Office of Chief Counsel
Internal Revenue Service
Memorandum

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subject: Communications Excise Tax; 911 Fees

This memorandum responds to your request for assistance dated June 18, 2010. This advice may not be used or cited as precedent.

ISSUE

Whether 911 Fees are subject to the tax on communications services under § 4251(a) of the Internal Revenue Code (the Code).

CONCLUSION

911 Fees are not subject to the tax on communications services under § 4251(a) of the Code.

FACTS

911 Fees are mandatory charges imposed under state or local law to finance emergency responder services, such as ambulance, police, and fire in a particular jurisdiction. 911 Fees also include fees for “E911” or “enhanced” 911 service that uses additional software to allow the 911 operator to specifically locate someone who is using a cell or mobile phone to contact the emergency service provider. 911 Fees are separately stated on bills rendered to persons paying for communications services (Customer). The communications services provider (Provider) generally collects the

911 Fees from the Customer and remits them to the appropriate government authority. However, a few jurisdictions impose the 911 Fee on the Provider and allow it to be passed on to the Customer. On the customer's bill, the Provider may describe the 911 Fee as either a charge, a fee, or a tax. The 911 Fee is generally based on either an amount per telephone access line or a percentage of revenue and is paid by all Customers.

LAW AND ANALYSIS

Section 4251(a) imposes a tax on "amounts paid" for communications services as defined in § 4251(b)(1). Section 4251(a)(2) provides that the tax is paid by the Customer and § 4291 provides that the tax is collected by the Provider.

For purposes of calculating the "amount paid," however, § 4254(c) provides that the tax base does not include the amount of any state or local tax imposed on the furnishing or sale of the communications services, but only if the amount of the tax is separately stated on the bill. Thus, if the 911 Fee is a state or local tax within the meaning of § 4254(c) (excluded tax), and is separately stated on the bill, it is not subject to tax. The facts provide that the 911 Fee is separately stated. Therefore, the remaining inquiry is whether the 911 Fee may be properly characterized as a state or local tax.

The IRS does not have any published guidance discussing whether a charge that is described as a fee on a bill rendered for communications services may be characterized as an excluded tax for purposes of § 4254(c). Rev. Rul. 77-472, 1977-2 C.B. 379, as modified by Rev. Rul. 78-154, 1978-1 C.B. 361, holds that three categories of sales taxes are not subject to the § 4251 tax because they are excluded taxes.[1] Nevertheless, because the 911 Fee has not been described as a sales tax, we assume that it does not fall under the categories of taxes identified in Rev. Rul. 77-472.

Thus, to determine whether the 911 Fee is an excluded tax, we must consider whether it is a "fee" or a "tax" based on the facts and circumstances. There is case law considering whether a charge is a fee or a tax. For example, Valero Terrestrial Corporation v. Caffrey, 205 F.3d 130, (4th Cir. 2000), considers whether a solid waste assessment charge, imposed by a state on the person disposing of solid wastes at landfills, is a fee or a tax. The solid waste assessment charge was described as a "fee" in the state statutes. Nevertheless, instead of relying on the name given to the charge

[1] The three categories are:
Category 1. These sales taxes are imposed on the Providers but passed on to the Customers.
Category 2. The Providers are required by statutes to add these taxes to the sale price or charge for the service, and the statutes also provide that such taxes become a part of the amounts charged for telephone service.
Category 3. These sales taxes are imposed on the Customers and the statutes do not provide that the taxes shall become part of the sales price or charge for the service. The Providers are required to collect the tax from the Customers.

in the relevant statute, the Valero court considered whether the charge was for revenue raising purposes, and thus a tax, or for regulatory or punitive purposes, and thus a fee.

To answer this question, the Valero court applied a three part test: (1) what entity imposes the charge; (2) what population is subject to the charge; and (3) what purposes are served by the use of the monies obtained by the charge. Valero at 134. Applying the three-part test, the Valero court concluded that the solid waste assessment charge was a tax because it was: (1) imposed by the legislature, not an administrative agency; (2) paid by citizens and businesses who pay a collection service fee to have their waste picked up; and (3) designed for the primary purpose of environmental safety, which benefits a large segment of the population of the state. Id.

In reaching this conclusion, the Valero court described the "classic tax" as imposed by the legislature on a large segment of society and spent to benefit the community at large and the "classic fee" as imposed by an administrative agency on only those persons, or entities, subject to its regulation for regulatory purposes, or to raise money placed in a special fund to defray the agency's regulation-related expenses. Valero at 134. However, the Valero court recognized that the most important factor is the purpose behind the statute, or regulation, which imposes the charge. Id. For examples applying the three-part test, the Valero court cited American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Management District, 166 F.3d 835 (6th Cir. 1999) (American Landfill) (holding the charge at issue was a tax, even though it was levied by an administrative agency instead of the state legislature, and even though one purpose of the fee was to defray administrative costs, because it served a broad public purpose of benefiting the entire community); San Juan Cellular Telephone Co. v. Public Service Comm'n, 967 F.2d 683, 685 (1st Cir. 1992) (holding the charge at issue was a fee, not a tax, because it was assessed by a regulatory agency, placed in a special fund, and used to defray the regulatory agency's costs, but did not provide a general benefit to the public); and Bidart Bros. v. California Apple Comm'n, 73 F.3d 925, 931 (9th Cir. 1996) (holding a charge at issue was a fee, not a tax, because it was not assessed by the legislature, paid by a small segment of the population to promote apple-growing in the state, and provided only an incidental benefit to the general public).

Applying the Valero three-part test to the facts at issue, the 911 Fee is more like a tax than like a fee because it is imposed on all Customers and provides a benefit to the entire community, regardless of which governmental entity imposes of the fee. Cf. American Landfill, 166 F.3d 835, supra. Access to emergency responder services (such as ambulance, police, and fire), like the environmental safety provided in Valero, benefits a large segment of the population. Further, the 911 Fee is paid by all Customers, regardless of whether the Customer actually uses the service. Thus, the 911 Fee meets the requirements of § 4254(c) and is not subject to the tax on communications services under § 4251(a) of the Code.

Section 4(a) of Notice 2007-11 provides that the method for sending or receiving a call, such as on a landline telephone, wireless (cellular) telephone, or some other method,

does not affect whether a service is local-only or bundled. Similarly, the method for sending or receiving a call does not affect whether a fee is treated as a tax for purposes of section 4254(c). Thus, in addition to the 911 Fee, a fee separately stated on the bill as "E911" is not subject to the tax on communications services under § 4251(a) of the Code.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

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