

**Office of Chief Counsel  
Internal Revenue Service  
Memorandum**

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(Passthroughs & Special Industries)

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subject: Indoor tanning services

This Chief Counsel Advice responds to your request for assistance dated April 13, 2011. This advice may not be used or cited as precedent.

**ISSUES**

Issue 1

Are “bonus bucks,” reward points, coupons, or similar devices (points) issued to a customer as a reward for purchases, subject to the indoor tanning services excise tax imposed by § 5000B of the Internal Revenue Code (Code) when the points are redeemed by the customer for indoor tanning services in the following circumstances?

1. If the points are earned for purchasing indoor tanning services.
2. If the points are earned for purchasing indoor tanning services and other, non-tanning goods or services and redeemed exclusively for indoor tanning services.
3. If a customer uses a combination of points and cash to obtain indoor tanning services.

Issue 2

Whether there are permissible methods to calculate the taxable portion of bundled services other than the ratio method described in § 49.5000B-1T(d)(3) of the Facilities and Services Excise Tax Regulations (regulations).

## **CONCLUSIONS**

### **Issue 1**

The points redeemed by a customer in exchange for indoor tanning services are not subject to the indoor tanning services excise tax. To the extent that any cash is paid in addition to points in exchange for indoor tanning services, the indoor tanning services excise tax applies only to the cash paid for those services.

### **Issue 2**

There may be permissible methods to calculate the taxable portion of bundled services other than the ratio method described in § 49.5000B-1T(d)(3).

## **FACTS**

An indoor tanning services provider runs a promotion during which a customer is awarded points for each dollar that the customer spends at the tanning salon. Customers accumulate points, which the customer uses like cash to obtain indoor tanning services or other goods and services such as tanning lotions or salon services. When the customer redeems points, the customer is able to receive the goods and services for free, or purchase them with cash at a reduced price, depending on the amount of points redeemed.

## **LAW AND ANALYSIS**

Section 5000B(a) of the Code imposes a tax (indoor tanning services excise tax) on any indoor tanning service equal to 10 percent of the amount paid for such service whether paid by insurance or otherwise. Section 5000B(c)(1) provides that the tax imposed by § 5000B(a) shall be paid by the individual on whom the service is performed. Section 5000B(c)(2) provides that every person receiving a payment for services on which a tax is imposed under § 5000B(a) shall collect the amount of the tax from the individual on whom the service is performed and remit such tax quarterly to the Secretary of the Treasury (Secretary) at such time and in such manner as provided by the Secretary.

Section 49.5000B-1T(b)(1) of the regulations provides that the indoor tanning services excise tax is imposed at the time of payment for any indoor tanning services. Thus, the event that triggers the tax is the payment for indoor tanning services. Section 49.5000B-1T(d)(1) provides that the tax is imposed on the total amount paid for indoor tanning services, including any amount paid by insurance. Thus, for purposes of the

indoor tanning services excise tax, the total amount paid for indoor tanning services forms the tax base to which the tax applies.

Section 49.5000B-1T(d)(3) provides that if an indoor tanning services provider offers indoor tanning services (whether of a specified or unlimited amount, including “free” or reduced-rate indoor tanning services) bundled with other goods and services, the payment for the bundled services includes an amount paid for indoor tanning services. The tax applies to that portion of the amount paid to the provider that is reasonably attributable to indoor tanning services. The amount reasonably attributable to indoor tanning services may be determined by applying to the total amount paid a ratio determined by comparing--

- (i) The provider’s charge for indoor tanning services not in bundled services or, in the event the provider only charges for other goods and services as part of bundled services, the fair market value of similar services (based on the amount charged by comparable providers in the same geographic area); to
- (ii) The charge determined in § 49.5000B-1T(d)(3)(i) plus the provider’s charge for the other goods and services in the bundled services or, in the event the provider only charges for other goods and services as part of bundled services, the fair market value of similar goods and services (based on the amount charged by comparable providers in the same geographic area).

### Issue 1

The first issue for which you requested our advice is essentially whether the redemption of points for indoor tanning services is a taxable event for purposes of the indoor tanning services excise tax. Under § 49.5000B-1T(b)(1), a taxable event occurs when an amount is paid for indoor tanning services. Thus, our analysis of the first issue turns on whether the redemption of points constitutes an “amount paid” for purposes of § 5000B.

