The Telephone Excise Tax: An Economic Analysis

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Summary

The federal telephone excise tax generated $5.0 billion in revenue in fiscal year (FY) 2006. Beginning in 2004, however, many taxpayers, individual and corporate, challenged the legality of the telephone excise tax as it applied to toll (long distance) telephone services. Recent court rulings have supported the taxpayers' position that long distance toll services are not taxable and have ordered refunds. On May 25, 2006, the U.S. Treasury Department conceded defeat and announced that the Department of Justice "will no longer pursue litigation and the Internal Revenue Service (IRS) will issue refunds of tax on long-distance service for the past three years." On August 31, 2006, the IRS announced individual taxpayers can file for a refund, to be included with their returns for the 2006 tax year, that varies from $30 to $60 based on family size.

This decision has initiated further congressional review of the remaining tax on local telephone services. Options include repealing or significantly modifying the structure of the telephone excise tax. Complete repeal of the tax, both the local and long distance portions, had been estimated by the Congressional Budget Office (CBO) to cost $67.0 billion over the FY2006 to FY2015 budget window. More recently, CBO estimated that repeal of the remaining excise tax on local telephone services would cost approximately $3.3 billion over the 2008 to 2017 budget window, while the Administration's FY2008 budget also proposes the same repeal and estimates the cost at $1.2 billion over the 2008 to 2017 budget window.

Administering the tax is relatively simple for the federal government, as third parties collect the tax and monitor compliance. From the standpoint of economic theory, the tax is regressive and does not treat similarly situated taxpayers equally. In addition, economic theory suggests the tax is inefficient, reducing overall economic welfare.

In the 109th Congress, S. 1321 and its companion, H.R. 1898, would have repealed the telephone excise tax entirely. On June 28, 2006, S. 1321 was approved by the Senate Finance Committee. In the 110th Congress, S. 140 and S. 170 would repeal the remaining tax on local telephone services, and S. 1123 would provide, to businesses, an extension for filing a refund request and safe harbor protection when using the formula for calculating refunds created by the bill. In the House, H.R. 1194 continues to add cosponsors, currently 116, and would repeal the remaining tax on local telephone services.

This report provides a brief history, description of the legal issues prompting scrutiny, and economic analysis of the tax. The report concludes with a discussion of legislative activity and options for the 110th Congress. For a history of the telephone excise tax, see CRS Report RL30553, *The Federal Excise Tax on Telephone Service: A History*.

This report will be updated as legislative events warrant.

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Brief History of the Telephone Excise Tax[1]

The federal excise tax on telephone calls (also known as the communications tax) originated on long distance service under the *Spanish War Act of 1898* (P.L. 55-133). The tax was repealed in 1902 but reenacted as the United States prepared to enter World War I, under the *Emergency Internal Revenue Tax Act of October 22, 1914* (P.L. 63-217). In December 1915, the tax was set to expire, when Congress decided to keep it in force for another year. On January 1, 1916, the tax did expire, though for only a little more than nine months, at which time it was reenacted under the *War Revenue Act of October 3, 1917* (P.L. 65-50). In 1924 the tax was repealed; it remained so until the passage of the *Revenue Bill of 1932* (P.L. 72-154). The enactment of this 1932 law was justified by its proponents as a way to pay down the federal budget deficit which followed the decline in income tax receipts during the Great Depression. A few months before the United States' entrance into World War II, the tax was broadened by the *Revenue Act of 1941* (P.L. 77-250) to include local telephone services.

Since the enactment of the federal telephone excise tax in 1932, the tax has been continuously in effect—though in the 1960s, 1970s, and 1980s, the tax was repeatedly extended on a temporary basis. In general, the laws under which the tax operated called for a gradual phase-down in the tax rate before total repeal of the tax. Often, revenue problems surfaced before the repeal date, and Congress responded by either increasing the rate, or maintaining the rate and extending the scheduled date for proposed repeal.

