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Cover Page Footnote

J.D./Tax LLM Candidate, May 2018, Loyola Law School, Los Angeles. I would like to thank Professor Ellen Aprill for her continuous edits and mentorship, not only in making sure this Comment was publishable but also in all things related to my career. I would also like to specifically thank my Note and Comment Editor, Michaela Goldstein, for going well above and beyond her duties in helping me get published. Lastly, I would like to thank the entire staff of the Loyola of Los Angeles Law Review for making this opportunity possible.

EGG DONATION: WHETHER A WOMAN HAS A PROPERTY RIGHT IN HER OWN EGG AND HOW DONORS SHOULD BE TAXED

*Richard Gano**

I. INTRODUCTION

To many, the idea that a woman has a property right in her own body seems obvious. While courts have granted individuals a property right in their own blood, breast milk, and sperm,¹ the issue of whether a woman has a property right in her own eggs is still undecided.² This lack of clarity leaves many tax scholars and egg donors alike asking whether the payment received for egg donation should be taxable income.³ Neither the Tax Court nor the IRS has addressed whether the payment should be taxable as income or, due to the trauma the woman's body endures, "damages," and therefore excludible.⁴ The question remains: how would the tax court analyze such a case?

A thriving market has formed in the United States around fertility, especially egg donation.⁵ Although not every jurisdiction allows for payments in exchange for an egg donation, brokers and donors can be

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1. Blood: *see* *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979); Sperm: *see* *Hecht v. Superior Court*, 20 Cal Rptr. 2d 275, 279 (1993). Breast Milk: Bridget J. Crawford, *Our Bodies, Our (tax) Selves*, 31 VA. TAX. REV. 695, 719–20 (2012).

2. *See* Tony Nitti, *The Top Ten Tax Cases (And Rulings) Of 2015: #10-Cash For Egg Donation Is Taxable Income*, FORBES (Oct. 26, 2015 1:35 PM), <http://www.forbes.com/sites/anthonyнити/2015/10/26/the-top-ten-tax-cases-and-rulings-of-2015-10-cash-for-egg-donation-is-taxable-income/#27cebb792d9f> (stating egg donation has "led to a rather big tax conundrum: do the amounts received by the donor in exchange for her eggs constitute taxable income?").

3. *Id.*

4. *Id.*

5. Lisa C. Ikemoto, *Eggs as Capital: Human Egg Procurement in the Fertility Industry and the Stem Cell Research Enterprise*, 34 J. OF WOMEN IN CULTURE AND SOC'Y 763, 770 (2009).

paid anywhere from “\$3,000 to tens of thousands of dollars per cycle.”⁶ Even though the donor is being compensated for her “service,” she is called an egg donor.⁷

From a health perspective the donation process is intrusive.⁸ The side effects can be severe: depression, short-term memory issues, insomnia, bleeding, weight gain, and sometimes even death.⁹ The donor must be constantly monitored, and the ultimate long term effects on the human body are still unknown.¹⁰ There is little dispute that the process is incredibly painful and damaging to the donor.¹¹ Because of the traumatic bodily experience the woman endures, some previous egg donors believe that some, if not all, of the payments received should be non-taxable.¹²

II. TAX LAW: EGG DONATION AS INCOME OR DAMAGES

Although an egg donor may feel the trauma her body has endured entitles her to non-taxable “damages,” the tax code uses a systematic way to determine the tax consequences of any payment. The Internal Revenue Code uses a broad definition of gross income.¹³ Gross income includes “all income from whatever source derived, including (but not limited to) . . . [c]ompensation for services.”¹⁴ An individual will be taxed on “undeniable accessions to wealth, clearly realized, and over which the taxpayer [has] complete dominion.”¹⁵ However, there are numerous exclusions. One such exclusion is for “the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness.”¹⁶ The Treasury Regulations define damages as “an amount received (other than workers’ compensation) through prosecution of a legal suit or

6. *Id.*

7. *Id.* at 771.

8. *Id.* at 770.

9. *Id.*

10. *Id.*

11. *Perez v. Comm’r*, 144 T.C. 51, 52 (2015).

