

*Federal
Communications
Excise Tax*

Published reports state that the government may be on the verge of conceding liability with respect to the federal communications excise tax (“FET”). The anticipated government concession is directly traceable to a series of court defeats.

Late last week, for example, a United States District Court Magistrate Judge, in a well-reasoned report, recommended that the United States District Court grant our client, PNC Bank, N.A., its Motion for Summary Judgment and deny the government’s Cross-Motion for Summary Judgment, thus extending the streak of decisions adopting the taxpayer’s position. We currently represent approximately 30 corporations in separate FET lawsuits throughout the country, including Hewlett-Packard Company (“Hewlett-Packard”), in connection with the government’s appeal to the Ninth Circuit Court of Appeals of the California District Court’s grant of Summary Judgment Motion in favor of Hewlett-Packard.

Following any government concession, each corporate taxpayer would be required to negotiate a

separate settlement with the Internal Revenue Service (“IRS”). Each corporate taxpayer would be obligated to provide a breakdown of its communications services and we anticipate that the IRS would attempt to disallow the FET refund claim to the extent attributable to certain services. IRS agents have stated that they believe it would take at least three years to execute settlement agreements with corporations that have filed FET refund claims.

Having negotiated with the IRS agents responsible for FET during the past eleven years, we continue to believe that a corporate taxpayer would have greater leverage negotiating a settlement in court (as opposed to in an administrative proceeding).

There are two final caveats. First, in many situations, a taxpayer unknowingly pays FET. In certain cases, the FET is not even separately identified on an invoice. We generally work with telecom personnel in an attempt to identify all sources of potentially recoverable FET.

Finally, we continue to be concerned regarding the possibility of an adverse tax law change. A gov-

ernment concession would give rise to a revenue loss of approximately \$30 - \$40 billion over a ten-year period. In light of the significant budget deficit, it is plausible that Congress would amend the Internal Revenue Code to eliminate the FET refund opportunity

and “grandfather” corporate taxpayers only to the extent they have filed FET refund claims as of a specified date. We generally advise clients to file FET refund claims on an expedited basis in order to reduce the risk of being subject to an adverse tax law change.

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