

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 40, 49, and 602

[TD ]

RIN 1545-BJ41

Indoor Tanning Services; Cosmetic Services; Excise Taxes

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations that provide guidance on the indoor tanning services excise tax imposed by the Patient Protection and Affordable Care Act of 2010. These final and temporary regulations affect persons that use, provide, or pay for indoor tanning services. The text of the temporary regulations also serves as the text of the proposed regulations (REG-112841-10) set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Applicability Date: For dates of applicability, see §§40.0-1T(e) and 49.5000B-1T(g).

FOR FURTHER INFORMATION CONTACT: Taylor Cortright, (202) 622-3130 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

**Paperwork Reduction Act**

These temporary regulations are being issued without prior notice and public procedure pursuant to the Administration Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and , approved by the Office of Management and Budget under control number 1545- xxxx. Responses to this collection of information are required for the provider of indoor tanning services to accurately calculate the tax on indoor tanning services when such services are offered with other goods and services, as described in §49.5000B-1T(d)(2). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Background**

This document amends the Excise Tax Procedural Regulations (26 CFR part 40) and the Facilities and Services Excise Tax Regulations (26 CFR part 49) under section 5000B of the Internal Revenue Code (Code). Section 5000B was added to the Code by section 10907 of the Patient Protection and Affordable Care Act of 2010 (PPACA), Public Law 111-148 (124 Stat. 119), to impose an excise tax on indoor tanning services.

### **Explanation of Provisions**

Section 5000B(a) imposes on indoor tanning services a tax equal to 10 percent of the amount paid for such service. Indoor tanning services, as defined in section 5000B(b), does not include phototherapy services provided by a licensed medical professional. The regulations define phototherapy services and clarify that such service must be performed by, and on the premises of, a licensed medical professional.

The tax applies to amounts paid for indoor tanning services on and after July 1, 2010. Liability for the tax arises at the time of payment for the indoor tanning services. If, however, it cannot be determined whether an amount has been paid for indoor tanning services (such as for an undesignated gift certificate, discussed below), the liability does not arise until such time as the provider can reasonably determine that the amount paid is for indoor tanning services.

The regulations provide that the “amount paid” includes all amounts paid to the provider for indoor tanning services, including any amount paid by insurance. Providers of indoor tanning services, however, often sell other goods

and services (such as protective eyewear, footwear, towels, and tanning lotions; manicures, pedicures and other spa treatments; and access to sport or exercise facilities) in addition to indoor tanning services. Thus, the regulations provide rules for determining the tax when the provider charges for other goods and services in addition to indoor tanning services.

Section 6001 requires taxpayers to keep books and records sufficient to show whether or not they are liable for tax. To that end, the regulations allow the provider to exclude charges for other goods and services if the charges are separable, do not exceed their fair market value, and are shown in the exact amounts in the records pertaining to the indoor tanning services charge. If the charges are not separately stated, but the total amount paid covers indoor tanning services, then the tax is based on the portion of the amount paid that is reasonably attributable to the indoor tanning services.

For example, if the provider sells bundled service in which the indoor tanning service is bundled with other goods and services, and the charge is not separately stated, the tax applies to the amount paid that is reasonably attributable to the indoor tanning services. This is consistent with the approach taken in Rev. Rul. 63-155 (1963-2 C.B. 566) (relating to the application of the §4261 tax on transportation by air to a package tour sold by a hotel that includes airfare, hotel accommodations, and other services not subject to the §4261 tax).

In addition, in some cases, it may not be possible to determine at the time of payment whether any portion of the payment is for indoor tanning services. For example, if a provider offers an undesignated gift certificate, gift card, or

similar device with a monetary value that can be redeemed for any services, including indoor tanning services (but not bundled service that specifically includes indoor tanning services), the provider may not be able to determine whether any portion of the price paid is for indoor tanning services.

To address these situations, the regulations provide that payment for indoor tanning services occurs at the time it can be reasonably determined that the payment is for indoor tanning services. Thus, in the case of an undesignated gift certificate, a taxable payment for indoor tanning services occurs at the time the undesignated gift certificate is redeemed, in whole or in part, for indoor tanning services. This is consistent with the approach taken in Rev. Rul. 56-157 (1956-1 C.B. 523) (relating to the application of the §4261 tax on transportation by air to a gift certificate that could be redeemed for air transportation or cash). In these cases, the provider of the services calculates the tax on the amount of the undesignated gift certificate that is redeemed for indoor tanning services at the time it is redeemed and the rules of section 5000B(c) apply to determine the person liable for the tax.