12. *See Emily’s Mom, Comment to Donor Egg and Tax Deduction*, FERTILE THOUGHTS (May 5, 2005, 10:35 AM), <http://www.fertilethoughts.com/forums/donor-issues-egg-and-sperm-317108-donor-egg-tax-deduction.html>.

13. *United States v. Burke*, 504 U.S. 229, 233 (1992) (stating, “The definition of gross income under the Internal Revenue Code sweeps broadly.”).

14. I.R.C. § 61 (1954).

15. *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

16. I.R.C. § 104(a)(2) (2012); *See* 26 C.F.R. § 1.104-1(c)(1) (2012).

action, or through a settlement agreement entered into in lieu of prosecution.”¹⁷

With the advent of the egg donor market, the tax implications of a payment received by an egg donor are unclear.¹⁸ With such a damaging and intrusive process, some egg donors try to exclude the payment from income.¹⁹ In a recent case, *Perez v. Commissioner*²⁰, the Tax Court held that the payment received by egg donor Nichelle Perez was taxable, barring Perez’s exclusion of the payment as “damages” under code section 104(a)(2).²¹ In doing so, the court held that a lawsuit, or threat of one, is a valid requirement in the Treasury Regulations under 104(a)(2).²² However, the court failed to clarify whether a woman has a property right in her eggs and the possible tax implications.²³

This Comment takes the position that the court in *Perez* correctly upheld the regulation. However, the court should have instead given Perez a property right in her eggs and analyzed the subsequent tax implications. As background, Part III of this Comment reviews the facts of *Perez*. Part IV explores the court’s holding in depth. Part V discusses how the court should have recognized Perez’s property right in her eggs, and how the court should have analyzed the subsequent tax implications. Part VI concludes by recommending that a court, when presented with the issue, clarify whether a woman has a property right in her eggs.

III. CASE HISTORY

In *Perez*, the court examined the medical procedures Perez endured and the contractual language between Perez and the donor company.²⁴ Both played a key role in the court’s determination that the payment Perez received was taxable.²⁵ The court focused on two

17. 26 C.F.R. § 1.104-1(c)(1) (2012).

18. See Robert W. Wood, *Taxing Egg Donations with the Wisdom of Solomon*, TAX NOTES (July 12, 2015), <http://www.taxnotes.com/tax-notes-today/settlements-and-dispute-resolution/taxing-egg-donations-wisdom-solomon/2015/07/02/14900991>.

19. See FERTILE THOUGHTS, *supra* note 12.

20. 144 T.C. 51 (2015).

21. *Id.* at 63.

22. *Id.* at 58–63. Although the statute itself has the lawsuit requirement, Perez questioned the regulation’s interpretation. I.R.C. § 104(a)(2) (2012).

23. *Perez*, 144 T.C. at 56.

24. *Id.* at 53–56.

25. *Id.* at 62.

key points: 1) Perez signed a waiver prior to undergoing the donation procedures, and; 2) the procedures were within the scope of the contract.²⁶

A. *Factual History*

1. Personal Background

In 2009, Nichelle Perez, a 29-year-old woman from Orange County, California, donated her eggs to a non-profit company called The Donor Source on two separate occasions.²⁷ The company is one of thirty egg donation agencies in California, and supervised approximately 250 egg-donation cycles in 2009 alone.²⁸ Like many other egg donation companies, The Donor Source conducts an exhaustive preliminary assessment.²⁹ To pass the initial screening, donors must be between the ages of 21 and 30, have a relatively clean medical history, and pass a series of psychological and physical tests.³⁰ Once approved, the donor creates a profile in hopes of being selected by prospective parents.³¹ The donor is promised future payment only if she is selected by prospective parents.³²

For Perez, the entire process was very painful.³³ Perez started by taking birth control pills for approximately one month to synchronize her menstrual cycle with that of the egg recipient.³⁴ Once her cycle was synchronized with the recipient's, Perez traveled repeatedly to a fertility clinic to undergo intrusive physical examinations, pregnancy tests, invasive ultrasound examinations, and blood draws.³⁵ At home, she injected herself in the stomach with daily hormones using a one-inch needle, causing bruising and pain.³⁶ She testified that the injections were "actually very painful . . . it was burning the entire time you were injecting it."³⁷ As the retrieval date approached, the frequency of the injections increased from once a day to three times a

26. *Id.* at 60–62.

