centers for Disease Control reveals that 94% of donors do it for monetary compensation.⁵⁷ By 2010, clinics offered as much as \$8,000 and individuals offered as much as \$50,000.⁵⁸

Monetary compensation is traditionally provided to a donor who provides for a single recipient. However, efforts to make this procedure affordable have led many recipients to enter “shared egg donor” programs.⁵⁹ These types of programs involve a process where various recipients agree to use the same donor for a total savings of up to 50%.⁶⁰ Recipients pay a set fee and are allowed to undergo up to six in vitro cycle treatments with a 100% money back guarantee if a baby is not delivered.⁶¹ Although this guarantee incentive affects the price for the recipient, it has no bearing on donor compensation. However, these programs are in fact beneficial to donors since prior to recipient selection, a donor only receives partial compensation, and via this process the likelihood of selection and full compensation is accelerated. Further, the higher the success rate a donor has, the more she is worth on a successive donation.

The cost sharing mechanism is one involving an exchange where a woman donates her eggs to receive a 50%-60% reduced cost in in vitro fertilization.⁶² Since this process implicates

⁵⁶ Id.

⁵⁷ A.S.M.R., *supra* note 54

⁵⁸ Id. and Clara Moskowitz “egg donors offered up to \$50, 000,” NBC News, (accessed 3/30/15), http://www.nbcnews.com/id/36057566/ns/health-womens_health/t/egg-donors-offered/

⁵⁹ Shady Grove Fertility “Shared Egg Donor,” Shady Grove Fertility, (accessed 4/3/15), <http://www.shadygrovefertility.com/shared-donor-egg>

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

the donation of eggs for the treatment of others, donors will be subjected to the same scrutiny in screening that a donor will endure in donating.⁶³ Ethical concerns regarding high payments can lead to the presumption of undue inducement for those in financial need.⁶⁴ A woman may be prone to lying about medical concerns to become a donor. Also a donor who could not afford in vitro fertilization may agree to cost sharing out of necessity without understanding the involved implications.

II. TAXATION OF THE INDIVIDUAL INCOME

The power of taxation derives from the United States Constitution; Article I Section 8 gives power to lay and collect taxes. Section 1 of the Code imposes tax on all taxable income.⁶⁵ The 16th Amendment of the United States Constitution gives congress the power to lay and collect taxes on income from whatever source derived without apportionment among several states and without regard to any census. Taxation on the income that is acquired through the sale of eggs is clear and unavoidable. However, ambiguity in tax treatment presents itself when the income from the sale of eggs is categorized as profits deriving from dealings with property and the transaction is one involving a trade or business subject to gain calculations and deductions.

Section 61(a)⁶⁶ of the Code defines gross income as all income from whatever source derived including but not limited to fifteen enumerated items. At issue for the sale of eggs we

⁶³ Human Fertilization & Embryology Authority, “Egg Donation and Egg Sharing,” Human Fertilization & Embryology Authority, (accessed 4/1/15), <http://www.hfea.gov.uk/egg-donation-and-egg-sharing.html>”

⁶⁴ Id.

⁶⁵ 26 U.S.C § 1

⁶⁶ 26 U.S.C. § 61(a)

examine enumeration three referring to “gains derived from dealings in property.”⁶⁷ Section 62⁶⁸ of the Code states that adjusted gross income is gross income minus a series of applicable expense deductions that applies to individuals engaged in carrying on a trade or business. Section 63(a)⁶⁹ of the Code defines taxable income as gross income minus the deductions. Under the sections of the Code, an egg donor who categorizes her donation as property should recognize her compensation as taxable income. Alternatively, if the gain is one that does not derive from property, it should then fall under the inclusive language of Section 61(a)⁷⁰.

Having settled the fact that under Section 61(a)⁷¹ tax avoidance is not possible, other tax implications are considered if the taxpayer is in fact engaged in a trade or business. If so, the taxpayer’s income should benefit by the applicable deductions and her tax should be measured by the difference signaling her total gain. Gain from the sale of property is discussed by the Code in Section 1001(a)⁷² defining it as the excess of the amount realized from the sale of property over the adjusted basis. The basis of any property is the cost of such property as defined by the Code in Section 1012(a).⁷³ The amount realized is computed by 1001(b)⁷⁴ as the amount realized from the sale of the property plus the fair market value of the property. The issue with the sale of eggs is it is difficult to determine expenses or gain without an established basis. Basis provides the starting point for any taxable computation and since a woman basis in this case is

⁶⁷ 26 U.S.C. § 61(a)(3)

⁶⁸ 26 U.S.C. § 62

⁶⁹ 26 U.S.C. § 63(a)

⁷⁰ supra note 66

⁷¹ Id.