Section 5000B(c)(1) provides that the person liable for the tax is the individual on whom the indoor tanning service is performed. In some cases, a person might pay for services to be performed on someone else, such as by purchasing a gift certificate for indoor tanning services. Because the tax is calculated on the amount paid for the indoor tanning services, and because the statute contemplates that the tax will be collected at the time payment is made, the person who pays for the services (purchaser) is deemed to be the person on

whom the services are performed for purposes of collecting the tax. Thus, the purchaser is liable for the tax on the services.

The rules for determining when an amount has been paid for indoor tanning services continue to apply, however. Thus, if a person pays for a gift certificate for indoor tanning services (or for bundled service that include indoor tanning services), then the person is liable for the tax at the time of payment. If a person pays for an undesignated gift certificate, then an amount has not been paid for indoor tanning services until the gift certificate is redeemed for indoor tanning services, and the person that redeems the certificate is liable for the tax.

Additionally, liability for the tax arises at the time of payment even if some or all of the amount paid is later reimbursed by insurance. The regulations provide, however, that an insurance company that pays a provider for services on behalf of an insured is not liable for the tax.

Section 5000B(c)(2) provides that the person receiving the payment on which tax is imposed (the provider) generally must collect the tax from the purchaser and pay the tax over quarterly to the government. Further, if the purchaser does not pay the tax at the time payment for the indoor tanning services is made, section 5000B(c)(3) provides that the provider must pay the tax. Thus, if the provider of the indoor tanning services fails to collect the tax from the purchaser at the time the purchaser makes a payment for indoor tanning services, the provider is liable for the tax.

These regulations apply the existing excise tax procedural rules in 26 CFR part 40 to the tax on indoor tanning services. Thus, the tax, whether paid by the

purchaser or provider under section 5000B(c), is reported by the provider on Form 720 "Quarterly Federal Excise Tax Return." These temporary part 40 regulations do not require semimonthly deposits of tax; rather, full payment of the tax is due quarterly at the time Form 720 is timely filed. The existing regulations also provide that once a Form 720 is required to be filed for a calendar quarter, a Form 720 must be filed for each subsequent calendar quarter, whether or not liability is incurred (or tax must be collected and paid over) during that subsequent quarter, until a final return under §40.6011(a)-2 is filed.

Some providers of indoor tanning services may operate more than one location at which the services are provided. Each business unit that has, or is required to have, a separate employer identification number is treated as a separate person that must file a separate Form 720.

Collected taxes are held in special trust for the United States pursuant to section 7501, and any person who willfully fails to collect and pay over the tax may be subject to the penalty in section 6672. The IRS will generally administer the indoor tanning services tax (in Chapter 49 of the Code), the same way it administers the other collected excise taxes in Chapter 33 of the Code (the communications and transportation taxes). However, the reporting provisions in §49.4291-1 of the regulations (relating to certain inability to collect or refusals to pay tax) do not apply to the tax on indoor tanning services because section 4291 provides that these rules apply only to the Chapter 33 taxes.

### Availability of IRS documents

The IRS revenue rulings cited in this preamble are published in the Internal Revenue Cumulative Bulletin and is available from the Superintendent of Documents, P.O. Box 371954, Pittsburgh PA, 15250-7954.

### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the Special Analysis section in the preamble to the cross-referenced notice of proposed rulemaking in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these temporary regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

### **Drafting Information**

The principal author of these regulations is Taylor Cortright, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

## List of Subjects

### 26 CFR Part 40

Excise taxes, Reporting and recordkeeping requirements.

### 26 CFR Part 49

Excise taxes, Reporting and recordkeeping requirements, Telephone, Transportation.

### 26 CFR Part 602

Reporting and recordkeeping requirements.

## Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 40, 49, and 602 are amended as follows:

### PART 40--EXCISE TAX PROCEDURAL REGULATIONS

Paragraph 1. The authority citation for part 40 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805.