27. *Id.* at 52, 55.

28. *Id.* at 52.

29. *See id.* at 52–53.

30. *Id.*

31. *Id.* at 53.

32. *Id.*

33. *See id.* at 55.

34. *Id.* at 54.

35. *Id.*

36. *Id.* at 54–55.

37. *Id.* at 55.

day.³⁸ Every time she gave herself a new shot “she had to search for a part of her stomach not already covered in bruises.”³⁹ In a nine-day period alone, Perez injected herself around 22 times.⁴⁰ On top of all of this, the final injection was an “intramuscular injection in the lower hip that goes through a two-inch needle” and “caused Perez significant physical pain deep in her muscles as well as extreme abdominal bloating.”⁴¹

On the retrieval date, March 27, 2009, she was required to undergo anesthesia and was informed of the possible risk of death.⁴² The doctor penetrated Perez’s ovaries and removed between 15 and 20 eggs, well above the body’s normal production of just one.⁴³ After the procedure, Perez “felt cramped and bloated; she had mood swings, headaches, nausea, and fatigue.”⁴⁴ For this entire process, Perez received a check for \$10,000.⁴⁵ Perez then went back for a second round the same year in August, undergoing the same procedures and signing the same contracts stating that payment was “in consideration for all of her pain, suffering, time, inconvenience, and efforts”.⁴⁶ Perez again received \$10,000 for her donation.⁴⁷

2. Contractual Language

Once a donor is selected by a recipient, The Donor Source has the donor sign two contracts: one with The Donor Source and one with the prospective parents.⁴⁸ The contract signed with the company gives The Donor Source the ability to terminate the agreement up to the time the donor begins to receive hormone injections for egg-stimulation.⁴⁹ Perez signed her first contract in February 2009, which included the following provision:

Donor Fee: Donor and Intended Parents will agree upon a Donor Fee for Donor’s time, effort, inconvenience, pain, and

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 56.

47. *Id.*

48. *Id.* at 53.

49. *Id.*

suffering in donating her eggs. This fee is for Donor's good faith and full compliance with the donor egg procedure, not in exchange for or purchase of eggs and the quantity or quality of eggs retrieved will not affect the Donor Fee.⁵⁰

The contract additionally allocated foreseeable risk by specifying that the donor assumes "all medical risks and agree[s] to hold The Donor Source harmless from any and all liability for any and all physical or medical harm to herself"⁵¹ Further, at the moment the eggs are removed, they immediately become the property of the intended parents.⁵²

3. Procedural History

The Donor Source sent Perez a Form 1099 for the \$20,000 she was paid for the 2009 tax year.⁵³ Unsure about how to classify the payments, she consulted other egg donors online.⁵⁴ She concluded that the money was not taxable because it compensated her for pain and suffering under code section 104(a)(2).⁵⁵ The Commissioner disagreed and sent Perez a notice of deficiency.⁵⁶ Perez filed a petition, and the Tax Court tried the case in California.⁵⁷

IV. DISCUSSION

A. Statutory Analysis

Since 1918, the Internal Revenue Code has recognized an exclusion for payments from personal injuries and sickness.⁵⁸ This exclusion is most clearly stated in section 104(a)(2), but what exactly qualifies as "damages" for the exclusion has changed over time.⁵⁹ The regulations currently define "damages" as "[an amount] received (whether by suit or agreement and whether as lump sums or as periodic

50. *Id.* at 54.

51. *Id.*

52. *Id.*

53. *Id.* at 56.

54. *Id.*

55. *Id.*; see I.R.C. § 104(a)(2) (2012).

56. *Perez*, 144 T.C. at 56.

