



*California State Board of Equalization,
Legislative and Research Division*

LEGISLATIVE BULLETIN



State Capitol Building (from the East) c.1945
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SPECIAL TAXES AND FEES LEGISLATION 2008

STATE BOARD OF EQUALIZATION
SPECIAL TAXES LEGISLATION
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Assembly Bill 2047 (Horton) Chapter 222
Offers in Compromise

Effective January 1, 2009. An act to amend, repeal, and add Sections 9278, 30459.15, 32471.5, 41171.5, 46628, 50156.18, 55332.5, and 60637 of the Revenue and Taxation Code, relating to taxation

BILL SUMMARY

This Board-sponsored bill allows the Board, until January 1, 2013, to compromise certain final tax, fee or surcharge (tax) liabilities of (1) businesses that are not discontinued or transferred if the final tax liability arises from transactions in which the taxpayer did not receive sales tax reimbursement or use tax, and (2) persons liable as successors.

Sponsor: Board of Equalization

LAW PRIOR TO AMENDMENT

Under the existing Use Fuel Tax Law, Cigarette and Tobacco Products Tax Law, Alcoholic Beverage Tax Law, Emergency Telephone Users Surcharge Act, Oil Spill Response, Prevention, and Administration Fees Law, Underground Storage Tank Maintenance Fee Law, Fee Collection Procedures Law, and Diesel Fuel Tax Law, the Board is allowed to compromise a final tax liability if certain requirements are met.

Under these laws, one of the requirements to compromise a final tax liability is that an offer can only be considered with respect to liabilities that were generated from a business that has been discontinued or transferred, where the taxpayer making the offer no longer has a controlling interest in or association with the transferred business or a controlling interest in or association with a similar type of business as the transferred or discontinued business. Therefore, under existing law, unless the business is discontinued or transferred, the Board may not accept an offer to compromise a tax debt from taxpayers.

Under existing law, when a final tax liability is not paid when due, the Board bills the taxpayer or feepayer (taxpayer), negotiates for payments, searches for the taxpayer's assets, and takes collection actions to gain access to assets to satisfy the debt. Collection actions may include manually searching records for assets, making telephone calls, or seizing and selling such assets as vehicles, vessels, or stocks. In the event of a hardship, existing law allows installment payment arrangements or deferred collection until the financial situation of the tax debtor improves. However, if taxpayers can obtain loans or can use credit lines to pay their tax debts, they are expected to do so.

If a debt remains unpaid for a number of years and a lien has been filed but assets cannot be located, the Board may write off the debt. When a debt is written off, it is still due and owing and any liens recorded are still valid, but routine billing and collection actions are discontinued unless assets are subsequently located. The

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debt also remains on the taxpayer's credit record, impeding his or her ability to obtain credit.

AMENDMENT

This bill amends, for a 4-year period ending on January 1, 2013, Sections 9278 (Use Fuel Tax Law), 30459.15 (Cigarette and Tobacco Products Tax Law), 32471.5 (Alcoholic Beverage Tax Law), 41171.5 (Emergency Telephone Users Surcharge), 46628 (Oil Spill Response, Prevention, and Administration Fees Law), 50156.18 (Underground Storage Tank Maintenance Fee Law), 55332.5 (Fee Collection Procedures Law), and 60637 (Diesel Fuel Tax Law) of the Revenue and Taxation Code to do the following:

- 1) Allow a qualified final tax liability to be compromised regardless of whether the business has been discontinued or transferred or whether the taxpayer has a controlling interest or association with a similar type of business.
- 2) Define "qualified final tax liability" to mean that part of the final tax liability, including interest, additions to tax, penalties, or other amounts assessed, arising from a transaction or transactions in which the Board finds no evidence that the taxpayer collected the tax from the purchaser or other person and which was determined against the person, or a final tax liability against a successor, as specified.
- 3) Specify that a qualified final tax liability may not be compromised with a taxpayer who previously received a compromise, as specified.
- 4) Allow the Board to enter into a written installment payment agreement that permits a taxpayer to pay the compromise installments for a period not exceeding one year.
- 5) Allow the Board to enter into any collateral agreement deemed necessary for the protection of the interests of the state, as specified.
- 6) Require a taxpayer that has received a compromise to file and pay by the due date all subsequently required returns and/or reports for a five-year period, as specified.

The bill becomes operative on January 1, 2009, and sunsets on January 1, 2013.

IN GENERAL

In general, an offer in compromise is a process whereby the taxpayer offers to pay an amount that he or she believes to be the maximum amount that he or she can pay within a reasonable time. If the parties agree to the amount offered, the debt is compromised (reduced) to that amount.

In the offer in compromise process, the Board administers the program consistent with procedures followed by the Franchise Tax Board (FTB) and the Employment Development Department (EDD) with respect to:

- The terms of the offer
- The process leading up to the acceptance of the offer, including high levels of review; and
- The refunding of rejected offers without interest, at the taxpayer's discretion.

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The Board has created an Offers in Compromise Section which is solely responsible for making compromises under the current provisions of law. Compromises are accepted when a tax liability is final and the Offers in Compromise Section finds that the amount the taxpayer proposes to pay represents the maximum amount the Board can expect to collect from that taxpayer in a reasonable period of time – typically five to seven years.