Section 40.0-1T also issued under 26 U.S.C. 5000B(c). \* \* \*

Par. 2. Section 40.0-1T is added to read as follows:

#### §40.0-1T Introduction (temporary).

(a) through (d) [Reserved]. For further guidance, see §40.0-1(a) through (d).

(e) Indoor tanning services--(1) The regulations in this part 40 also set forth administrative provisions relating to the excise taxes imposed by chapter 49, relating to cosmetic services.

(2) This paragraph (e) applies to returns that relate to calendar quarters beginning after June 30, 2010.

(3) This paragraph (e) does not apply after **[INSERT DATE THREE YEARS AFTER THE FILING OF THIS DOCUMENT WITH THE FEDERAL REGISTER]**.

**§40.6302(c)-1 [Amended]**

Par. 3. Paragraph (a)(1) of §40.6302(c)-1 is amended by removing the language “by statute” and adding “by statute, by §40.6302(c)-1T(g),” in its place.

Par. 4. Section 40.6302(c)-1T is added to read as follows:

§40.6302(c)-1T Use of government depositaries (temporary).

(a) through (f) [Reserved]. For further guidance, see §40.6302(c)-1(a) through (f).

(g) Exception for indoor tanning services. (1) No deposit is required for the taxes imposed by section 5000B (relating to indoor tanning services) for any calendar quarter beginning after June 30, 2010.

(2) This paragraph (g) does not apply after **[INSERT DATE THREE YEARS AFTER THE FILING OF THIS DOCUMENT WITH THE FEDERAL REGISTER]**.

**PART 49--FACILITIES AND SERVICES EXCISE TAX**

Par 5. The authority citation for part 49 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Section 49.5000B-1T also issued under 26 U.S.C. 5000B.

Par. 6. Section 49.0-3T is added to read as follows:

§49.0-3T Introduction; cosmetic services (temporary).

On and after July 1, 2010, this part 49 also applies to taxes imposed by chapter 49 of the Internal Revenue Code, relating to cosmetic services. See part 40 of this chapter for regulations relating to returns and payments of taxes imposed by chapter 49.

Par. 7. Subpart G is added to read as follows:

**Subpart G--Cosmetic Services**

§49.5000B-1T Indoor Tanning Services (temporary).

(a) Overview. This section provides rules for the tax imposed by section 5000B on any indoor tanning service.

(b) Imposition of tax--(1) General rule. Tax is imposed by section 5000B at the time of payment for any indoor tanning service.

(2) Undesignated payments. In the case of an undesignated payment, the tax is imposed at the time it can be reasonably determined that the payment is for indoor tanning services. For example, if a payment is for an undesignated gift certificate, gift card, or similar device that can be redeemed for any goods or services, it can be reasonably determined that a payment is for indoor tanning services when the undesignated gift certificate is redeemed, in whole or in part, for indoor tanning services.

(c) Definitions.

Indoor tanning service means a service employing any electronic product designed to incorporate one or more ultraviolet lamps and intended for the

irradiation of an individual by ultraviolet radiation, with wavelengths in air between 200 and 400 nanometers, to induce skin tanning. The term does not include phototherapy service performed by, and on the premises of, a licensed medical professional (such as a dermatologist, psychologist, or registered nurse).

Other goods and services include, but are not limited to, protective eyewear, footwear, towels, and tanning lotions; manicures, pedicures and other spa treatments; and access to sport or exercise facilities.

Phototherapy service means a service that exposes an individual to specific wavelengths of light for the treatment of--

- (1) Dermatological conditions (such as acne, psoriasis, and eczema);
- (2) Sleep disorders;
- (3) Seasonal affective disorder or other psychiatric disorder;
- (4) Neonatal jaundice;
- (5) Wound healing; or
- (6) Other medical condition determined by a licensed medical

professional.

(d) Application of tax--(1) Tax on total amount paid for indoor tanning services. The tax is imposed on the total amount paid for indoor tanning services, including any amount paid by insurance.

(2) Charges for other goods and services; tanning services separately stated. If a payment covers charges for indoor tanning services as well as other goods and services, the charges for other goods and services may be excluded in computing the tax payable on the amount paid, if--

(i) The charges are separable (regardless of the manner of invoicing the charges);

(ii) Do not exceed their fair market value; and

(iii) Are shown in the exact amounts in the records pertaining to the indoor tanning services charge.