57. *Id.*

58. Wood, *supra* note 18.

59. See I.R.C. § 104(a)(2) (2012); 25 Fed. Reg. 11201, 11490 (1960); Wood, *supra* note 18; see also 77 Fed. Reg. 3107 (2012); Small Business Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755, 1839 (repealing the exclusion of punitive damages and the exclusion for damages not attributable to physical injuries or sickness).

payments) on account of personal injuries or physical sickness.”⁶⁰ In *Perez*, the petitioner questioned the secretary’s interpretation that damages require a legal prosecution or the threat of one. Since the statute does not define damages, the court applied the *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁶¹ two-prong analysis of regulatory interpretations.⁶²

1. *Chevron* Step One: Congress Has Not Spoken Directly on the Meaning of the Statute

Under the first step of *Chevron*, a court considers whether Congress has spoken directly on the meaning of the statute at issue. Here, *Perez* argued that Congress did speak directly on the meaning of “damages” from a textualist perspective.⁶³ *Perez* argued that the regulation’s interpretation is invalid because the basic dictionary meaning of the word “damages” does not require prosecution, the threat of one, or a settlement agreement.⁶⁴ *Perez* also relied on previous case law policy rationale as a way to determine the plain meaning of “damages.”⁶⁵ Courts have recognized the idea that personal injury recoveries are nontaxable because they represent a return of capital, making a person “whole.”⁶⁶ Following the same logic, because the idea of the payment is to make the person whole, it should not matter if or when the person voluntarily subjects themselves to the damage so long as the payment the person receives is to make them whole. However, the court did not accept *Perez*’s argument that Congress spoke directly to the meaning of damages.⁶⁷ Instead, the court looked to the second step of the *Chevron* analysis and examined the legislative history to decide if the secretary’s interpretation of the statute was arbitrary or capricious.⁶⁸

60. 26 C.F.R. § 1.104-1(c)(1) (2012).

61. 467 U.S. 837 (1984) (asking if Congress has spoken directly on the issue and, if not, whether the regulation is a reasonable interpretation of Congress’s intent); *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 56 (2011) (stating there is “no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations).

62. *Perez*, 144 T.C. at 59.

63. Brief for Petitioner at 28–29, *Perez v. Comm’r*, 144 T.C. 51 (2015) (No. 9103-12).

64. *Id.* at 29.

65. *Id.* at 30.

66. *Roosevelt v. Comm’r*, 43 T.C. 77, 88 (1964).

67. *Perez v. Comm’r*, 144 T.C. 51, 59 (2015).

68. *Id.*

2. *Chevron* Step Two: Section 104(a)(2) Is a Reasonable Interpretation of Congress's Intent

Under the second step of the *Chevron* analysis, the court seeks to determine whether the regulation is a reasonable interpretation of Congress's intent.⁶⁹ Here, the court used the legislative history to guide its analysis.⁷⁰ The court pointed to a recent significant change in the regulation: the fact that it no longer requires the payment to stem from a legal suit based on "tort-type or tort-type rights action."⁷¹

The first section 104 regulations, enacted in 1960, required that payments excluded under code section 104(a)(2) be "received through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution."⁷² The 1960 requirement remained until the 2009 proposed regulations were implemented in 2012, removing the requirement that the legal suit be based on "tort or tort type rights."⁷³ The 2012 regulations responded to the Supreme Court's decision in *United States v. Burke*⁷⁴, a case which restricted exclusion under code section 104(a)(2) by interpreting "tort or tort type rights" to mean damages from personal injuries only for which a full range of tort-type remedies were available.⁷⁵ This tort-type remedy requirement was too narrow, as it precluded exclusion under "no-fault" statutes that do not provide traditional tort-type remedies.⁷⁶ However, the change in the language of the regulation did not change the precedent that the taxpayer's claim or settlement must be after the injuries occur.⁷⁷

The court therefore kept the requirement that the payment be received "through prosecution of a legal suit or action, or through a

69. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

70. *Perez*, 144 T.C. at 59.

71. *Id.*

72. 25 Fed. Reg. 11201 (1960). *See also*, *Perez*, 144 T.C. at 58 (quoting *id.*).

73. *See* 74 Fed. Reg. 47152-53 (2009); 77 Fed. Reg. 3107 (2012).