BACKGROUND

The authorization for the Board to accept offers in compromise was added into law by AB 1458 (Stats. 2002, Ch. 152) and applied to final tax liabilities under the Sales and Use Tax Law, the Use Fuel Tax Law, and the Underground Storage Tank Maintenance Fee Law. In 2006, AB 3076 (Stats. 2006, Ch. 364) added similar provisions under the Cigarette and Tobacco Products Tax Law, Alcoholic Beverage Tax Law, Timber Yield Tax Law, Energy Resources Surcharge Law, Emergency Telephone Users Surcharge Law, Hazardous Substances Tax Law, Integrated Waste Management Fee Law, Oil Spill Response, Prevention, and Administration Fees Law, Fee Collection Procedures Law, and Diesel Fuel Tax Law.

Before these authorizations were added into law, in order to compromise a taxpayer's liability, the Board was required to obtain a stipulated judgment from the court.

COMMENTS

1. **Purpose.** This bill extends the Board's current offers in compromise program to those open and active businesses that have not received reimbursement from the taxes, fees or surcharges owed and to successors of businesses that may have inherited tax liabilities of their predecessors.

The current offers in compromise program only applies to businesses that have discontinued or transferred their operations. The Board will now allow compromises with those taxpayers who may otherwise have to sell or discontinue their businesses because of their inability to pay in full a final tax liability that arose from transactions in which the taxpayers did not collect tax from the purchasers or other persons. These situations arise because taxpayers mistakenly believe that their transactions are not subject to the tax. Upon audit, the taxpayer first learns that the transactions are subject to tax, but the taxpayer cannot legally or realistically collect the tax from his or her customers. In addition, this bill allows compromises with respect to successor liabilities where the successor is still in business.¹ The Board has found that these liabilities often come as a surprise to the taxpayer and can financially cripple otherwise law-abiding taxpayers.

The bill is intended to address those unique situations where the Board believes that it would be in the best interest of the state to compromise a tax debt, when the taxpayer does not have the means to pay more than the amount offered now or in the near future. It also provides for a voluntary resolution that is agreeable to both taxpayers as well as the Board.

¹ Current law holds a purchaser of a business personally liable for the unpaid sales and use tax liability of the seller up to the purchase price of the business, if the purchaser fails to withhold sufficient funds to cover the liability when purchasing the business.

2. **What if the Board compromises a tax debt and the business becomes profitable?** The bill contains a provision that specifies that taxpayers may be required to enter into any collateral agreement that is deemed necessary for the protection of the interests of the state. The bill provides that the collateral agreement may include a provision that allows the Board to reestablish the liability or any portion thereof, if the taxpayer has sufficient annual income during the succeeding five-year period.
3. **What do the other tax agencies do?** Offers in Compromise programs are also available for income tax liabilities due the Internal Revenue Service (IRS) and the FTB, as well as employment tax liabilities due the EDD. Both the IRS and FTB's programs have the ability to compromise liabilities of ongoing businesses, and according to FTB, compromises are frequently made with collateral agreements. Thus, this measure would be consistent with those tax agencies' programs. Also, the IRS and EDD allow installment payment option terms for offered amounts where the offered funds cannot be paid in a lump sum. This measure would also allow installment payment terms, as long as payment of the offered funds is made within a year.

Assembly Bill 3079 (Committee on Revenue and Taxation) Chapter 306
Board-Sponsored Measure

Effective January 1, 2009. Among its provisions, amends Sections 7342, 7470, 60135, and the heading of Article 3 (commencing with Section 7470) of Chapter 4 of Part 2 of Division 2 of, and adds Sections 7652.8 and 60204.6 to, the Revenue and Taxation Code.

BILL SUMMARY

With respect to Special Taxes and Fees, this bill contains Board of Equalization-sponsored provisions to redefine “train operator” for purposes of the Motor Vehicle Fuel Tax Law, and require a train operator transporting fuel products to obtain a license and file monthly information reports on fuel products entering, moving within, and departing the state.

Sponsor: Board of Equalization

LAW PRIOR TO AMENDMENT

Under the Motor Vehicle Fuel Tax Law (Part 2 (commencing with Section 7301) of Division 2 of the Revenue and Taxation Code, the state imposes an excise tax of \$0.18 per gallon on the removal of motor vehicle fuel (gasoline) at the refinery or terminal rack, upon entry into the state, and upon sale to an unlicensed person.

Similarly, under the existing Diesel Fuel Tax Law (Part 31 (commencing with Section 60001) of Division 2 of the Revenue and Taxation Code, the state also imposes an excise tax of \$0.18 per gallon on the removal of diesel fuel at the refinery or terminal rack, upon entry into the state, and upon sale to an unlicensed person, unless specifically exempted.

In general, California’s reporting scheme for these fuel taxes is based on the premise that all fuel products must be accounted for within the bulk transfer/terminal system in California, which consists of refineries, pipelines, vessels, and petroleum terminals. The reporting system presently includes information reports provided by vessel and pipeline operators (the carriers), receipt and disbursement reports filed by terminal operators, and tax returns recounting terminal removals and taxable imports filed by licensed suppliers. The reporting system allows for the cross-checking of transactions between carriers and terminals and between terminals and suppliers. This information is used by the Board for audit and compliance purposes to ensure the fuel gallons and taxes are properly reported and collected.