Before passage of the *Revenue Reconciliation Act of 1990* (P.L. 101-508), the tax was scheduled to expire on December 31, 1990. The 1990 Act permanently extended the tax at a 3% rate. The rationale for continuance was that budget deficits precluded allowing the tax to expire. Over the telephone tax's long history, exemptions from the tax have been provided to governmental customers, the American Red Cross, nonprofit educational organizations and nonprofit hospitals, common carriers, and radio and television broadcasting stations, among others.

There was a general lull in major legislative events from 1990 until around 2004, when the courts began seeing challenges to the tax (see the next section, "Legal Issues"). In early 2005, the Joint Committee on Taxation and CBO issued reports that studied changes to the tax,[2] and Members of the 109th Congress followed these studies with the introduction of several bills (see the "Legislative Activity" section below).

Legal Issues

The Internal Revenue Code continues to mandate that a 3% telephone excise tax on private charges should be levied on the following services: (1) local telephone service, (2) toll telephone service (i.e., long distance), and (3) teletypewriter exchange service.[3] The focus of recent

[1] For a legislative history of the telephone excise tax see CRS Report RL30553, *The Federal Excise Tax on Telephone Service: A History*, by Louis Alan Talley.

[2] *See* U.S. Congress, Joint Committee on Taxation, *Options to Improve Tax Compliance and Reform Tax Expenditures*, 109th Cong., 1st sess., JCS-02-05 (Washington: January 27, 2005), pp. 368-378; U.S. Congressional Budget Office, *Budget Options* (Washington: February 2005), p. 333.

[3] 26 U.S.C. § 4251.

litigation was the definition of toll telephone service. In particular, in the tax code, a toll telephone service means, in part,

> a telephonic quality communication for which ... there is a toll charge which varies in the amount with the distance **and** elapsed transmission time of each individual communication[4] [emphasis added].

Before May 25, 2006, the IRS had taken the position that the toll charge may vary according to distance *or* elapsed transmission time. However, the courts have ruled in favor of taxpayers who claimed that distance *and* time are required by the law. Then, on May 25, 2006, the Treasury Department announced that the Department of Justice

> will no longer pursue litigation and the Internal Revenue Service (IRS) will issue refunds of tax on long-distance service for the past three years. Taxpayers will be able to apply for refunds on their 2006 tax forms, to be filed in 2007.[5]

More precisely, collection of the tax on long distance telephone service and bundled local and long distance service (including cell phone service) ended after July 31, 2006. Taxpayers who are charged under a local-only telephone service plan or a plan that separates charges for local and long distance services continue to have the tax collected on their local service charges.[6]

OfficeMax Inc. v. United States argued before the 6th Circuit Court of Appeals on July 29, 2005, and decided on November 2, 2005, highlights the legal issues and arguments that eventually led to the announcement above terminating collection of the tax on long distance services.[7] OfficeMax challenged the legality of the excise tax in claims made on April 6, 2002, and February 13, 2003, and requested a full refund of excise taxes paid of $380,296.72. OfficeMax argued that its phone service provider, MCI, was not providing "a telephonic quality communication for which there is a toll charge which varies in amount with the *distance* and elapsed transmission time of each individual communication ..."[8] [emphasis in the original]. The OfficeMax toll telephone service charges (i.e., long distance) were based primarily on elapsed transmission time and not distance. Thus, OfficeMax argued, the phone service offered by MCI was not as defined in tax law and therefore not subject to the telephone excise tax. On November

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[4] 26 U.S.C. § 4252(b)(1). IRC § 4252(b) defines "toll telephone service" 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.

[5] IRS Notice 2006-50, Internal Revenue Bulletin 2006-25, June 19, 2006.

[6] Ibid.

[7] OfficeMax Inc. v. United States, 428 F.3d 583 (6th Cir. 2005). On March 30, 2006, the court denied the government's motion for the case to be reheard by the full court. OfficeMax Inc. v. United States, No. 04-4009, 2006 U.S. App. LEXIS 8294 (6th Cir. March 30, 2006).

[8] *Id.* at 587.