⁷² 26 U.S.C. § 101(a)

⁷³ 26 U.S.C. § 1012(a)

⁷⁴ 26 U.S.C. § 1001(b)

self-created, it is fair to compute her basis to be zero.⁷⁵ An argument can be made that the property in the sale of eggs is created by the mere fact of existing and remaining in a healthy state of egg production. Expenses such as nutrition, gym membership and vitamins can be said to be deductions to the compensation for the egg donation. However this line of reasoning would be inconsistent with the solid tax principle that personal expenses are not deductible and that a deduction as per section 162 of the Code need to be ordinary and necessary expenses incurred during the year.⁷⁶

A. Categorization of the Human Body as Property

As outlined above, vast considerations come in place if the body is deemed to be property. Tax courts understanding the troublesome analysis that such determination would create have craftily avoided the categorization. Factors such as illegality, intrusiveness in extraction, concerns of undue influence, and amount of compensation are among the many factors the court addressed in evading the underlying property question.⁷⁷ Organs have clearly been established to be illegal to sell or purchase. The reasoning behind such ban is the possibility of an open market of criminality that such allowance could create. Therefore tax implications on the sale of organs are not applicable. Other bodily components such as blood and breast milk are allowed to be sold or purchased.⁷⁸ Unlike organs, the extraction of either is said to be less intrusive and does not leave long lasting effects on the human body.⁷⁹ Tax

⁷⁵ Bridget J. Crawford, “Our Bodies, Our (Tax) Selves,” 31 Va. Tax Rev. 695 (Spring 2012)

⁷⁶ 26 U.S.C. § 162

⁷⁷ Bridget J. Crawford, *supra* see note 75

⁷⁸ Id.

⁷⁹ Id.

implications for both have not been clear.⁸⁰ Courts have resorted to the analysis of these components to decide whether the sale of eggs constitutes property.⁸¹

B. Blood and Breast Milk

Blood seems to largely derive from donors that do not receive compensation and if they do, the compensation for tax purposes is said to be *de minimis*, too trivial or too minor to merit consideration.⁸² Blood is not analogous to organs and does not raise a concern about undue influence or the consensual autonomous decision of one's body.⁸³ The concept of donating blood is analogous to the rendering of a personal service by the donor rather than a contribution of property. The *de minimis* analysis of blood changes when blood is extracted for the purpose of obtaining plasma. Plasma is used to develop medicines to treat certain types of disorders, this treatment is said to be a six billion dollar business.⁸⁴ When considering the commercial purpose and the compensation where the donor receives \$250 per donation, such donation is compensation that needs to be reported.⁸⁵

The cases involving the sale of plasma did not lay out an inclusive framework for property sale categorization. However, in conjunction they provided precedent for factors such as size and quality that would lead a court to develop a property sale categorization. *Green v. Commissioner* involved the sale of plasma for compensation.⁸⁶ The taxpayer was paid by the

⁸⁰ *Id.*

⁸¹ *Perez v. Commissioner*, 144 T.C.No. 4(January 22, 2015)

⁸² *Green v. Commissioner*, 74 T.C. 1229(1980)

⁸³ *Id.* at 1230

⁸⁴ *Id.*

⁸⁵ *Id.* at 1233

⁸⁶ *supra* note 82

pint and the court found the donor to be engaged in the sale of tangible property rather than the performance of services.⁸⁷ *United States v. Garber* also involving the sale of plasma for compensation, the Fifth Circuit found the donor to be engaged in the sale of property because the extent of the donor's compensation was directly related to the concentration of antibodies in the plasma the donor produced.⁸⁸ The court acknowledged the donor underwent a strenuous process to donate the plasma that could have rendered the donation as a service.⁸⁹ However, the court felt no need to solve this puzzle and instead decided on the ground that criminal prosecution for tax evasion was an inappropriate vehicle for pioneering interpretations of tax law.⁹⁰ Against the umbrella precedent of *Green* and *Garber*, the sale of eggs could never constitute the sale of property since the compensation of eggs is not dependent on size or quality.