As part of this effort, Section 7403.1 of the Motor Vehicle Fuel Tax Law and Section 60106.1 of the Diesel Fuel Tax Law provide that train operators are required to obtain a license or permit from the Board for the purpose of issuing exemption certificates to their suppliers for the fuel used in operating trains (fuel used “off-highway” is generally exempt from the state fuel taxes). Sections 7403.2 and 60107, respectively, require such train operators to provide information reports to the Board on the gallons of fuel purchased *for use* in their trains, or for other off-highway use, under an exemption certificate.

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Currently, Sections 7652.7 and 60204.5 provide that only vessel and pipeline operators are required to file reports with the Board regarding motor vehicle fuel (gasoline) and diesel fuel carried by their vessels and pipelines, as these fuel movements are deemed “above the rack,” i.e., before the point of taxation. Existing law does not require train operators who transport fuel by rail to file such reports.

AMENDMENT

This bill amends the heading of Article 3 (commencing with Section 7470) of Chapter 4 of Part 2 of Division 2 of the Revenue and Taxation Code, and amends Sections 7342, 7470, and 60135, of, and add Sections 7652.8 and 60204.6 to, the Revenue and Taxation Code, to do the following:

1. For purposes of the Motor Vehicle Fuel Tax Law, expand the definition of “train operator” to include a person that owns, operates, or controls *any* train (not just motor vehicle fuel-powered trains) that is licensed as a railroad by a state or federal agency.
2. For purposes of the Motor Vehicle Fuel Tax Law and the Diesel Fuel Tax Law, require every train operator that transports specified fuel into, out of, or within this state to obtain a license from the Board, and
3. Require each train operator to prepare and file with the Board a report, as specified, which must include specified information regarding the amount of, location of, and date of delivery of, specified fuel and any other information required by the Board for proper administration of the Motor Vehicle Fuel Tax Law and the Diesel Fuel Tax Law.

BACKGROUND

In 1995 and in 2002, the imposition of the diesel fuel and motor vehicle fuel taxes, respectively, was moved to the “rack” (the “rack” is a mechanism for delivering fuel from a refinery or terminal into a truck, trailer, railroad car, or similar means). At that time, very little fuel moved by rail in California, and almost all of that movement related to fuel destined for export to neighboring states. Therefore, train operators have not been required to report movements of fuel by rail, because such movements occurred *after* the point of taxation.

However, since that time, many significant changes have occurred in the California petroleum market. First, California gasoline was reformulated to use ethanol as an oxygenate (the ethanol is added to fuels, especially gasoline, to make them burn more efficiently). Because of its properties, ethanol, which is primarily produced in the Midwest, cannot be shipped by pipeline (due to its corrosive qualities and the possibility that water in the pipeline might damage the fuel). Therefore, millions of gallons of ethanol are being shipped into the state each year, primarily by rail. Second, the California Legislature and the Governor have made the reduction of greenhouse gas emissions a priority with the signing in 2006 of both AB 32 (Ch. 488, Stats. 2006, The California Global Warming Solutions Act) and Executive Order S-01-07, which directed the establishment of a low carbon fuel standard for transportation fuels used in California. Additionally, biodiesel fuels continue to be popular alternatives to petroleum diesel fuel. Like ethanol, these fuel stocks are primarily produced in the Midwest and shipped by rail into California.

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Board staff is concerned about the lack of accountability for rail imports since rail movements are not currently considered part of the bulk transfer system. Ethanol is a reportable product for motor fuels reporting, meaning that it is not a taxable product itself but becomes taxable when blended with motor vehicle fuel to produce California Reformulated Gasoline. This blending must occur within the petroleum terminal, and terminal operators report their receipt of ethanol into the terminals. But without reports from the rail carriers, the Board has no way of cross-checking to determine if all of the ethanol delivered by the rail carriers from out-of-state locations to in-state terminals is actually being reported by the in-state petroleum terminal operators. During 2006, California petroleum terminals reported receiving 1.2 billion gallons of ethanol.

Unlike ethanol, biodiesel and similar biofuels are considered taxable fuel products and are subject to tax when imported into the state. Additionally, biofuel imports generally bypass the terminal system and are delivered directly to distributors or end-users. Biofuel importers are required to be licensed as suppliers and remit tax on the fuel imported into the state. The Board makes every effort to identify and timely register biofuel importers but continues to come across taxpayers who are operating without the proper license and incurring unreported tax liabilities because they are importing biofuels by rail. Rail carrier reporting would assist in more timely identification of unlicensed biofuel importers and lead to a greater level of voluntary compliance and tax recovery. During 2006, 20.8 million gallons of biodiesel fuel were reported as having been received from out-of-state sources. In addition, using alternative means of identifying biodiesel importers who have not reported their biodiesel imports, the Board is investigating several audit leads with a potential for \$360,000 in additional tax assessments.

COMMENT

Purpose. This provision is intended to address the lack of accountability for rail imports since rail movements are not currently accounted for under the existing bulk transfer system. We anticipate that California would realize a direct tax benefit from rail carrier reporting because these reports would provide valuable information to the Board that can be used in improving motor fuel tax collection and enforcement efforts. The Board is aware of at least eight states that require rail carriers to report fuel movements into and out of their states, and we are unaware of any concerns voiced by these carriers over these added reporting requirements.