2, 2005, the 6th Circuit Court of Appeals concluded that “a toll charge must vary by both distance and elapsed transmission time in order to be taxed. We thus hold for the taxpayer and affirm.”[9]

The *OfficeMax* ruling was one of several IRS losses in court on this issue.[10] Because of the continued IRS court losses, volume of pending suits, and willingness of the Treasury Department to eliminate the tax, the potential loss of revenue was foreseen and factored into federal revenue projections at the time.[11] The CBO revenue projection for telephone excise taxes assumed that “there is a significant likelihood—about 75 percent—that the IRS will acquiesce or lose those cases by 2007 and the tax on toll services will be terminated.”[12]

On August 31, 2006, the IRS announced individual taxpayers would be able to file for a standard refund that varied from $30 to $60 based on family size.[13] The refund request would be filed along with the individual income tax return for the 2006 tax year. Taxpayers also had the option of analyzing old telephone bills and submitting a claim for actual taxes paid since February 23, 2003. Some taxpayers have challenged the refund method arguing that taxpayers should be able to claim a refund for telephone excise taxes paid before February 28, 2003, as well.[14]

The refunds, to have been issued in 2007, were expected to approach $13 billion. Actual refund requests appear to be falling short of expected totals. In April 2007, the Government Accountability Office (GAO) released a report detailing the telephone tax refund requests by individual taxpayers as of March 24, 2007.[15] In this report, GAO segmented individual filers into those taxpayers who were obliged to file tax returns based on economic activity separate from the telephone tax and those taxpayers who had no obligation to file taxes. Approximately two-thirds of the returns received from individuals who were otherwise obliged to file included a request for the telephone tax refund. In contrast, only about 2% of the projected 10 million to 30 million requests from individuals without a tax filing obligation were received. In addition to challenging the refund method in court, in at least one case, a taxpayer has argued that the lower than expected number of requests for refunds received by the IRS so far indicates that many of those eligible for a refund have not been adequately notified.[16]

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[9] *Id*. at 584-85.

[10] *See* Am. Bankers Ins. Group v. United States, 408 F.3d 1328 (11th Cir. 2005), reversing 308 F. Supp. 2d 1360 (S.D. Fla. 2004); Am. Online, Inc. v. United States, 64 Fed. Cl. 571 (Ct. Cl. 2005); Honeywell Int’l, Inc. v. United States, 64 Fed. Cl. 188 (Ct. Cl. 2005); AMTRAK v. United States, 338 F. Supp. 2d 22 (D.D.C. 2004); Hewlett-Packard Co. v. United States, No. 04-03832, 2005 U.S. Dist. LEXIS 19972 (N.D. Cal. August 5, 2005); Reese Bros. v. United States, No. 03-745, 2004 U.S. Dist. LEXIS 27507 (W.D. Pa. October 20, 2004); Fortis, Inc. v. United States, No. 03 Civ. 5137, 2004 U.S. Dist. LEXIS 18686 (S.D.N.Y. September 16, 2004).

[11] Kurt Ritterpusch, “Snow Says Court Ruling Could Spell End to Enforcement of Telephone Excise Tax,” BNA Daily Tax Report (February 16, 2006).

[12] U.S. Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2007 to 2016*, January 2006, p. 97. Nevertheless, the IRS issued a notice on November 15, 2005, that the service would continue to assess and collect the tax under § 4521 on all taxable communication services, including communications services similar to those at issue in the cases. Internal Revenue Service, Notice 2005-79, *Communications Excise Tax; Section 4251*, November 14, 2005. This ruling was revoked by IRS Notice 2006-50.

[13] Internal Revenue Service, Notice 2006-137, *IRS Announces Standard Amounts for Telephone Excise Tax Refunds*, August 31, 2006.

[14] Stephen Joyce, “Five Class Actions Federal Cases Launched On Telephone Excise Taxes, Refund Method,” BNA Daily Tax Report (July 14, 2006).

[15] Government Accountability Office, *Tax Administration: Telephone Excise Tax Refund Requests Are Fewer Than Projected and Have Had Minimal Impact on IRS Services*, GAO-07-695 (Washington: April 11, 2007).