The Internal Revenue Service (Service) has not issued guidance directly addressing the definition of the phrase “amount paid” for purposes of the indoor tanning services excise tax. However, the concept of an “amount paid” is well developed under other sections of the facilities and services excise taxes (collected excise taxes). Rev. Rul. 54-332<sup>1</sup>, 1954-2 C.B. 417, holds that where a telephone company furnishes telephone service to certain employees free of charge, no tax attaches. The revenue ruling further holds that where telephone service is furnished to employees at a reduced rate, the tax applies to the amount actually paid for such services. Although the communications services excise tax is not at issue in this case, further IRS guidance in the collected excise taxes area is consistent with this ruling.

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<sup>1</sup> Issued under § 3465 of the Internal Revenue Code of 1954, the predecessor statute to § 4251 of the Code.

Rev. Rul. 72-245, 1972-1 C.B. 347, for example, holds that where an airline furnishes an employee the use of its international air travel facilities entirely free of charge, the \$3 tax imposed by § 4261(c) (use of international travel facilities) does not apply because there is no amount paid for transportation within the meaning of § 4261(c).

Also, Rev. Rul. 84-12, 1984-1 C.B. 211, holds that the tax imposed by § 4261(a) (taxable transportation of persons by air) does not apply to free bonus tickets issued by an airline company to customers who have already satisfied all requirements to qualify for the bonus; however, the tax applies to any amount the customer subsequently pays because of not fully qualifying for the free bonus ticket. Rev. Rul. 84-12 reasons that if no amount is paid, the tax does not apply. If payment is made at a reduced rate, however, then the reduced amount is an amount paid for air transportation within the meaning of § 4261(a), because the amount subject to tax is the actual amount paid for taxable transportation.

Thus, to the extent an indoor tanning services provider provides indoor tanning services for free, no amount is paid and, therefore, no tax arises as a result of the transaction. Similarly, no amount is paid with respect to any indoor tanning services obtained by the customer entirely with the redemption of points and, therefore, no tax arises as a result of the transaction. It is irrelevant to this analysis how the customer acquired the points. Therefore, we reach the same conclusion regardless of whether the redeemed points were earned for purchasing indoor tanning services or if the points are earned for purchasing indoor tanning services and other, non-tanning goods or services. However, if a customer uses points and cash to purchase indoor tanning services, the indoor tanning excise tax applies to the amount of cash paid.

## Issue 2

The second issue for which you requested our advice relates to the ratio provided by § 49.5000B-1T(d)(3) that is used to calculate the amount attributable to indoor tanning services that are provided as part of a bundle of taxable and nontaxable goods and services. You asked whether there are ways other than the ratio provided in § 49.5000B-1T(d)(3) to arrive at the taxable portion of the bundle. In addition, you provided a hypothetical method whereby an indoor tanning services provider relies on its detailed historical records to determine the amount of the bundle attributable to indoor tanning services. You asked whether such a method is permissible under the regulations.

Section 49.5000B-1T(d)(3) provides that the indoor tanning services excise tax applies to that portion of the amount paid to the indoor tanning services provider that is reasonably attributable to indoor tanning services. The amount reasonably attributable to indoor tanning services *may* (emphasis added) be determined by applying to the total amount paid a ratio determined by comparing the amounts calculated in § 49.5000B-1T(d)(3)(i) and (ii).

We interpret regulatory terms, when otherwise not defined in the Code or regulations, using the common, everyday meaning of the word. The regulations do not contain any alternative methods, but also do not contain any language that restricts indoor tanning services providers from using alternative methods. The word “may” expresses opportunity or permission. Read in light of the regulatory framework, and applying the common, everyday meaning of the word, the word “may” in § 49.5000B-1T(d)(3) is permissive, rather than mandatory. Thus, we conclude that there may be permissible methods of calculating the taxable portion of bundled services other than the ratio method described in § 49.5000B-1T(d)(3).

We believe that determining whether any method other than the ratio method described in § 49.5000B-1T(d)(3) results in the calculation of an amount reasonably attributable to indoor tanning services is a tax administration issue rather than a legal issue. Thus, we believe that such a determination is best developed during the examination process using real facts rather than using hypotheticals.

Please call Michael Beker at (202) 622-3130 if you have any further questions.