Senate Bill 1040 (Kehoe) Chapter 17
Emergency Telephone Users (911) Surcharge

Effective May 21, 2008, except the VoIP provisions become operative January 1, 2009. Amends Sections 41007, 41009, 41011, 41016, 41020, 41025, 41030, 41031, 41046, and 41050 of, and adds Sections 41016.5, 41019.5, and 41152 to, the Revenue and Taxation Code.

BILL SUMMARY

Among other things, this bill changes the Emergency Telephone Users (911) Surcharge Act² to do the following:

- Clarifies the definition of "toll telephone service."
- Imposes the 911 surcharge on amounts paid by every person in the state for Voice over Internet Protocol (VoIP) service.

Sponsor: California Department of General Services

"Toll Telephone Service" Definition
Amends Section 41016 of the Revenue and Taxation Code

LAW PRIOR TO AMENDMENT

Emergency Telephone Users (911) Surcharge Act

Under existing law, Section 41020 of the Revenue and Taxation Code imposes a surcharge on amounts paid by every person in the state for intrastate telephone communication services. The current surcharge rate is 0.50 percent of the amounts paid for intrastate telephone services in this state. The surcharge is paid to the Board of Equalization (Board) and deposited in the State Treasury to the credit of the State Emergency Telephone Number Account in the General Fund. The funds in this account are used to pay for the costs of administration of the 911 emergency telephone number system.

Section 41010 defines intrastate telephone communication services to mean all local or toll telephone services where the point or points of origin and the point or points of destination of the service are all located in this state.

Section 41015 defines "local telephone service" to mean both of the following:

- (a) The access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone or radiotelephone stations constituting a part of the local telephone system.
- (b) Any facility or service provided in connection with a service described in subdivision (a).

The term "local telephone service" does not include any service which is a "toll telephone service" or a "private communication service."

² Part 20 (commencing with Section 41001) of Division 2 of the Revenue and Taxation Code.

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Section 41016 defines “toll telephone service” to mean:

- (a) A telephonic quality communication for which (1) there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication and (2) the charge is paid within the United States, and
- (b) A service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radiotelephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located.

Section 41021 requires every service supplier to collect the surcharge from each service user at the time it collects its billing from the service user. A service provider is defined in Section 41007 to mean any person supplying intrastate telephone communication services pursuant to California intrastate tariffs to any service user in this state. The term also includes any person supplying intrastate telephone communications services for whom the California Public Utilities Commission (CPUC), by rule or order, modifies or eliminates the requirement for that person to prepare and file California intrastate tariffs.

Federal Law

Under existing federal law, an excise tax is imposed on amounts paid for communications services. The term “communication services” is defined to mean, in part, local telephone service and toll telephone service. “Toll telephone service” is defined in Section 4252(b) of Title 26 of the United States Code to mean:

1. A telephonic quality communication for which (A) there is a toll charge which varies in amount with the distance **and** elapsed transmission time of each individual communication and (B) the charge is paid within the United States, and
2. A service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located.

The federal excise tax on telephone services is administered and collected by the Internal Revenue Service (IRS).

AMENDMENT

This bill amends Section 41016 to revise the definition of “toll telephone service” to clarify that (1) either of the services described in subdivisions (a) and (b) constitutes a “toll telephone service,” (2) toll charges may vary in amount with either the distance or elapsed transmission time, or the distance and elapsed transmission time, of each individual communication, and (3) subdivision (b) includes flat rate service plans with a fixed number of minutes.

As an urgency measure, these provisions became effective May 21, 2008.

IN GENERAL

According to the Department of General Services (DGS) staff, there are 475 official public safety answering points (PSAPs) that are funded by the 911 surcharge. PSAPs include primarily law enforcement agencies, such as local police and sheriff departments, and fire departments. The 911 surcharge revenues pay for all of the network and infrastructure that support 911 services, and ongoing support for refreshing equipment, the network, and database information that appears at each site when someone calls "911." The 911 surcharge rate is currently set at 0.50 percent, the lowest rate allowed by statute, which is expected to produce approximately \$100 million for the 2007/08 fiscal year.

Toll telephone service. With the advent of telephone services where the charges vary based only on the elapsed time, and not on the distance between the caller and the recipient of the call, questions arose as to whether such services constituted "toll" services under the federal definition. A number of cases were brought to challenge the imposition of the federal excise tax on these services. Five federal appellate courts agreed with the claimants that the tax could not be imposed on the charges for these services because, since the charges for the services did not vary with the distance of the call, the services did not come within the federal definition of toll telephone services, nor did they constitute local telephone services. (*American Bankers Insurance Group v. United States* (11th Cir. 2005) 408 F.3d 1328; *OfficeMax, Inc. v. United States* (6th Cir. 2005) 428 F.3d 583; *National Railroad Passenger Corp. v. United States* (D.C.Cir. 2005) 431 F.3d 374; *Fortis, Inc. v. United States* (2d Cir. 2006) 447 F.3d 190; and *Reese Brothers, Inc. v. United States* (3d Cir. 2006) 447 F.3d 229.)

The courts held that, with respect to the definition of "toll telephone service" as provided in Section 4252(b)(1)(A) of the United States Code, the word "and" (emphasized above) is used "conjunctively" and could not be construed to be used "disjunctively" to mean "or." Neither the Ninth Circuit nor the U.S. Supreme Court has issued an opinion on this legal issue.