[16] Plaintiff’s Amended Class Action Complaint, RadioShack Corporation v. United States, (Fed. Cl. 2007) (No. 06-
(continued...)

Economic Analysis

As the debate surrounding the future of the remaining excise tax on local phone service continues, it is, perhaps, instructive to evaluate the tax from an economic perspective. Economists and public finance experts typically evaluate a tax using the following criteria. First, how simple is the tax to administer? Second, is the tax an equitable tax, or do taxpayers in similar economic situations encounter dissimilar tax liability? Equity could also be measured by the change in burden as income rises, or the degree of progressivity. And, third, does the tax generate revenue efficiently?

Administrative Complexity

The 3% telephone excise tax is relatively easy to administer because a third party, telecommunications companies, collects the tax for the IRS. Enforcement is also relatively simple as service providers could stop providing service for nonpayment of taxes. Note, however, that collecting the telephone excise tax on behalf of the IRS does increase the complexity of tax compliance for telecommunications companies. The termination of the tax on long distance services could increase the complexity as telephone service providers will need to account separately for long distance and local services. Nevertheless, from the perspective of the federal government, the telephone excise tax is simple and almost costless to administer.

Equity Issues

Economists usually evaluate the equity of a tax in two directions, horizontal and vertical. The repeal of the excise tax on long distance services has marginally improved horizontal equity, while vertical equity has worsened. Evaluating horizontal equity entails comparing the tax liability of similarly situated individuals. Evaluating vertical equity entails comparing the tax liability of tax units residing in different income levels. The degree of progressivity (or regressivity) of a tax is an often-used descriptor of vertical equity.

Horizontal equity

The telephone excise tax does not treat similarly situated individuals equally, thus deviating from the principle of horizontal equity. Two families of the same size and income level could pay significantly different federal taxes based on local telephone service charges. Horizontal equity in public finance means like individuals (or families), based on income or consumption, should encounter roughly the same tax liability. With the telephone excise tax, two families with roughly the same total consumption or income could pay different (more or less) federal taxes because of differences in the amount charged for their local telephone services. The recent Treasury announcement, ending the tax on long distance services, likely increased the horizontal equity of the tax as the variation in local telephone service costs do not vary as dramatically as long distance services.

(...continued)

28T). IRS efforts to publicize information about the telephone tax refunds can be examined, in part, from information on the IRS website, available at http://www.irs.gov/newsroom/article/0,,id=164032,00.html.

Vertical equity

Assessing the vertical equity of the telephone excise tax requires examining the tax as it applies to two types of services: local telephone and long distance. Local telephone service is generally believed to be a normal good (a necessity) and long distance service more like a luxury.

A progressive tax regime is characterized by high income taxpayers paying a larger share of their income in taxes.[17] Typically, economists and political theorists posit that a vertically equitable tax regime is a progressive tax regime.[18] Excise taxes are almost always classified as regressive taxes, since they do not take into account the individual's ability to pay.

The telephone excise tax on *local* telephone service, which does not vary by level of consumption or income, is a regressive tax. In contrast, the now eliminated telephone excise tax on *long distance* telephone service, a service which could be considered more akin to a luxury, was less regressive.[19] As noted above, a regressive tax is generally not considered vertically equitable.

Efficiency

Repeal of the excise tax on toll and wireless services has, on balance, improved the telephone excise tax's economic efficiency. Economic theory and public finance experts posit that a tax should not change the consumption decisions of taxpayers. Changing the consumption patterns of taxpayers results in the skewed allocation of resources away from the taxed good to other goods. The loss in economic efficiency can sometimes exceed the revenue generated by the tax if consumption patterns change significantly.

On the other hand, optimal tax theory suggests that goods with very inelastic demand (i.e., demand that does not change much with a change in prices) should face relatively higher taxes. The logic behind this theory is that, in general, government should not be influencing economic decisions. Therefore, because tax policy is a tool of government, tax policy should attempt to avoid influencing or changing the economic decisions of individuals. The less individuals change their behavior in response to a tax (i.e., a price increase) the more the economic efficiency loss is minimized. Though compelling in theory, for equity and fairness reasons, applying optimal tax theory would seem misplaced for telecommunications services generally and local telephone services specifically.