(3) Charges for other goods and services; tanning services bundled. This paragraph (d)(3) applies if paragraph (d)(2) of this section does not apply. If a provider offers indoor tanning services as part of bundled services (including “free” or reduced-rate indoor tanning services) with other goods and services, the payment for the bundled service 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 service or the fair market value of similar services (based on the amount charged by a comparable provider in the same geographic area) to

(ii) The charge determined in paragraph (d)(3)(i) of this section plus the provider’s charge for the other goods and services in the bundled service or the fair market value of similar goods and services (based on the amount charged by a comparable provider in the same geographic area).

(e) Person liable for the tax--(1) General rule. The person who pays for the indoor tanning service (other than an insurance company that pays the

provider on behalf of an insured) is deemed to be the person on whom the service is performed for purposes of collecting the tax. Thus, the person paying for the indoor tanning service (other than an insurance company that pays the provider on behalf of an insured) is liable for the tax at the time of payment.

(2) Tax not collected at time of payment. If the person paying for the indoor tanning services does not pay the tax at the time of payment, the person receiving the payment is liable for the tax.

(f) Persons receiving payment must collect tax. Every person receiving a payment for indoor tanning services on which a tax is imposed under this section shall collect the amount of the tax from the person making that payment.

(g) Examples. The following examples illustrate the application of section 5000B and this section. In the examples, A provides indoor tanning services and sells other goods and services.

Example 1. On July 1, 2010, B, an individual, pays A for one 10-minute indoor tanning service (as defined in paragraph (c) of this section) and one pair of protective eyewear. A charges \$15.00 for the 10-minute indoor tanning service and \$2.00 for a pair of protective eyewear. The \$2.00 charge for the protective eyewear does not exceed its fair market value. The invoice from A is \$17.00 (exclusive of the tax imposed by section 5000B) and separately states the cost of the protective eyewear. Because the cost of the protective eyewear is separately stated, A calculates the section 5000B tax on \$15.00 as provided by paragraph (d)(2) of this section. B is liable for the tax when B pays for the services and A must collect the tax from B. If B does not pay the tax at the time B pays for the services, A is liable for the tax.

Example 2. A periodically offers bundles its services to promote additional business. On July 1, 2010, C, an individual, buys bundled service from A including 10 swimming lessons, the use of towels while on A's premises, one pair of protective eyewear, and 2 "free" 10-minute indoor tanning services. A charges \$252.00 for the bundled service. Outside of the bundled service, A usually charges \$25.00 per swimming lesson and provides use of towels for free, usually charges \$15.00 for a 10-minute indoor tanning service, and usually charges \$2.00 for the protective eyewear. As determined under paragraph (d)(3) of this

section, the section 5000B tax applies to the amount reasonably attributable to the indoor tanning service, or \$26.81  $((\$30/\$282) \times \$252)$ .

Example 3. On July 1, 2010, D buys bundled service (described in Example 2) from A as a gift for C. Under paragraph (e)(1) of this section, D is deemed to be the person on whom the indoor tanning services are performed for purposes of collecting the tax. Therefore, under paragraph (b)(1) of this section, D is liable for the tax when D pays for the services. The tax will be computed under the rules of paragraph (d)(3) of this paragraph. If D does not pay the tax at the time D pays for the services, A is liable for the tax.

(h) Effective/applicability date. This section applies to amounts paid for indoor tanning services after June 30, 2010.

(i) Expiration date. This section does not apply after **[INSERT DATE THREE YEARS AFTER THE FILING OF THIS DOCUMENT WITH THE FEDERAL REGISTER]**.

Part 602--OMB CONTROL NUMBERS UNDER THE PAPERWORK  
REDUCTION ACT

Par. 8. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 9. In §602.101, paragraph (b) is amended by adding the following  
entry in numerical order to the table to read as follows:

§602.101 OMB Control numbers.

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(b) \* \* \*

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CFR part or section where Identified and described	Current OMB control No.
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Deputy Commissioner for Services and Enforcement.

Approved:

Assistant Secretary of the Treasury (Tax Policy).