On May 25, 2006, the IRS announced that it would stop collecting the federal excise tax imposed on long-distance telephone service. In addition, the IRS published IRS Notice 2006-50 (see http://www.irs.gov/irb/2006-25_IRB/ar09.html), which provided the background and basis for its decision and the rules for obtaining refunds of federal excise tax paid during the period March 1, 2003, through July 31, 2006.

BACKGROUND

In 2001, Assembly Bill 1458 (Kelley) would have revised the Emergency Telephone Users Surcharge Law to instead impose a surcharge upon service users for each access line for each month a service user subscribes or contracts with the service supplier. This Board-sponsored measure was intended to simplify the application of the surcharge for service suppliers by eliminating the complicated calculations and interpretations of what charges are subject to the 911 surcharge. That bill was amended to remove these provisions before the bill was heard in its first policy committee.

COMMENTS

1. **Purpose.** This bill is intended to change the definition of "toll telephone service" to include time or distance in addition to time and distance, in response to the IRS ruling which announced that, under the current federal definition, toll charges are not subject to the federal excise tax.
2. **Has the state's definition of "toll telephone service" been challenged?** As of the date of this analysis, neither the federal Ninth Circuit Court of Appeals nor any California state court of appeals has addressed the subject of the state's definition of "toll telephone service." It is reasonable to expect that a California state court will be asked to consider the definition, and it is possible that the court could decide that the 911 surcharge may not be imposed on charges for toll telephone service that do not vary by both elapsed time and distance, as "toll telephone service" is presently defined.

Expansion of 911 Surcharge to VoIP Service

Amends Sections 41007, 41009, 41011, 41020, 41025, 41030, 41031, 41046, and 41050 of, and adds Section 41016.5, 41019.5 and 41152 to, the Revenue and Taxation Code.

LAW PRIOR TO AMENDMENT

Under existing law, Section 41020 of the Revenue and Taxation Code imposes a surcharge on amounts paid by every person in the state for intrastate telephone communication services.

Section 41021 requires every service supplier to collect the surcharge from each service user at the time it collects its billing from the service user. A service provider is defined in Section 41007 to mean any person supplying intrastate telephone communication services pursuant to California intrastate tariffs to any service user in this state. The term also includes any person supplying intrastate telephone communications services for whom the California Public Utilities Commission (CPUC), by rule or order, modifies or eliminates the requirement for that person to prepare and file California intrastate tariffs.

Section 41020 provides, in accordance with the federal Mobile Telecommunications Sourcing Act (P.L. 106-252), that the surcharge does not apply to any charges for mobile telecommunications services billed to a customer where those services are provided, or deemed provided, to a customer whose place of primary use is outside this state.

"Charges for mobile telecommunications services" is defined to mean any charge for, or associated with, the provision of commercial mobile radio service, as defined in Section 20.3 of Title 47 of the Code of Federal Regulations, as in effect on June 1, 1999, or any charge for, or associated with, a service provided as an adjunct to a commercial mobile radio service that is billed to the customer by or for the customer's home service provider, regardless of whether individual transmissions originate or terminate within the licensed service area of the home service provider.

"Mobile telecommunications service" is defined to mean commercial mobile radio service, as defined in Section 20.3 of Title 47 of the Code of Federal Regulations, as in effect on June 1, 1999.

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The Board is required, pursuant to Section 41128, to enforce the provisions of the 911 Surcharge Act and is authorized to prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of the 911 Surcharge Act.

AMENDMENT

This bill amends Section 41020 to impose the 911 surcharge on amounts paid by every person in the state for (1) intrastate telephone communication services in this state, and (2) VoIP service that provides access to the "911" emergency system by utilizing the digits 9-1-1 by any service user in this state. With respect to VoIP service, the bill specifically provides that the surcharge does not apply to charges for VoIP service where any point of origin or destination is outside this state.

This bill clarifies that books and records kept in the regular course of business may be used to calculate charges not subject to the surcharge despite a service supplier's billing practices. In addition, a service supplier may choose a reasonable and verifiable method to calculate the interstate revenue portion not subject to the surcharge. Any method chosen by a service supplier must remain in effect for at least one calendar year. The methods are as follows:

- Books and records kept in the regular course of business.
- Traffic or call pattern studies representative of the service supplier's business within California.
- For VoIP service only, the VoIP safe harbor factor established by the Federal Communications Commission (FCC) to be used to calculate the service supplier's contribution to the federal Universal Service Fund (USF).

The FCC safe harbor factor in effect for VoIP service on September 1 each year applies for the period of January 1 through December 31 of the next succeeding calendar year for purposes of this method.

The VoIP safe harbor method would become void and of no effect at such time as the FCC establishes a safe harbor factor for the federal USF for VoIP service that is greater than seventy-five percent for interstate revenue or abolishes the safe harbor factor applicable. In such case, a VoIP service supplier may use an alternative method approved in advance by the Board, which would be available to all VoIP service suppliers.

The FCC safe harbor factor applicable to VoIP service is used solely as a mechanism to calculate the charges not subject to the surcharge for VoIP service and is not necessarily reflective of the intrastate portion of VoIP service. Furthermore, the bill states that the use of the FCC safe harbor factor shall not be interpreted to permit application of any intrastate requirement, other than the application of the 911 surcharge, upon VoIP service suppliers.