Breast milk, on the other hand, has been considered property by I.R.S General Counsel Memorandum taking into account that breast milk "is commodity whether from a human being or a cow."⁹¹ Breast milk could be owned or possessed; it is tangible, transferable and replenishable to an existing commercial market.⁹² Under this precedent, the sale of eggs can receive the sale of property categorization. Like breast milk, it can be argued that eggs are tangible and transferable even if it requires medical intervention. Eggs are not exactly replenishable but a woman produces an egg every month and is born with one or two million

⁸⁷ *Id.* at 1235

⁸⁸ *United States v. Garber*, 589 F.2d 843 (5th Cir. 1979)

⁸⁹ *Id.* at 846

⁹⁰ *Id.*

⁹¹ I.R.S. Gen Couns. Mem. (September 15, 1975)

⁹² *Id.*

immature eggs which seem plentiful.⁹³ Lastly, undisputedly the egg market has grown to a size that can be classified as commercial.

C. Taxing Human Gametes

Further ambiguity in the search for the body as possible taxable property relates to the sale of human gametes. Sperm appears to be less controversial since its availability is abundant and method of donation is less intrusive and does not have any long term effects.⁹⁴ However, eggs propose a challenge in that unlike sperm, the method is intrusive and it has long term lasting health effects.⁹⁵ There seems to be a falsehood that egg donation is an altruistic act but evidentially in a new world of reproductive advancements involving egg banks and surrogacy, egg donation may in fact be profit driven.⁹⁶ The market for a particular egg donor can range somewhere between \$3,500 and \$50,000.⁹⁷ There is a legal deference guaranteed by our constitution for individuals to make their own reproductive decisions that derives from rights that protect liberty and privacy.⁹⁸ Prior to a landmark Perez decision this year, courts never made the attempt to discuss the categorization of gametes as property. However, the disposition of gametes displays some property-like treatment from other courts. In *Hetch v. Kane*, the court declined the analysis of whether gametes were property but found an interest in the nature of

⁹³Sierra Falter, “Go ask Alice,” Columbia Health, (accessed 4/1/15), <http://goaskalice.columbia.edu/women-and-their-eggs-how-many-and-how-long>

⁹⁴ Bridget J. Crawford, *supra* note 75

⁹⁵ *Id.*

⁹⁶ Care Fertility, “IVF Treatment with donor eggs and embryos,” Care Fertility, (accessed 4/1/15), <http://www.carefertility.com/donation-programme-sc3/treatment-using-donor-eggs-amp-embryos-sj2/>

⁹⁷ A Perfect Match, “Is this egg worth \$50,000?,” A perfect Match, (accessed 3/30/15), <http://www.aperfectmatch.com/selfarticle.pdf>

⁹⁸ Bridget J. Crawford, *supra* see note 75

ownership that allowed for freedom of disposition. Following *Hecht v. Kane*⁹⁹ in *Kievernangel v. Kievernangel*, the court did not focus on the property aspect of it in analyzing the disposition of the gamete, but rather reasoned that the person's intent controlled the disposition, thereby treating sperm as a sort of quasi-property to be disposed of in a lifetime contract.¹⁰⁰ In light of comparing gametes to other property, it can arguably be concluded that gametes are actual property.

D. Exploration of the Body as a Capital Asset

Eggs stand a tough burden to overcome under the analysis provided by the Green and Garber courts for property sale categorization. However, the General Counsel Memorandum in its analysis of breast milk as property allows for an opposite argument to be made. The Federal Income Tax Code allows for those who are engaged in a trade or business who sell their property to receive a preferred tax treatment which allows the gain derived from such sale to be taxed at a lower rate of 15%. Subsequent questions rise such as: if the body is in fact property, then for taxation purposes what type of property is it? Can the body be categorized as a capital asset subject to preferential reduced treatment under the Code?

