DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF THE CHIEF COUNSEL

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Dear :

I am responding to your letter to the Commissioner, dated April 30, 2018, in which you asked whether the 2019 health insurance provider fee enacted under the Maryland Health Care Access Act of 2018 is deductible for federal tax purposes.

As you relate in your letter, on April 10, 2018, Maryland enacted into law the Maryland Health Care Access Act of 2018 ("Act"). The Act imposes on entities subject to the Act an assessment of 2.75% of all amounts used to the calculate the entity's premium tax liability or premium tax exemption value for the 2018 calendar year. The amounts assessed will be used to fund the state reinsurance program for the general purpose of individual health insurance market stabilization.

You asked whether these assessments under the Act should be treated, for federal income tax purposes, as a deductible expense pursuant to section 162 or a deductible tax pursuant to section 164 of the Internal Revenue Code ("Code"). I am pleased to provide the following general information.

Section 162(a) of the Code generally provides that ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business are deductible. A regulatory fee is deductible as an ordinary and necessary business expense under section 162.

Section 164(a) of the Code generally provides that state and local taxes paid or accrued within the taxable year in carrying on a trade or business are deductible.

In its decision in Home Builders Association v. City of Madison, 143 F.3d 1006, 1011 (5th Cir. 1998), the Fifth Circuit Court of Appeals, discussed the distinction between a tax and a regulatory fee: "The classic tax is imposed by a state or municipal legislature, while the classic fee is imposed by an agency upon those it regulates. The classic tax is designed to provide a benefit for the entire community, while the classic fee is designed to raise money to help defray an agency's regulatory expenses." See also Principal Life Ins. Co. v. U.S., 70 Fed. Cl. 144, 168 (2006). The critical inquiry focuses on the purpose of the assessment and the ultimate use of the funds. Collins Holding Corp. v. Jasper County, 123 F.3d 797, 800 (4th Cir. 1997); see also Rev. Rul. 70-622, 1970-2 C.B. 41; Rev. Rul. 57-345, 1957-2 C.B. 132 ("A tax is an enforced contribution pursuant to legislative authority in the exercise of taxing power, and imposed and collected for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for some special privilege granted or service rendered.").

As you observe, section 9010(f)(2) of the Affordable Care Act treats the annual fee imposed under section 9010(a) as a tax described in section 275(a)(6), which denies a deduction for certain taxes. The fee Maryland enacted, however, is not a federal tax described in section 275(a)(6), and therefore should not be subject to the limit on deductibility provided by section 275(a).

In view of the foregoing, regardless of whether the Maryland Assessment is considered a fee or a state tax, which we need not determine, the assessment would be deductible either under section 162 or section 164 of the Code for those entities carrying on a trade or business.

I hope this information is helpful. If you have any questions, please contact at .

Sincerely,

Scott K. Dinwiddie
Associate Chief Counsel
(Income Tax & Accounting)