If a service supplier reasonably relies upon books and records kept in the regular course of business or any documentation that satisfies such "reasonable and verifiable method," then such service supplier's determination of the portion of the billed amount attributable to services not subject to the surcharge would be rebuttably presumed to be correct. The service supplier's choice of books and records or other method and surcharge billing practice would also be rebuttably presumed to be fair and legal business practices.

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The bill also contains Legislative intent language stating that the provisions of the VoIP safe harbor method are not to be considered to be a precedent for the application of the surcharge or any other tax or fee where a person is required to collect a tax or fee imposed upon another.

This bill also makes conforming changes to Section 41020 for purposes of the Federal Mobile Telecommunications Sourcing Act to include VoIP service with respect to the taxation of mobile telecommunications services, which can also be nomadic. Specifically it provides that the surcharge does not apply to any charges for VoIP service billed to a customer where those services are provided, or deemed provided, to a customer whose place of primary use is outside this state.

This bill also amends Section 41007 to revise the definition of “service supplier” to include any person supplying intrastate telephone communication services to any service user in this state pursuant to California intrastate tariffs and providing access to the “911” emergency system by utilizing the digits 9-1-1 and any person supplying VoIP service to any service user in this state and providing access to the “911” emergency system by utilizing the digits 9-1-1. The definition will continue to include any person supplying intrastate telephone communications services for whom the Public Utilities Commission, by rule or order, modifies or eliminates the requirement for that person to prepare and file California intrastate tariffs.

This bill also adds Section 41016.5 to define “VoIP service” to mean any service that satisfies the following two requirements:

- Does all of the following:
 - Enables real-time, two-way voice communication that originates from and terminates to the user's location using Internet Protocol (IP) or any successor protocol;
 - Requires a broadband connection from the user's location;
 - Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network; and
- Does at least one of the following:
 - Requires Internet protocol-compatible customer premises equipment (CPE);
 - When necessary is converted to or from transmission control protocol (TCP)/IP by the service user's service supplier before or after being switched by the public switched telephone network;
 - Is a service that the FCC has affirmatively required to provide 911 or E911 service.

Section 41019.5 is added to the 911 Surcharge Act to provide that it is the intent of the Legislature that any voice quality communication utilizing VoIP is not to be regulated by the enactment of this bill, and to clarify that the bill's sole purpose is to ensure that all forms of voice quality communication that connect to the “911” emergency system contribute to the State Emergency Telephone Number Account.

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This bill also adds Section 41152 to incorporate the Legislature's findings and declarations, which are as follows:

- Access to emergency telephone service has been a longstanding goal of the state.
- The Act remains an important means for making emergency telephone service available to every person in this state.
- Every reasonable means should be employed by telephone corporations and every provider of telephonic quality communication to ensure that every person using their service is informed of, and is afforded the opportunity to use, emergency telephone service, regardless of the means by which emergency telephone calls are placed.
- The furnishing of emergency telephone service is in the public interest and should be supported fairly and equitably by every telephone corporation and every provider of telephonic quality communication in a way that is equitable, nondiscriminatory, and competitively neutral.

And lastly, this bill makes conforming references to "VoIP service" throughout the 911 surcharge law.

As an urgency measure, these provisions became effective May 21, 2008; however the provisions expanding the imposition of the 911 surcharge on amounts paid by every person in the state for VoIP service and a service supplier's choice to use a reasonable and verifiable method, as described, for purposes of calculating the interstate revenue portion not subject to the surcharge, become operative January 1, 2009.

COMMENTS

1. **Purpose.** This provision is intended to address the growth of VoIP services that will further reduce the 911 base, citing Montana as a jurisdiction that recently expanded their 911 surcharge base to include VoIP services. The shrinking of the base upon which the 911 surcharge is levied potentially jeopardizes the ability of the state to fully fund the 911 program. Moreover, it creates a competitive inequity where charges for some telecommunications services are assessed to pay for the state's 911 program while other equivalent services are not.
2. **What is VoIP?** According to the FCC, VoIP "is a technology that allows you to make voice calls using a broadband Internet connection instead of a regular (or analog) phone line. Some VoIP services may only allow you to call other people using the same service, but others may allow you to call anyone who has a telephone number - including local, long distance, mobile, and international numbers. Also, while some VoIP services only work over your computer or a special VoIP phone, other services allow you to use a traditional phone connected to a VoIP adapter."

In June 2005, the FCC imposed Enhanced 911³ (E911) obligations on providers of "interconnected" VoIP services. Interconnected VoIP service allows you to

³ E911 systems automatically provide to emergency service personnel a 911 caller's call back number and, in most cases, location information.

make and receive calls to and from traditional phone numbers, usually using an Internet connection, possibly a high-speed (broadband) Internet connection, such as Digital Subscriber Line (DSL), cable modem, or wireless broadband.

While interconnected VoIP service may be used from a single location, like a residence, some interconnected VoIP services can be used wherever you travel, as long as a broadband Internet connection is available. Interconnected VoIP service is offered to consumers under a number of different brand names, but for purposes of this analysis, such services are referred to as “nomadic.”

3. **How would the imposition of the 911 surcharge differ for VoIP service?**

This measure would expand the imposition of the 911 surcharge to include amounts paid by every person in the state for VoIP service. Currently, the surcharge is imposed only upon “intrastate telephone communication service,” which includes all local or toll telephone service where the point or points of origin and the point or points of destination of the service are all located in this state.