74. 504 U.S. 229 (1992).

75. *See id.* Although code section 104(a)(2) was amended in 1996, partly in reaction to *Burke*, the treasury regulations were only amended in 2012. Ronald H. Jensen, *When Are Damages Tax Free: The Elusive Meaning of "Physical Injury,"* 10 PRTT. TAX REV. 90-93 (2013); 74 Fed. Reg. 47152 (2009).

76. *See* 74 Fed. Reg. 47152-53 (2009). In fact, in the summary of the comments to the final 2012 regulations, one commentator suggested "that eliminating the tort type rights test would create confusion about what constitutes a personal injury. The commentator suggested that the regulations should retain the tort type rights test but clarify that meeting the test does not depend on the nature of the remedies or the state law characterization of the cause of action." However, the final regulations did not adopt this comment. 77 Fed. Reg. 3107 (2012).

77. *Perez*, 144 T.C. at 60.

settlement agreement entered into in lieu of prosecution” under the second step of the *Chevron* analysis.⁷⁸ The next question is whether Perez entered into a “settlement agreement in lieu of prosecution” as intended by the statute.

B. Contractual Language

From the outset, the court stated that the issue in this case was not about determining whether human eggs are property but instead whether the contractual language and posture between Perez and The Donor Source qualified for the “settlement agreement in lieu of prosecution” requirement.⁷⁹ The court ruled the contract did not qualify as a settlement agreement under the regulation because the contract Perez signed was a waiver, something done ad hoc, as opposed to a true settlement agreement which is signed post hoc.⁸⁰ The court cited previous cases which also held compensation for advance waivers of possible future damages as taxable, and reiterated that the interpretation “reads most naturally . . . in terms of payment for injuries sustained prior to a suit or settlement agreement.”⁸¹ Further, the court acknowledged that although Perez had an interest in her personal rights, because the procedures were within the scope of which she consented, those rights were not violated.⁸² Because her rights were not violated, the pain and suffering was not the same kind of pain and suffering considered by code section 104(a)(2).⁸³

The court also explained its holding using two different policy rationales: one based on the case law’s general underlying rationale for the statute and one based on the practical implications of deciding the issue the other way.⁸⁴ Case law states the underlying rationale for a section 104(a)(2) payment is to ““make the taxpayer whole from a previous loss of personal rights.””⁸⁵ When individuals waive their rights, they do not get the benefit of recovering those rights tax-free.⁸⁶ Additionally, the practical reason for holding the payment as taxable

78. *Id.* at 58.

79. *Id.*

80. *Id.* at 60.

81. *Id.* (citing *Starrels v. Comm’r*, 35 T.C. 646 (1961), *aff’d*, 304 F.2d 574 (9th Cir. 1962)).

82. *Id.* at 61.

83. *Id.*

84. *See id.* at 60–63.

85. *Id.* at 60 (quoting *Starrels*, 35 T.C. 646 (1961)).

86. *Id.* at 60.

is because the alternative would cause widespread abuse and mischief.⁸⁷ The court gives an example of how athletes could exploit an alternative holding:

A professional boxer could argue that some part of the payments he received for his latest fight is excludable because they are payments for his bruises, cuts, and nosebleeds. A hockey player could argue that a portion of his million-dollar salary is allocable to the chipped teeth he invariably suffers during his career . . . We don't doubt that some portion of the compensation paid all these people reflects the risk that they will feel pain and suffering, but it's a risk of pain and suffering that they agree to before they begin their work. And that makes it taxable compensation and not excludable damages.⁸⁸

Accordingly, after analyzing both the regulation and the contract, the court concluded that the payment received by Perez was taxable.⁸⁹

V. ANALYSIS

The court incorrectly analyzed the case as a contractual issue instead of a property right issue. Although the contract stated the compensation was not to buy Perez's individual eggs,⁹⁰ trial testimony suggested she had a property interest in her eggs.⁹¹ The court should have given deference to the testimony. The resultant tax consequences will be shown below.

