

provided or the services rendered to assert the amount of tax due, affording that person the same conference, protest, and appellate rights as are available to other excise taxpayers. In addition, when a field or office audit of a collecting agent's records, or of a taxpayer's records, discloses that the collecting agent failed during prior reporting periods to collect taxes due, the Commissioner may assert those taxes directly against the person to whom the facilities were provided or the services rendered, whether or not the collecting agent had attempted collection or the person liable for the tax had refused payment thereof. For purposes of this section, the report due date is—

(a) In the case of a person using the alternative method of making deposits described in § 40.6302(c)-3 of this chapter, the due date of the return on which the item of adjustment relating to the uncollected tax would be reflected if items of adjustment were determined without regard to the limitation in § 40.6302(c)-3 of this chapter; and

(b) In any other case, the due date of the return on which the tax would have been reported but for the refusal to pay or inability to collect.

[T.D. 8685, 61 FR 58007, Nov. 12, 1996, as amended by T.D. 9051, 68 FR 15942, Apr. 2, 2003; T.D. 9149, 69 FR 48394, Aug. 10, 2004; T.D. 9221, 70 FR 49870, Aug. 25, 2005]

### 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 payment cards.* In the case of an undesignated payment card (within the meaning of paragraph (c)(5) of this section), payment for indoor tanning services is made when it can reasonably be determined that a payment is made specifically for indoor tanning services. Thus, when the undesignated payment card is redeemed, in whole or in part, to pay for indoor tanning services (and not when a pay-

ment is made to purchase the undesignated payment card), it can reasonably be determined that a payment for indoor tanning services is made, and the tax is imposed.

(3) *Payments to qualified physical fitness facilities.* No portion of a payment to a qualified physical fitness facility (within the meaning of paragraph (c)(4) of this section) that includes access to indoor tanning services is treated as a payment for indoor tanning services.

(c) *Definitions—(1) 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).

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

(3) *Phototherapy service* means a service that exposes an individual to specific wavelengths of light for the treatment of—

(i) Dermatological conditions (such as acne, psoriasis, and eczema);

(ii) Sleep disorders;

(iii) Seasonal affective disorder or other psychiatric disorder;

(iv) Neonatal jaundice;

(v) Wound healing; or

(vi) Other medical condition determined by a licensed medical professional to be treatable by exposing the individual to specific wavelengths of light.

(4) *Qualified physical fitness facility* means a facility—

(i) In which the predominant business or activity is providing facilities, equipment, and services to its members for purposes of exercise and physical fitness (determined by taking into consideration all of the facts and circumstances, such as the cost of the equipment, variety of services offered, actual usage of services by customers,

revenue generated by different services, and how the entity holds itself out to the public through advertising or other means);

(ii) In which providing indoor tanning services is not a substantial part of the business or activity; and

(iii) That does not sell indoor tanning services for a fee to the public or otherwise offer different pricing options to its members based in whole or in part on access to indoor tanning services.

(5) *Undesignated payment card* means a gift certificate, gift card, or similar item that can be redeemed for goods or services that may, but do not necessarily, include indoor tanning services.

(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 the charges—

(i) Are separable (regardless of the manner of invoicing the charges);

(ii) Do not exceed the fair market value of such other goods and services; 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 (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 paragraph (d)(3)(i) of this section 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).

(e) *Person liable for the tax*—(1) *General rule.* The person who pays for the indoor tanning service 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 is liable for the tax at the time of payment.

(2) *Undesignated payment cards.* In the case of a payment made with an undesignated payment card (within the meaning of paragraph (c)(5) of this section) described in paragraph (b)(2) of this section, the person who redeems the card, in whole or in part, to pay specifically for indoor tanning services is the person who pays for the indoor tanning services. Thus, the person who redeems an undesignated payment card, in whole or in part, to pay specifically for indoor tanning services is liable for the tax at the time such payment is made.

(3) *Tax not collected at time of payment.* If the person paying for the indoor tanning services does not pay the tax to the person receiving the payment for the services at the time of payment for the services, 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. The total amount paid is presumed to include the tax if the tax is not separately stated.

(g) *Examples.* The following examples illustrate the application of section 5000B and this section.