Section 1221(a)¹⁰¹ defines a capital asset as property held by the taxpayer connected with his business or profession that is not inventory, depreciable, business real estate, accounts receivable, copyrights or works of art. In order to receive capital asset status, the first prong

⁹⁹ *Hecht v. Kane*, 20 Cal. Rept. 2d 275(Cal. App. 4th 1993)

¹⁰⁰ *Kievernangel v. Kievernangel*, 83 Cal. Repr. 3d 311(Cal. App. 7th 1993)

¹⁰¹ 26 U.S.C. § 1221(a)

under section 1221¹⁰² requires us to determine if the sale of eggs is a business. In *Mauldin v. Commissioner*,¹⁰³ the court provided a set of determinative factors to establish if someone is engaged in a trade or business. The court looks at the business for which the property was acquired, whether it was for a sale, and frequency of sales as opposed to isolated transactions. Applying this factor analysis to the sale of eggs is challenging since eggs are not acquired property and a woman is born with all the eggs she will ever produce. However, since a woman may donate various times, it can be concluded that there is a certain frequency. In engaging in the same analysis, the court in *Malat v. Riddell*¹⁰⁴ instead focused on the purpose for which the property is held. Under this switch, an argument is made that a woman could be maintaining and up keeping her body for the purpose of making it into a business. This is a difficult argument to make since a woman has to maintain the upkeep of her body in order to survive, despite her intention to use it as a business.

Notably, the categorization of the body as property allows for various considerations that essentially opens Pandora's Box. Difficulties such as the capital asset analysis demonstrate one of the many considerations that courts will face following a determination that the body is in fact property. The small amount of precedent clearly displays reluctance in making that categorization and one could assume that this derives from the implications that will follow. The body may in fact be property thus eligible for preferred status and/or deductions yet regardless of the categorization, it is taxable as income based on any gains that derive therefrom.

¹⁰² 26 U.S.C. § 1221

¹⁰³ *Mauldin v. Commissioner*, 195 F.2d 714(10th Cir. 1952)

¹⁰⁴ *Malat v. Riddell*, 83 U.S. 569(1966)

III. TAX AVOIDANCE

Efforts from many angles are made in order to avoid taxation on the sale of eggs. Attention on such avoidance gained responsive insight from the court earlier this year through the landmark decision in Perez¹⁰⁵. Attempts to avoid taxation derive through the two methods available for compensation. Through the monetary compensation method, contracts have been unsuccessfully manipulated to fit under the section 104¹⁰⁶ umbrella disguising the compensation as one acquired for pain and suffering rather than the performance of a service or sale of property. The cost shared basis method of compensation has also intended to evade taxation, perhaps more successfully since the exchange only discounts the price of the procedure, yet the tax code is clear in that bartering amounts to an exchange of money. As outlined above, the property categorization does not avoid taxes for a taxpayer but it does allow for a preferred tax status. Yet, under the light of tax avoidance the property categorization for purposes of transferability is not beneficial and likely not desired since it may be excessive under the statutory tax caps and thereby taxable on the excess. Section 213¹⁰⁷ provides relief for eligible recipient taxpayers whose medical expenses in acquiring an egg donor amount to a significant portion of their pay. It is my position that section 213¹⁰⁸ allows for a quid pro quo system to be put in place that would allow a fair quid pro quo taxation treatment between the recipient and the donor and it would regulate market prices for eggs.

¹⁰⁵ supra note 81

¹⁰⁶ supra note 7

¹⁰⁷ supra note 5

¹⁰⁸ Id.

A. Section 104(a)(2) Loophole

Another view, which is perhaps the more preferred view of a donor, is that the donation of eggs should not be taxed at all regardless of it being deemed property or not. Section 104(a)(2)¹⁰⁹ lists the amount of any damages received on account for personal injuries or sickness as an exception to gross income. A donor may argue that under 104(a)(2),¹¹⁰ the compensation received for the sale of eggs is only intended as consideration for an injury that has been proven to have long lasting effects on women. Unlike punitive damages which are taxed, the compensation received does not have any surplus for tax purposes and solely intends to make the taxpayer whole from the injury. Taxpayers consent and damages derived from a lawsuit or settlement has an effect on the applicability of the statute.

