

We Won – So Let’s Repeal the Spanish-American War Tax

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In 1898 Congress enacted a tax on telephones, then a luxury item, to help pay for the war against Spain. The war lasted 114 days (we won). The tax has lasted 38,181 days, and counting.

On several occasions over the years, the tax was scheduled to expire, but Congress extended it each time. In 1990, Congress made the tax permanent at three percent. As technology has expanded, our elected leaders have insured that the tax grows with it. In addition to telephones, the tax today applies to fax machines, cell phones and internet lines. Cell phone users alone pay about \$4.5 billion a year.

Recently, the U.S. Court of Appeals for the D.C. Circuit, joining two other circuit courts, issued an opinion saying that long-distance telephone services are not subject to the federal telecommunications excise tax. The D.C. Circuit held that the definition of “toll telephone service” requires a toll charge that varies in amount with the time and distance of each individual communication.

The Court’s opinion effectively negates the applicability of the Spanish American War Tax. Consequentially, consumers of telecommunication services should see the cost of their telephone bills fall by three percent. The IRS, however, has yet to concede the issue and continues to require collection of the tax, which brings in approximately \$8 billion annually to the federal treasury.



“Charge of the Rough Riders at San Juan Hill” by Frederic Remington. The Rough Riders took San Juan Hill, but their great, great grandchildren are still paying the Spanish-American war tax.

The Court’s Reasoning

Typically, consumers’ long-distance charges vary in amount with time of the communication, but do not vary with the distance between the callers. In other words, a ten-minute call from Seattle to New York typically costs the same as a ten-minute call from Seattle to Spokane. The distance between the parties on the call is irrelevant to the cost of the call.

Therefore, say federal judges of the 6th, 11th, and now D.C., circuit courts, the federal telecommunications excise tax does not apply to the typical consumer, so we shouldn't have to pay it.

Background

The federal telephone excise tax is collected by the telecommunications provider and sent to the U.S. Treasury. Since telecom companies simply include the tax on people's overall phone bills, the consumer is the person who actually pays the tax. Consequently, the consumer (who is also the taxpayer) can file individual refund claims with the IRS, even though the tax was collected from the consumer and remitted to the U.S. Treasury by the service provider.

Congressional Action

In 2000, the House and Senate passed joint appropriations legislation that included the repeal of the tax. President Clinton vetoed the bill, however. In June 2005, Representative Cathy McMorris (R-WA) co-sponsored H.R. 1898 that would repeal the tax on all telecommunication services. Oregon Senator Gordon Smith co-sponsored a similar bill in the Senate (S.1321). Both bills are currently in committee and neither house of Congress has voted out final legislation.

IRS's Current Position

In September 2005, the IRS issued Notice 2005-79. The purpose of the Notice was to advise taxpayers and service providers that, notwithstanding the Service's losses in the 6th, 11th and D.C. circuit courts, telecommunication service providers must continue to collect and remit the tax to the U.S. Treasury, and taxpayers must continue to pay.

In addition, the IRS informed taxpayers that any claims for refunds of this tax will not be processed while cases are pending on appeal. In other words, the IRS' position is to insist on collecting a tax that three federal circuit courts have ruled invalid.

Conclusion

The issue of the applicability of this tax will be resolved in one of two ways. First, the U.S. Supreme Court may decide the issue in a manner consistent with the three lower appellate courts and hold that the tax does not apply to most kinds of phone service. Such a decision will not happen any time soon, however, because the IRS has not appealed any of the lower court rulings to the Supreme Court.

Second, Congress may again vote to repeal the tax and, with a different president in office, it would likely become law. Even then, however, the repeal of the tax would only be prospective; it would not automatically refund any money consumers have paid so far. In that case, consumers' only recourse would be to file a claim for a refund with the IRS.

Until this matter is settled one way or another, consumers would be well advised to file a claim. In the meantime, we will all continue paying for the Spanish-American War.

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