*Example 1.* A is a provider of indoor tanning services and other goods and services. On July 1, 2010, B, an individual, pays A for one 10-minute indoor tanning service (as defined in paragraph (c)(1) 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. If A does not collect the tax from B at the time B pays for the services, A is liable for the tax.

*Example 2.* A, a provider of indoor tanning services and other goods and services, periodically offers bundled services to promote additional business. On July 1, 2010, C, an individual, buys bundled service from A that includes 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 (exclusive of the tax imposed by section 5000B) for the bundled services. If these services are purchased separately, A charges (exclusive of the tax imposed by section 5000B) \$25.00 per swimming lesson, \$15.00 for a 10-minute indoor tanning service, \$2.00 for the protective eyewear and does not charge for the use of towels while on A's premises. As determined under paragraph (d)(3) of this section, the section 5000B tax applies to the amount reasonably attributable to the indoor tanning service, which is \$26.81 ( $(\$30/\$282) \times \$252$ ).

*Example 3.* On July 1, 2010, D buys bundled services (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 section. If D does not pay the tax at the time D pays for the services, A is liable for the tax.

*Example 4.* S operates a spa that provides a variety of cosmetic goods and services, including indoor tanning services. On July 1, 2010, D buys a gift certificate in the amount of \$100.00 from S as a gift for C. The gift certificate may be redeemed by C for C's choice among several services offered by S, including indoor tanning services. On July 15, 2010, C partially redeems the gift certificate to pay for one 10-minute indoor tanning service.

Under paragraph (b)(2) of this section, a payment for indoor tanning services is made, and the tax under section 5000B is imposed, on July 15, 2010, when C partially redeems the gift certificate to pay for one indoor tanning service. Under paragraph (e)(2) of this section, C is the person who pays for the indoor tanning services. Therefore, C is liable for the tax, computed under the rules of paragraph (d) of this section, and pays the tax by permitting S to debit the amount of the tax from the balance of the gift certificate or by paying the amount of the tax to S in cash. If C does not pay the tax at the time C partially redeems the gift certificate to pay for the indoor tanning services, S is liable for the tax.

*Example 5.* On July 1, 2010, E pays \$1000 (exclusive of the tax imposed by section 5000B) to spa S for the right to use the following equipment and services during the month of July: up to four massages or facials, unlimited use of a sauna, steam room, showers, and towel service, and unlimited indoor tanning services. If the services are purchased separately, S charges (exclusive of the tax imposed by section 5000B) \$150 for unlimited indoor tanning services during the month of July, and \$900 for the other equipment and services during the month of July, not including indoor tanning services. Under paragraph (b) of this section, E has made a payment for indoor tanning services and the tax will be computed under the rules of paragraph (d)(3) of this section. As determined under paragraph (d)(3) of this section, the section 5000B tax applies to the amount reasonably attributable to the indoor tanning services, which is \$142.86 ( $(\$150/\$1050) \times \$1000$ ). If E does not pay the tax at the time E pays for the bundled services, S is liable for the tax.

*Example 6.* G operates a full-service gym facility that offers fitness classes, multiple exercise machines (such as treadmills, stationary bicycles, weight training machines, and free weights), and has as its predominant business providing these facilities, equipment, and services to members for purposes of exercise and physical fitness. G provides its members with access to indoor tanning services, comprised of two tanning beds that meet the definition of indoor tanning services under paragraph (c)(1) of this section. G generally charges its members a fee for monthly usage of its facilities, equipment, and services, but also offers short-term or free trial memberships and allows non-members to purchase individual or a series of exercise classes. G does not charge any fee for the indoor tanning services, does not offer indoor tanning services separately from its other services, and has no membership tier or category that differs from others based on access to the indoor tanning services. G holds itself out to the public through advertising and marketing as providing equipment

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and services to improve physical fitness. On July 1, 2010, F pays a membership fee to G in return for use of G's facility during the month of July. Under paragraph (b)(3) of this section, no portion of F's membership fee payment is treated as a payment made for indoor tanning services, because G is a qualified physical fitness facility under paragraph (c)(4) of this section. Therefore, no liability for tax arises under section 5000B.

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

(i) *Expiration date.* This section expires on or before June 11, 2013.

[T.D. 9486, 75 FR 33686, June 15, 2010]