(1) Current Landmark Decision

While evading all the sensitive mentioned issues and complexities of the Code, on January 22, 2015, the United States Tax Court ruled on a case involving the sale of eggs and held them to be taxable income. In *Perez v. Commissioner*¹¹¹, plaintiff, a 29 year old high school graduate working as a full time sales associate for Sprint, came across a craigslist ad from Donor Source International, LLC, a for-profit California company.¹¹² The company required that an eligible donor be between the ages of 21-30, nonsmoker, and no history of cancer, infertility, or mental disorders.¹¹³ Accordingly, Ms. Perez passed the initial screening.¹¹⁴ Ms. Perez thereafter

¹⁰⁹ 26 U.S.C. § 104(a)(2)

¹¹⁰ 26 U.S.C. § 104(a)(2)

¹¹¹ *Perez v. Commissioner*, *supra* see note 81

¹¹² *Id.* at 4

¹¹³ *Id.*

underwent a series of psychological and physical evaluations and upon passing these exams was allowed the opportunity to make a public profile for prospective parents to view.¹¹⁵ The opinion acknowledges an obvious truth in the market of egg donations by stating the term “donation” is a misnomer since the participant is compensated.¹¹⁶ Consequently, Ms. Perez was promised \$5,500 with the promise that the pay would increase with the limit cap set by the American Society for Reproductive Medicine of \$10,000.¹¹⁷ In 2009, Ms. Perez signed a contract with Donor Source, which stated that the fee received was not for the sale of eggs but rather for the donor’s good faith and full compliance with the procedure.¹¹⁸

Later that same year, Ms. Perez entered into another contract with the intended parents which stated that the payment was in consideration for all of her pain, suffering, time, inconvenience and efforts.¹¹⁹ Shortly after signing the contract, the process began. Ms. Perez started to take birth control pills to synch her menstrual cycle with that of the intended mother.¹²⁰ Ms. Perez underwent a series of intense medical examinations involving an internal ultrasound and five vials of blood were drawn.¹²¹ As a take-home assignment, Ms. Perez had to self-administer hormonal injections using a one inch needle from March 7-10 once a day, and three times per day as the date got closer to the procedure.¹²² As a result, Ms. Perez was severely

¹¹⁴ Id.

¹¹⁵ Id.

¹¹⁶ Id. at 5

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ Id. at 6

¹²² Id.

bruised in her stomach and in pain from the continuous administration of vaccines.¹²³ On March 25, the day of the surgical procedure, Ms. Perez received an intramuscular injection which rendered her in pain and abdominal bloating.¹²⁴ Ms. Perez had to undergo anesthesia for the procedure which alone carries the risk of death.¹²⁵ For the procedure, a doctor inserted an ultrasound needle in Ms. Perez that penetrated her ovaries and harvested 15-20 eggs rather than the body's normal production of one egg.¹²⁶ After the surgery Ms. Perez received \$10,000, and she expressed feeling cramped, bloated, and experienced headaches, nausea and fatigue.¹²⁷ On August 31 of that same year, Ms. Perez contracted with Donor Source again and received another check for \$10,000.¹²⁸ At the end of the year, Ms. Perez received a Form 1099 for \$20,000 from Donor Source which she chose to disregard since she believed it was not taxable.¹²⁹ The Commissioner sent Ms. Perez a notice for deficiency and she filed a suit, a trial proceeded in California.¹³⁰

The opinion in Perez begins by stating what it will not do. The court states that the case at issue does not need the court to decide whether human eggs are capital assets, the basis for eggs or the character of the gain from the sale of eggs.¹³¹ The court understood the opposing views at issue as Ms. Perez stated that the payments were not for the sale of her eggs but rather an exchange for her pain and suffering and physical injuries from the process and the

¹²³ Id.

¹²⁴ Id.

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ Id. at 7

¹²⁸ Id.

¹²⁹ Id.

¹³⁰ Id. at 8

¹³¹ Id.