A. *Perez Had a Property Right in Her Eggs*

The court in *Perez* was quick to note that both parties agreed the payments were not about a sale or transfer of Perez's eggs (thus not giving Perez a property interest in her eggs), but were rather for Perez's performance of services.⁹² The court did not take issue with this because "Perez's compensation depended on neither the quantity

87. *Id.* at 63.

88. *Id.*

89. *Id.*

90. *Id.* at 54 ("The Parties acknowledge and agree that the funds provided to the Donor shall not in any way constitute payment to Donor for her eggs.").

91. Marie Sapirie & Andrew Velarde, *Money From Egg Donation is Taxable Compensation, Court Holds*, TAX NOTES (Jan. 23, 2015), <http://www.taxnotes.com/imp/9506896> ("[T]he fertility clinic's chief operating officer said at trial that the lump sum amount that the egg donor provider would be paid was subject to reduction if no eggs were retrieved.").

92. *Perez*, 144 T.C. at 56.

nor the quality of eggs retrieved, but solely on how far into the egg-retrieval process she went.”⁹³ The court referred to two cases that, unlike *Perez*, held the transfer of blood plasma was a transfer of property.⁹⁴ In *Green*, the court held the transfer of blood plasma was a sale of tangible property rather than the performance of services because the taxpayer was paid based on quantity.⁹⁵ In *Garber*, although the court did not make a ruling on the issue, the court indicated the transfer of blood plasma may be a sale of property because the taxpayer’s compensation was related to the amount of antibodies in the blood.⁹⁶

However, some commentators believe the trial court gave too much deference to the contract at the expense of the trial testimony.⁹⁷ The trial testimony showed the payments would have been reduced if no eggs were retrieved, indicating that, similar to *Green*, the quantity of eggs *Perez* produced was part of the consideration.⁹⁸ This shows the contract could just as well have been classified as a mixture between property and services.⁹⁹ The court, however, decided to give deference to the contractual language.¹⁰⁰ The court should have given more deference to the trial testimony and, similar to *Green*, concluded *Perez* had a property right in her eggs.

B. Perez’s Tax Consequences: Egg Donation Costs as a Business Deduction

Taxable income includes income from “gains derived from dealings in property.”¹⁰¹ So if a human egg is considered property, when the donor sells it “she will recognize taxable income to the extent she has ‘gain.’”¹⁰² To calculate gain, the statutory framework provides the appropriate method. Gain is the “excess of the amount realized” over the “adjusted basis.”¹⁰³ Adjusted basis is the cost of the item

93. *Id.* at 57.

94. *Id.* at 56–57. (citing *Green v. Comm’r*, 74 T.C. 1229 (1980) and *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979)).

95. *Green*, 74 T.C. at 1234.

96. *Garber*, 607 F.2d at 97. The court did not have to decide the tax issue because the appeal was for a criminal conviction. *Id.* at 100.

97. *See Sapirie, supra* note 91.

98. *Id.*

99. *Id.*

100. *Perez*, 144 T.C. at 57–58.

101. I.R.C. § 61(a)(3) (1954).

102. *Crawford, supra* note 1, at 736.

103. I.R.C. § 1001(a) (1993).

adjusted for any capital expenditures and depreciation.¹⁰⁴ For example, if a seller sells her property for \$6,000, the amount realized is \$6,000.¹⁰⁵ The seller's basis in the property is usually the cost basis.¹⁰⁶ If the same seller originally bought the property she is selling for \$500, then that will be the cost basis.¹⁰⁷ When she sells it several years later for \$6,000, she will have a gain of \$5,500.¹⁰⁸

The main issue when a person "sells" a part of the human body is how to calculate an appropriate cost basis. The cost basis in self-created property is "limited to the cost of the materials used to create the property."¹⁰⁹ For example, when a painter paints a portrait, the basis the painter has in that portrait is the cost of the paint and canvas that can be allocated to that specific portrait.¹¹⁰ When it comes to a basis in the human body, there is overwhelming agreement in the tax community that a woman who sells her eggs would have a zero basis in the eggs unless she is able to allocate specific expenditures for her eggs (food, medication, etc.), which from an administrative standpoint is very impractical.¹¹¹ So it would seem the entire gain would be taxed, as there would be no basis to subtract from the amount realized. However, Perez could use *Green v. Commissioner* to generate offsets to the gain, namely as business expenses under code section 162.¹¹²

