

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

Number: **201226022**

Release Date: 6/29/2012

CC:PSI:B07:MHBeker
POSTN-101348-12

Third Party Communication: None
Date of Communication: Not Applicable

UILC: 5000B.00-00

date: April 4, 2012

to: Holly L. McCann
Chief, Excise Tax Program

from: Frank Boland
Chief, Branch 7
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

subject: Indoor Tanning Services - Taxability of Enrollment and Freeze Fees

This Chief Counsel Advice responds to your request for assistance dated January 10, 2012. This advice may not be used or cited as precedent.

ISSUES

Issue 1

Whether “start,” “joining,” “registration,” “enrollment,” or similar fees (enrollment fee) described in the facts below are taxable under § 5000B (indoor tanning services excise tax) of the Internal Revenue Code (Code).

Issue 2

Whether “freeze,” “unfreeze,” or similar fees (freeze fee) described in the facts below are taxable under § 5000B.

CONCLUSIONS

Issue 1

The enrollment fees described in the facts below are taxable under § 5000B (subject to the bundle rules of § 49.5000B-1T(d)(3) described below).

Issue 2

The freeze fees described in the facts below are taxable under § 5000B.

FACTS

Some indoor tanning services providers offer a monthly membership program through which customers receive a number of tanning sessions at a cost lower than would be charged for each session individually. Some of these providers charge customers an enrollment fee when the customers join a membership program.

Typically, the customer pays the enrollment fee before paying the first monthly membership charge. The value offered by enrollment fees varies from provider to provider. Depending on the individual provider, payment of an enrollment fee by a customer may allow the customer to any or all of the following benefits:

- Reduced prices for the monthly membership charge and for non-tanning goods or services purchased at the time of enrollment.
- If the enrollment fee is paid immediately, a credit of the enrollment to the monthly membership charge.
- The ability to pay for indoor tanning services through Electronic Funds Transfer.
- An inducement for a customer to not intermittently stop and restart monthly membership charges.

Some indoor tanning service providers also impose freeze fees on their customers. The value offered by freeze fees varies from provider to provider. Depending on the individual provider, payment of a freeze fee by a customer may allow the customer to any or all of the following benefits:

- Skipping one or more months of membership dues without being charged an enrollment fee when the customer restarts the monthly membership.
- Waiver of any required contract cancellation fee or preserve the customer's status within a membership plan or package, including not being subject to monthly fee increases during the freeze period.

LAW AND ANALYSIS

Section 5000B(a) of the Code imposes a 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 Facilities and Services Excise Tax Regulations (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.

Under § 49.5000B-1T(b)(1), a taxable event occurs when an amount is paid for indoor tanning services. Thus, we must determine whether enrollment fees and freeze fees constitute an “amount paid” for purposes of § 5000B.

The concept of an “amount paid” is well developed under other sections of the facilities and services excise taxes (collected excise taxes). For services that are not addressed by the regulations, IRS published guidance in the air transportation area generally limits the tax base to amounts that must be paid for travel on the aircraft for a certain type or level of service. Rev. Rul. 73-508, 1973-2 C.B. 366, for example, holds that a security charge is part of the amount paid for taxable transportation because it is required to be paid as a condition to receiving air transportation. Although air transportation excise taxes are not at issue in this case, further IRS guidance in the collected excise taxes area is consistent with this ruling.

Rev. Rul. 84-12, 1984-1 C.B. 211, for example, holds that the air transportation excise taxes do 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.

These revenue rulings stand for the proposition that all amounts paid as a condition to receiving air transportation are subject to tax. Similarly, all amounts paid as a condition to receiving indoor tanning services are subject to tax. Thus, all amounts paid for indoor tanning services (subject to the bundle rules described below) to the indoor tanning services provider are taxable under § 5000B.

If a customer pays an enrollment fee, the customer receives some benefit in exchange, such as a discounted monthly charge. A payment in exchange for a discount for a service is no different than a payment directly for the service itself at a reduced rate. Thus, the enrollment fee in these cases also constitute an amount paid for indoor tanning services and are subject to tax under § 5000B. Similarly, a customer receives certain benefits in exchange for paying a freeze fee, such as maintaining the customer's status in a membership program when the customer restarts the program after the freeze period. Further, a freeze fee compensates the indoor tanning services provider for the lost monthly membership fee paid in exchange for indoor tanning services that the provider would have received during, and but for, the freeze. Thus, a freeze fee also constitutes an amount paid for indoor tanning services and are subject to tax under § 5000B.

Further, it is irrelevant that an enrollment fee or freeze fee is designated as an administrative fee by the indoor tanning services provider. For example, embedded in the purchase price of an individual indoor tanning services session is an amount to cover indirect (or overhead) costs of the indoor tanning services provider. Amounts paid for indoor tanning services do not escape taxation merely because they are split from direct costs of the indoor tanning services and paid separately by the person purchasing the services.

As stated above, § 49.5000B-1T(d)(3) provides that if an indoor tanning services provider offers indoor tanning services bundled with other goods and services, the payment for the bundled services includes an amount paid for indoor tanning services. Therefore, if a customer receives other goods and services as part of a monthly membership fee, some amount of that fee must be allocated to the other goods and services. Similarly, an enrollment fee paid to join that monthly program must be allocated to the other goods and services.

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