According to industry, current technology does not allow VoIP service suppliers to differentiate between intrastate and interstate communications (where the point of origin is located in this state and the point of destination of the service is located outside this state). To address this technological disadvantage, this bill would allow VoIP service suppliers to calculate the interstate revenue portion, based on a reasonable and verifiable method, so that amount can be excluded from the basis upon which the 911 surcharge is imposed. The reasonable and verifiable methods would include books and records, traffic or call pattern studies, and the VoIP safe harbor established by the FCC for contributions to the federal USF.

This bill would also allow other service suppliers (landline and wireless) the option of using traffic and call pattern studies, in addition to standard books and records, to calculate the interstate revenue portion not subject to the surcharge. Currently, the surcharge applies to a charge that includes interstate, long distance services when bundled with intrastate telephone services if the service supplier cannot clearly breakdown the interstate, long distance service charges. The “safe harbor” factor would be available for VoIP service only.

4. **What is the VoIP “safe harbor”?** In 1997, the FCC created the USF to meet the goals of Universal Service authorized by the Telecommunications Act of 1996. The goals of Universal Service are to promote the availability of quality services at just, reasonable, and affordable rates; increase access to advanced telecommunications services throughout the nation; advance the availability of such services to all consumers, including those in low income, rural, insular, and high cost areas at rates that are reasonably comparable to those charged in urban areas.

In addition, the 1996 Act states that all providers of telecommunications services should contribute to federal universal service in some equitable and nondiscriminatory manner. This contribution provides support to the high cost, low income, rural health care and school and libraries programs.

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The USF contributions are assessed only on revenues generated from interstate or international calls. Due to the difficulty for VoIP providers to determine the percentage of interstate and international traffic, the FCC established a VoIP “safe harbor” that approximates the percentage of VoIP revenues generated from interstate and international calls. The VoIP safe harbor, which is used to estimate interstate revenue, is currently set at 64.9 percent of total VoIP service revenue. VoIP service providers may also utilize traffic studies or the actual percentage of interstate calls to determine their federal USF contributions.

5. **Bundling of services.** Many service suppliers have begun to offer bundled pricing when two or more services are purchased (e.g. phone, cable and Internet services for a single package price). The surcharge would apply only to the portion of the bundled price representing charges for intrastate telephone communication or VoIP services. This bill clarifies that a service supplier may use books and records to determine the charges not subject to the 911 surcharge.

Under existing law, Section 41056 requires a service supplier to maintain such records as may be necessary to determine the amount of the surcharge collected under the provisions of the 911 Surcharge Act, and Section 41129 requires every service supplier to keep such records in such form as the Board may require. Furthermore, Regulation 2431, *Records*, requires a surcharge-payer to maintain all records necessary to determine the correct surcharge liability under the 911 Surcharge Act and all records necessary for the proper completion of the required surcharge return. Additional specific record keeping requirements generally include totals for intrastate telephone communication billed, exemptions allowed by law, and amounts of the 911 surcharge collected.

Senate Bill 1161 (Lowenthal) Chapter 616
Underground Storage Tank Fee

Effective January 1, 2009. Among its provisions, amends Sections 25299.24 and 25299.81 of, the Health and Safety Code.

BILL SUMMARY

Among other things, this bill extends the current underground storage tank fee an additional five years to January 1, 2016.

Sponsor: 7-11, Inc.

LAW PRIOR TO AMENDMENT

Under current Section 25299.41 of the Health and Safety Code (Article 5 (commencing with Section 25299.40) of Chapter 6.75 of Division 20), owners of an underground storage tank are required to pay a storage fee of six mills (\$0.006) for each gallon of petroleum (including, but not limited to, gasoline and diesel fuel) placed in an underground storage tank which he or she owns. Section 25299.43 imposes an additional fee of eight mills (\$0.008) for a total underground storage fee of fourteen mills (\$0.014) per gallon. The fees, which are reported and paid to the Board of Equalization (Board), are deposited into the Underground Storage Tank Cleanup Fund and are earmarked for the cleanup of leaking tanks. This fee is due to sunset on January 1, 2011.

Current Section 25299.24 of the Health and Safety Code (Article 2, (commencing with Section 25299.10) of Chapter 6.75 of Division 20) defines "tank," "underground storage tank," "underground tank system," and "tank system" as having the same meaning as defined in Chapter 6.7 (commencing with Section 25280), except that, for purposes of Chapter 6.75, these terms mean only those tanks that contain only petroleum or, consistent with the federal act, a mixture of petroleum with de minimis quantities of other regulated substances.

Health and Safety Code Section 25281, in Chapter 6.7, provides definitions for "tank," "underground storage tank," and "underground storage tank system" or "tank system" and provides specific exclusions of what does not constitute an underground storage tank. Furthermore, subdivision (b) of Section 25281.5 provides that "underground storage tank" does not include, among other things, vent lines, vapor recovery lines, and certain piping.

AMENDMENT

This bill amends Section 25299.81 of the Health and Safety Code to change the sunset date of the underground storage tank fee from January 1, 2011, to January 1, 2016.