In *Green*, the taxpayer was able to deduct the costs allocable to income from blood donation as a business expense.¹¹³ In order to qualify for the business deduction, the court found that the taxpayer in *Green* was "actively engaged in the continual and regular process of producing and selling blood plasma to the lab for profit."¹¹⁴ The court allowed a deduction for food expenses "beyond that necessary for her

104. I.R.C. § 1001(a) (1993); I.R.C. § 1012 (2008); I.R.C. § 1016 (2010).

105. Crawford, *supra* note 1, at 736–37.

106. *Id.* at 737.

107. *Id.*

108. *Id.*

109. *Id.*; see also I.R.C. § 1012(a) (2008).

110. Crawford, *supra* note 1, at 737.

111. Having the costs accumulate over her entire life, even over the time of the surrogacy (e.g., the costs of choosing not to smoke) would be too hard to administer and thus would be too speculative for courts. See Jay A. Soled, *The Sale of Donors' Eggs: A Case Study of Why Congress Must Modify the Capital Asset Definition*, 32 U.C. DAVIS L. REV. 919, 948–50 (1999); see also Lisa Milot, *What Are We—Laborers, Factories, or Spare Parts? The Tax Treatment of Transfers of Human Body Materials*, 67 WASH. & LEE L. REV. 1053, 1104 (2010); Crawford, *supra* note 1, at 737.

112. See I.R.C. § 162 (2012).

113. *Green v. Comm'r*, 74 T.C. 1229, 1230–32 (1980).

114. *Id.* at 1235.

personal needs”¹¹⁵ and the food and vitamins “intimately related to petitioner’s production of acceptable blood plasma . . . in furtherance of her business selling blood plasma.”¹¹⁶ The court also allowed her to deduct the travel expenses to the lab because she was transporting her “product” to the marketplace.¹¹⁷ The court stated: “The nature of her product was such that she could not transport it to market without her accompanying it. Of necessity, she had to accompany the blood plasma to the lab. Unique to this situation, petitioner was the container in which her product was transported to market.”¹¹⁸

Here, Perez has a good argument that the frequency at which she donated her eggs would allow her to allocate and deduct some of the expenses as business expenses. She not only donated her eggs twice in 2009, she also donated her eggs in 2008.¹¹⁹ Whether this is continuous or frequent enough for the court is open for debate. However, because of how long the entire process takes, and the fact she did it three times in two years, Perez would have a strong argument.¹²⁰ Similar to the taxpayer in *Green*, Perez could deduct the travel expenses as well as the food and vitamins directly allocable to the egg development. However, these costs would only likely accumulate once she signed the contract with The Donor Source, as her business relies solely on her qualifying for the contract.¹²¹

VI. WHETHER A WOMEN HAS A PROPERTY RIGHT IN HER EGGS IS STILL UNDECIDED

The issue with classifying reproductive material as property for tax purposes poses issues that are both ethical and practical. Whereas courts have tackled the issue of property rights when it comes to sperm, blood, and breast milk, courts have yet to determine whether a woman has a property right in her eggs.¹²² When the next court is

115. *Id.* at 1236.

116. *Id.* at 1236 n.12.

117. *Id.* at 1237–38.

118. *Id.* at 1238.

119. *See* Sapirie, *supra* note 91.

120. *See* Biedenharn Realty Co. v. United States, 526 F.2d. 409, 416 (5th Cir. 1976) (stating that when determining whether something is considered inventory, “[a]lthough frequency and substantiality of sales are not usually conclusive, they occupy the preeminent ground in our analysis.”).

121. Having the costs accumulate over her entire life (e.g., the costs of choosing not to smoke) would be too hard to administer and thus would be too speculative for courts. *See* Soled, *supra* note 111, at 948–50.

122. *See* Crawford, *supra* note 1.

presented with this issue, the court should clarify whether a woman has a property right in her eggs.