Commissioner's view as simply viewing the payment as compensation for services rendered subject to taxation under 61(a)(1).¹³² The court, lacking precedent on this issue, used the blood cases *Green*¹³³ and *Garber*,¹³⁴ and contrasted them with the case at issue, holding that since Perez was compensated despite the quantity or quality of her eggs, her compensation derived from the performance of a service.¹³⁵

The issue was framed in connection to 104(a)(2) whether a taxpayer who suffers physical pain or injury while performing a contract for personal services may exclude the amounts paid under the service contract as damages, despite the taxpayer knowing and consenting to the pain and injuries that were to follow.¹³⁶ The court explained precedent that has held that amounts contracted in advance for a consent to an invasion of privacy were taxable income¹³⁷ and that a waiver for personal injuries constitutes taxable income.¹³⁸ The court stated that Ms. Perez clearly legally recognized an interest against bodily invasion and any amounts she received should therefore be taxable income.¹³⁹ Ms. Perez' pain was exactly within the scope of the medical procedures and thereby the pain was a byproduct of performing a service contract and not to compensate her for some unwanted invasion.¹⁴⁰ The court stated that if the medical provider had performed and excess of pain was not to be expected, then that pain can be

¹³³ *supra* note 82

¹³⁴ *supra* note 88

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Starrels v Commissioner*, 35 T.C. 646(9th Cir. 1962)

¹³⁸ *Roosevelt v. Commissioner*, 43 T.C. 77 (1964)

¹³⁹ *supra* note 81 at 8

¹⁴⁰ *Id.*

allocated as damages.¹⁴¹ Further, the amendments of 104(a)(2) do not favor Ms. Perez since her suffering was the result of a voluntary contract that compensated her to endure them which made the money she received not damages.¹⁴² The court warned about what a ruling in favor of Perez might cause: a professional boxer claiming damages from his last fight; a hockey player claiming damages for chipped teeth as a result from a game injury; a football player claiming damages for bodily damages. In sum, the court stated that consensual pain and suffering before anyone begins work is taxable income.¹⁴³

The court spoke loudly and clearly that under the traditional system in place for egg donations, it is by all means taxable. In considering eggs as property, the court agreed with the precedent established by the plasma cases. The court left open the consideration of an egg donor who is compensated by factors such as: quantity of eggs, quality of eggs and success rate. It would seem that compensation based on those factors would lead a court to categorize the sale of eggs as property, which would then implicate the considerations discussed above such as deductions, and preferred treatment.

B. Cost Sharing Basis, Bartering

The cost sharing method of compensation allows for a donor to donate her eggs to a facility for an incentive of receiving a discounted in vitro treatment. This method of compensation is narrowly tailored for women whose fertility issues derive from their infertile male partners. It would seem that this exchange of services could be the perfect way to avoid

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ Id.

taxation. Yet the I.R.S is clear that bartering is trading one product or service for another and is subject to reporting and taxable. ¹⁴⁴ Bartering provides income at both sides, each side must report the market value of the services they have received in return and be taxed according to the gain acquired. ¹⁴⁵ The I.R.S is clear that bartering is all-inclusive in that “you name the swap, the IRS wants to tax it.”¹⁴⁶ A barterer who hosts the exchange of more than 100 transactions per year is required to send out 1099-B forms which indicate proceeds from broker and barter exchange transactions. It is apparent that the 1099 form is essential for the government to audit barterers. Applying this notion under the cost sharing method of compensation for egg donors proves that these exchanges are a form of bartering and are therefore taxable. Clinics in the business of operating by cost sharing compensation who transact over 100 exchanges would inevitably have to provide 1099 forms to donors and recipients and would not be able to escape taxation. However, a small clinic who transacts in a smaller scale may be able to get away with not providing a 1099 form, thereby disarming the I.R.S. from auditing capabilities and illegally avoid taxation.

C. Implications on Transferability

Within the line of thought of evading tax implications is the possibility of transferring the donation of eggs via a gift or will as part of one estate. Section 102(a) ¹⁴⁷ of the Code states that

¹⁴⁴ I.R.S. “Barter Exchanges, I.R.S.,” (accessed 3/20/15), <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Barter-Exchanges>

¹⁴⁵ Id.