Additionally, this bill amends Section 25299.24 to change the definition of "tank," "underground storage tank," "underground tank system" and "tank system" to have the same meaning as defined in Chapter 6.7 (commencing with Section 25280), except that:

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- These terms mean only those tanks that contain only petroleum or, consistent with the federal act, a mixture of petroleum with de minimis quantities of other regulated substances
- These terms include components that are either directly or indirectly connected to the tank, including spill containment structures that are substantially or totally beneath the surface of the ground and those portions of the vent lines, vapor recovery lines, and fill pipes that are below the surface of the ground.

BACKGROUND

The Underground Storage Tank Cleanup Fund was originally established in 1989 by SB 299 (Keene). Subsequent legislation affected fees, fund accounts, repeal dates, and various other provisions.

SB 989 (Ch. 812, Stats. 1999), among other things, last extended the sunset date to January 1, 2011.

COMMENTS

1. **Purpose.** This bill is intended to provide an ongoing source of funds for reimbursement of expenses related to the cleanup of leaking underground storage tanks and to ensure that integral parts of the underground storage tank system are eligible for reimbursement.
2. **Extension of the underground storage tank fee would not create administrative problems for the Board.** Section 25299.51 of the Health and Safety Code allows the State Water Resources Control Board to expend revenues to pay the administrative costs of the Board.

The Board has continued its outreach efforts to educate and inform possible underground storage tank owners and operators of the existence of this program and their responsibilities. Despite the almost 20 year existence of the program, and the efforts of federal, state and local agencies, there continue to be a small number of cases where the owner has not known of the existence of the program.

3. **The change in definition of “tank” affects the funds disbursed, not the revenues collected.** The State Water Resources Control Board worked with industry representatives to address a need for fee-paying tank owners to seek reimbursement of costs if a release was attributable to a leaking vent line, vapor recovery line, or fill pipe. Conversely, this technical change does not affect the number of tank owners that are responsible for the payment of the underground storage tank fee.

TABLE OF SECTIONS AFFECTED

SECTION	BILL AND CHAPTER NUMBER	SUBJECT
Revenue and Taxation Code		
<i>Motor Vehicle Fuel Tax Law</i>		
§7342 Amend	AB 3079 Ch. 306	“Train Operator”
Heading of Article 3 (Commencing with §7470)	AB 3079 Ch. 306	License
§7470 Amend	AB 3079 Ch. 306	Application for train operator
§7652.8 Add	AB 3079 Ch. 306	Report; train operator
<i>Use Fuel Tax Law</i>		
§9278 Amend Add Repeal	AB 2047 Ch. 222	Offers in compromise
<i>Cigarette and Tobacco Products Tax Law</i>		
§30459.15 Amend Add Repeal	AB 2047 Ch. 222	Offers in compromise
<i>Alcoholic Beverage Tax Law</i>		
§32471.5 Amend Add Repeal	AB 2047 Ch. 222	Offers in compromise
<i>Emergency Telephone Users Surcharge Law</i>		
§41007 Amend	SB 1040 Ch. 17	“Service supplier”
§41009 Amend	SB 1040 Ch. 17	“Service user”
§41011 Amend	SB 1040 Ch. 17	“Charges for services”

TABLE OF SECTIONS AFFECTED (CONTINUED)

SECTION		BILL AND CHAPTER NUMBER		SUBJECT
Revenue and Taxation Code				
<i>Emergency Telephone Users Surcharge Law continued</i>				
§41016	Amend	SB 1040	Ch. 17	"Toll Telephone Service"
§41007	Amend	SB 1040	Ch. 17	"Service user"
§41016.5	Add	SB 1040	Ch. 17	"VoIP service"
§41019.5	Add	SB 1040	Ch. 17	Intent of the Legislature; VoIP regulation
§41020	Amend	SB 1040	Ch. 17	Imposition and rate of surcharge
§41025	Amend	SB 1040	Ch. 17	Billing of surcharge
§41030	Amend	SB 1040	Ch. 17	Determination of rate
§41031	Amend	SB 1040	Ch. 17	Determination time
§41046	Amend	SB 1040	Ch. 17	Charges exempt under federal law
§41050	Amend	SB 1040	Ch. 17	Surcharge due
§41152	Add	SB 1040	Ch. 17	Legislature's intent and declarations
§41171.5	Amend Add Repeal	AB 2047	Ch. 222	Offers in compromise
<i>Oil Spill Response, Prevention, and Administration Fees Law</i>				
§46628	Amend Add Repeal	AB 2047	Ch. 222	Offers in compromise
<i>Underground Storage Tank Maintenance Fee Law</i>				
§50156.18	Amend Add Repeal	AB 2047	Ch. 222	Offers in compromise

TABLE OF SECTIONS AFFECTED (CONTINUED)

SECTION		BILL AND CHAPTER NUMBER		SUBJECT
Revenue and Taxation Code				
<i>Fee Collection Procedures Law</i>				
§55332.5	Amend Add Repeal	AB 2047	Ch. 222	Offers in compromise
<i>Diesel Fuel Tax Law</i>				
§60135	Amend	AB 3079	Ch. 306	License
§60204.6	Add	AB 3079	Ch. 306	Report; train operator
§60637	Amend Add Repeal	AB 2047	Ch. 222	Offers in compromise
Health and Safety Code				
<i>Petroleum Underground Storage Tank Cleanup</i>				
§25299.81	Amend	SB 1161	Ch. 616	Sunset provision