Excise taxes are sometimes justified either to correct for a market failure or to discourage consumption of a good or service to ultimately benefit society. Economic efficiency is improved in both scenarios with some type of selective tax. The telephone excise tax, however, is unlike the other prominent selective excise taxes. For example, the gasoline excise tax is often identified as a tax designed to correct a market failure. In this case, the market failure is the inability of the

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[17] Some economists use the term "equal sacrifice." Equal sacrifice relies on the tenet that the last dollar of income is worth less to a high-income taxpayer than to a low-income taxpayer.

[18] The *degree* of progressivity is not as well settled. For purposes here, it is assumed that even a mildly progressive tax regime would achieve vertical equity.

[19] Jerry Hausman, *Taxation by Telecommunications Regulation*, National Bureau of Economic Research, Working Paper no. 6260, November 1997, p. 12. An income elasticity of greater than one means, for example, that a 1% increase in income generates a greater than 1% increase in demand for a good. Hausman states that "...the income elasticity of demand of long distance demand is about 1.0." This implies that long distance service could be a luxury good.

competitive market system to fully account for the cost to society of burning fossil fuels. The gasoline excise tax, it is argued, helps correct this market failure through internalizing this cost and is therefore an efficiency improving tax.[20]

Excise taxes on tobacco and alcohol, on the other hand, are not correcting for an explicit market failure. Supporters of these so called "sin taxes" argue that the negative impact on society of alcohol and tobacco consumption merit taxing these goods to discourage their consumption.

Economic theory suggests that if an excise tax does not correct for some market failure or does not intend to achieve some societal goal, then the tax almost certainly reduces overall economic efficiency. The telephone excise tax does not meet either criterion.[21] Nevertheless, if local service is indeed a necessity, the remaining tax on local telephone services is very efficient in that taxpayers cannot easily change behavior to avoid the tax.

Telephone Excise Tax Revenue

Although the telephone excise tax generated $5.0 billion in revenue in FY2006 this revenue represents just 0.21% of total federal revenue. **Table 1** reports the revenue generated by the telephone, tobacco, and alcohol excise taxes since FY1998. These excise taxes individually represent a relatively small portion of total excise revenue collected. **Table 1** also reports the projected revenue generated by the taxes in FY2017 and the percentage of total federal revenue generated by the telephone excise tax.

The CBO estimates that telephone excise tax revenue will comprise, at most, $100 million of total federal revenue in 2017. This sharp relative decline reflects the CBO belief at the time the estimates were published, that the IRS will lose the revenue generated by the excise tax on toll telephone services. The announcement that the refunds for taxes paid on long distance services will be approximately $13 billion implies that about 75% of the excise tax revenue over the last three years was from the tax on long distance services.

Table 1. Selected Excise Tax Revenue, 1998 to 2006, and 2017

($ in billions)

Year	Total Revenue	Excise Tax Receipts				
		Total	Telephone		Tobacco	Alcohol
			Amount	Percent of Total Revenue		
1998	1,722	59.2	4.7	0.27%	5.7	7.6
1999	1,828	72.1	5.2	0.28%	5.3	7.9
2000	2,026	70.6	5.6	0.28%	7.2	8.1

[20] In addition, the gas tax is sometimes viewed as a "user fee" for the use of federally financed roads. This is another argument for using a selective excise tax: it can be used as a benefit tax.

[21] For more, see U.S. Department of the Treasury, Office of Tax Analysis, *Report to Congress on Communications Services Not Subject to Federal Excise Tax*, August 1987.