¹⁴⁶ Robert W. Wood, “Do you barter? The IRS Wants Its Cut,” Forbes, (accessed 4/1/15), <http://www.forbes.com>

/2009/11/11/irs-tax-barter-exchange-income-personal-finance-wood.html

¹⁴⁷ 26 U.S.C. § 102(a)

gross income does not include the value of property acquired by a gift, bequest, devise, or inheritance. In ascertaining whether the gift tax exclusion is applicable for the sale of eggs, we will test it against guidelines provided by the courts and regulations on other matters. In *Commissioner v. Hogle*,¹⁴⁸ the court held that transfers of property are subject to tax but that services are not. Is the sale of eggs analogous to blood donation a service? The strenuous process associated with the donation favors the classification of a service. Treasury Regulation 25.2511-2(b)¹⁴⁹ asks whether the transfer is a gift, it looks at the completeness of the transaction. A donor who is gifting her eggs under this regulation would have to prove that her transfer is the product of detached and disinterested generosity. The process of donating the eggs physically separated the donor from the gift and along with an enforceable contract waiving the donor's rights, a donor could be said to have lost complete dominion over the gift. Treasury Regulation 25.2512(b)¹⁵⁰ questions if there are any exclusions or deductions that would allow the transfer to be nondeductible since if there was a gift, consideration would be unnecessary.

Donors are not typically taxed on gift or estate tax. However, if the gift or the estate exceeds the set monetary caps, tax will apply to the excess of the amount. For the year 2014-2015, the estate cap is \$5,340,000 and the gift cap is \$15,000.¹⁵¹ These caps render for consideration the price that may be allocated to the transfer of eggs. Placing a value on human eggs is a rather sensitive issue that may have no logical formula of computation. Yet, in a new

¹⁴⁸ *Commissioner v. Hogle*, 165 F.2d 352 (10th Cir. 1947)

¹⁴⁹ Treas. Reg. § 25.2511-2(b)

¹⁵⁰ Treas. Reg. § 25.2512(b)

¹⁵¹ Deborah L. Jacobs, "IRS Raises Limit On Tax-Free Lifetime Gifts," *Forbes*, (accessed 4/1/15) <http://www.forbes.com/sites/deborahljacobs/2013/10/31/irs-raises-limit-on-tax-free-lifetime-gifts/>

world with evolving reproductive technology, one can imagine how desired traits are no longer a wish but a tangible outcome. Factors such as looks, personality and intelligence can play a significant role in determining the worth of eggs.¹⁵²

Adopting a unitary approach that eggs are in fact property may help move toward clarity and predictability. Yet, Professor Radhika Rao and Professor Lisa Milot have proposed different approaches towards a move for consistency.¹⁵³ Professor Rao has suggested that the law need not take a single approach to the human body.¹⁵⁴ Instead it should focus on whether the body should be identified as the subject of a privacy interest or the object of property ownership which depends essentially on: (1)whether it is living or dead; (2)whether it is integrated with the whole person or a separate part and; (3)whether it is involved in a personal relationship or an object of relationship.¹⁵⁵ According to this theory, one should only tax human gametes undertaken for purposes of nonsexual reproduction. Professor Milot proposed a contextual approach to determine when a body should be treated as property for tax purposes based on three baseline principles: (1)intact human bodies are subjects; (2)human body materials removed from a human person and transferred in a commercial transaction are property but gratuitously transferred body materials are not property; (3)cadaver is not property unless parts are sold commercially.¹⁵⁶ Professor Milot posits that bodies are subjects and thus transactions with them are only taxable

¹⁵² The Clinical Advisor, “How much is your egg worth?,” Forbes, (accessed 3/15/15), <http://www.forbes.com/sites/deborahljacobs/2013/10/31/irs-raises-limit-on-tax-free-lifetime-gifts/>

¹⁵³ Bridget J. Crawford, *supra* see note 75

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

as services.¹⁵⁷ This is consistent with revenue ruling 162 which held that the provision of blood was a service.¹⁵⁸

IV. SECTION 213, “A LIMITED EXCEPTION” FOR RECIPIENTS, A PROPOSAL FOR DONOR TAX PREFERENCE

Section 213 has been interpreted to create a “limited exception” to the deductibility of medical care extending to the taxpayer, spouse or dependent.¹⁵⁹ Medical care is defined in relevant parts as amounts paid for diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body.¹⁶⁰ This exception aims to cover taxpayers who incur a significant amount of medical expenses to the degree that these expenses will affect their ability to pay federal income tax.¹⁶¹ The section requires that these expenses be out of pocket and not ones covered by insurance, the expenses must also exceed ten percent of the taxpayer’s adjusted gross income.¹⁶² Assistive reproductive technology has become a perfect candidate to qualify as an exception under the umbrella of section 213.¹⁶³ The exception applies for an existing fertility problem requiring medical intervention for a female or when a male is infertile.¹⁶⁴ Expenditures such as procedures, associated costs, cost of obtaining

¹⁵⁷ Id.