Year	Total Revenue	Excise Tax Receipts				
		Total	Telephone		Tobacco	Alcohol
			Amount	Percent of Total Revenue		
2001	1,991	68.2	5.7	0.29%	7.4	8.1
2002	1,853	69.2	5.8	0.31%	8.3	8.4
2003	1,783	69.5	5.8	0.33%	7.9	8.5
2004	1,880	71.8	5.8	0.31%	7.9	8.7
2005	2,154	73.0	5.9	0.27%	8.7	8.6
2006	2,407	74.0	5.0	0.21%	8.7	8.8
2017(p)	4,284	90.0	0.1	0.00%	7.7	11.5

Sources: Excise tax receipts for 1998 through 2005 are from the IRS, *Federal Excise Taxes Reported to or Collected by the Internal Revenue Service, Alcohol and Tobacco Tax and Trade Bureau, and Customs Service*. Total revenue through 2006 are from the Office of Management and Budget, *Economic Report of the President*, February 2007, Table B-78, p. 323. Data for 2017 and 2006 excise tax receipts are from the Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2008 to 2017*, Table 4-7, p. 95.

Note: (p) Indicates projected revenue.

Legislative Activity

In the 109th Congress, S. 1321 and its companion, H.R. 1898, would have repealed the telephone excise tax entirely.[22] On June 28, 2006, S. 1321 was approved by the Senate Finance Committee by voice vote. The House version was sponsored by Representative Gary Miller, and it had bipartisan support with 220 cosponsors (as of September 7, 2006). In February 2007, the CBO estimated that repeal of the remaining excise tax on local telephone services would cost approximately $3.3 billion over the 2008 to 2017 budget window.[23] In the 110th Congress, S. 140 and S. 170 would repeal the remaining tax on local services, and S. 1123 would provide, to businesses, an extension for filing a refund request and safe harbor protection when using the formula for calculating refunds created by the bill. In the House, H.R. 1194 continues to add cosponsors, currently 116, and would also repeal the remaining tax on local telephone services. Supporters of the repeal legislation cite the efficiency losses associated with the tax as well as the regressive characteristics of the tax described earlier in this report.

Opponents of outright repeal cite the revenue loss if the tax were completely repealed. Bolstering this argument is the size of the current budget deficit and the prospect for continued deficits well into the future. The budget issues become particularly acute if proposals to make the tax cuts permanent become law.[24] The estimated revenue cost over the 2008 to 2017 budget window of making permanent (1) estate tax repeal ($498.8 billion) and (2) the individual income tax

[22] Another bill, S. 758, would prohibit the extension of the federal telephone excise tax to Internet access services.

[23] U.S. Congressional Budget Office, *Budget Options 2007* (Washington: February 2007) p. 326.

[24] See CRS Report RS22045, *Baseline Budget Projections Under Alternative Assumptions*, by Gregg A. Esenwein and Marc Labonte.

provisions of *Economic Growth Tax and Relief Reconciliation Act of 2001* (EGTRRA; P.L. 107-16) ($1.2 trillion) are cited by opponents of further tax cuts such as telephone excise tax repeal.[25] Opponents of repeal also note the administrative simplicity of the tax and its relatively high compliance rate.

One intermediate option that would improve the economic efficiency of the tax would be to amend existing law so that all communications services are taxed at the same rate. Without credits or transfers to lower-income taxpayers, however, the tax would still fail the test of vertical equity. Horizontal equity would also suffer, as different consumption choices would change the burden of taxes across equally situated individuals.

From an economic perspective, the repeal of the excise tax on toll and wireless services has had uneven effects. The repeal has increased the regressivity of the telephone excise tax but marginally improved its economic efficiency. Economic efficiency has been improved because local services are, practically speaking, a necessity; and, as such, individuals would not change their behavior in response to the tax (at least in the near term). Vertical equity suffers for the same reason efficiency is increased. Local services are typically levied at a fixed rate, thus lower-income taxpayers will encounter the same tax liability as high-income taxpayers. Horizontal equity may be marginally improved, as tax liability would not depend on consumption of long distance services, and charges for local services would not vary across taxpayers. How telecommunications companies respond to changes in the tax law will likely have a significant effect on the overall efficiency and equity of a retooled telephone excise tax regime.

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[25] Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2008 to 2017* (Washington: January 2007), Table 4-10, pp. 102-107.