¹⁵⁸ supra note 82

¹⁵⁹ Tessa R. Davis, “Reproducing Value: How Tax Law Differentially Values Fertility, Sexuality & Marriage,” 19 *Cardozo J.L & Gender* 1(2012-2013)

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² 26 U.S.C. § 213

¹⁶³ Id.

¹⁶⁴ Anthony C. Infanti, “The House of Windsor: Accentuating the Heteronormativity in the Tax Incentives for Procreation,” *Washington Law Review*, Vol 89:1185-1233

an egg donor, and legal fees are all applicable under section 213.¹⁶⁵ The I.R.S. has opposed deducting the cost of a surrogate as a medical expense and only allowed it in narrow circumstances when a fertility problem exists.¹⁶⁶

Section 262 states that an individual cannot deduct personal expenses.¹⁶⁷ In precluding such, the I.R.S. has made some questionable value judgments regarding the applicability of section 213 that have not been applied evenhandedly across the board. Inconsistencies derive from factors such as taxpayer's gender, sexuality and relationship status.¹⁶⁸ People seeking egg donors however, clearly qualify under the umbrella of section 262. Revenue Ruling 502 clearly makes treatments such as acquiring eggs a deductible medical expense "regardless of the motivation for using it."¹⁶⁹ Further, Revenue Ruling 2007-72 makes pregnancy tests used in aid of reproductive pursuits deductible.¹⁷⁰ In light of this recognition and treatment for qualified egg beneficiaries, should the sale of eggs be taxed? The answer seems equally clear in a compromise. Section 262 requires that in order for the exception to apply, a second requirement is in place in which the expense must exceed ten percent of the taxpayers' adjusted gross income. Thereby, not all taxpayers would meet this requirement and be entitled to the exception. In my opinion, this creates the one instance where a donor can be tax exempt. A quid pro quo compromise system should be in place that would allow an egg donor favorable or preferred reduced tax status contingent on the treatment the beneficiary received. If in fact the beneficiary

¹⁶⁵ Id.

¹⁶⁶ Id.

¹⁶⁷ 26 U.S.C. § 262

¹⁶⁸ Magdalin v. Commissioner, T.C. memo 2008-293

¹⁶⁹ I.R.S. Pub'ln (Dec. 9 2008)

¹⁷⁰ Rev. Rul. 2007-50 I.R.B 1154

received a preferred status, only then can a donor be exempt for taxes. Yet if the beneficiary received no favorable treatment, it would be inconsistent not to tax the donor. Not only would this provide consistency, it would also incentivize donors to seek out less privileged recipients, thereby alleviating an overpriced egg market.

CONCLUSION

Fair taxation is not simply black or white. A tax court should not be the primary ground for considering complex questions of bodily autonomy. The sale of eggs could benefit from having these complex issues resolved but these are matters that need the attention of the Supreme Court. Understandingly, without a proper resolution to these issues tax law may seem harsh and unforgiving to those in the business of selling eggs. Under the current principles, the sale of eggs is an income generating choice that correctly does not receive any exclusion, deduction or preferential tax treatment. Tax law must be decided with an eye towards the future and acknowledging the importance of tax collection. Decisions need to be made that won't hinder tax revenues whose purpose, amongst other important things, is to fund our government and the redistribution of wealth from the rich to the poor.

Under a restructuring of section 213, a compromise may be reasonably allocated where both the recipient and the donor receive a tax benefit under limited circumstances. Currently section 213 allows a benefit for a recipient whose expenses in acquiring a donor exceed ten percent of her income. Under such condition, the recipient women who receive this credit would not be amongst the wealthiest in the pool of recipients. The donor on the other hand, currently receives no incentive regardless of who the recipient is. I propose a structural change to this benefit, which allows a donor who selects amongst the underprivileged portion of the pool

to receive the same taxable benefit or a comparable preference. This benefit would incentivize donors not to look for the wealthiest since less money subject to lower taxation may have equal and more desirable value. It is my position that this would substantially stabilize a market as far as pricing and expand egg donation to a group beyond the wealthy. Fair taxation requires a level of creativity as outlined above which currently is not in place.