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IRS ISSUES

Poof! The Nonprofit Parking Tax is Gone

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In mid-December, our Congressional representatives scurried to avert another government shutdown like the disastrous one a year ago. They made the deadline just in time for the Christmas recess. Tossed into the final appropriations package were a few surprise holiday gifts for nonprofit organizations.

Members of our sector were thrilled to learn that lawmakers had retroactively repealed the "hugely unpopular" tax on parking and other transportation-related fringe benefits paid by nonprofits for their employees. This new tax had (inexplicably) been added to the 2017 Tax Cuts and Jobs Act (TCJA). Opposition surfaced almost immediately and grew louder and louder for two long years. But nothing happened – until now.

"Justice delayed is still justice," according to David Thompson, vice president of public policy for the National Council of Nonprofits, applauding the long-awaited repeal. But even this influential gentleman couldn't resist the opportunity to take a much-deserved jab at the Congressional quagmire responsible for this mistake that "never made sense to anyone and that forced thousands of front-line nonprofits to divert two years of attention and millions of dollars away from their missions."

And while the retroactive feature means that organizations may be able to seek and receive a refund, they will not, according to David Wheeler Newman, Esq. in *Hasta La Vista to the Reviled Nonprofit Parking Tax*, "be compensated for the wrinkles and gray hair resulting over the last two years from a surprisingly convoluted compliance regime."

The Chaotic Tax Overhaul of 2017

Since the establishment of the federal tax law in 1913, there have been several comprehensive overhauls of the Internal Revenue Code. Most recently, in 1986, the process went fairly well as "President Reagan, the Treasury

Department, and Congress worked for almost two years to develop and write a plan that passed, under the regular order rules of the Senate, with 'broad bipartisan support.'"

From the first days of the current administration in January 2017, the White House and the GOP-controlled House and Senate leadership were eager for another major tax-code rewrite. Although there was general agreement on the need for serious action, this time the process was a mess.

There was little preparation or detail work ahead of the full-court push that began in early November 2017. The Administration and Congressional leaders were determined to get the tax package signed, sealed, and delivered by the end of that same year. In *Nonprofits and The Tax Bills: A Half-Time Update* (November 21, 2017) and *Nonprofits and the Tax Bills: Third-Quarter Action* (December 5, 2017), we reported in detail on the chaos, confusion, speed, and rancor that dominated the process that resulted in the Tax Cuts and Jobs Act (TCJA) of 2017.

There were no hearings and little debate. The House of Representatives passed a 448-page bill a mere two weeks after it was offered to the legislators for consideration. Senators produced their own 515-page amended bill and raced through it almost as quickly. "The action in December to reconcile and vote on the final 500+-page legislation happened at such warp speed that many legislators freely admitted in front of TV cameras that they voted before even reading the entire package…."

Contributing to the chaos was the decision to use the 51-vote budget "reconciliation rules" in the Senate. There was also "unfinished business on the federal budget as well as the lasting debris from the sequestration law passed several years ago. The final 'negotiations' were – to put it charitably – horse-trading to secure enough votes for passage. Items were tossed in and out of the legislative brew without any serious consideration of policy or consequences."

Also omitted were the customary transition periods in which new provisions are phased in to make tax planning easier for those affected, to correct mistakes and ambiguities, and – occasionally – to rethink or toss out a badly conceived law.

So the 2017 Tax Cuts and Jobs Act (TCJA), signed into law in late December that year, "made sweeping changes in the federal tax code affecting almost all entities and individuals after a whirlwind frenzy of activity beginning just weeks before …."

On New Year's Day 2018, the nonprofit sector reeled from some of these provisions in the TCJA, as we reported in *Nonprofits: Happy New (Tax) Year* (January 9, 2018). Described as a "disaster," there was concern from many quarters that the Administration and the Congressional tax writers were determined to squeeze out as much money as possible from any quarter, including from nonprofits, to help offset the cost of the huge tax cuts in the law. See, for instance, *Nonprofits are the unintended victims of the new tax bill* (December 29, 2017); *Charities fear tax bill could turn philanthropy into a pursuit only for the rich* (December 23, 2017); *Tax bill makes nonprofits pay up for millionaires.* (December 2017).

In particular, the philanthropy world was concerned about the dramatic broadening of the standard deduction (and a corresponding drop in the number and amount of charitable deductions claimed)

which seemed to presage the significant drop in individual charitable giving that, indeed, occurred.

But the nonprofit sector was also taken aback by other provisions including the entirely new "tax on qualified transportation fringe benefits (QTFs)" under Internal Revenue Code section 512(a)(7). Referred to most commonly as "the parking tax," this provision was specifically criticized for being part of the effort to comb "every nook and cranny" to pay for the tax cuts.

The "Reviled" Parking Tax

Many nonprofits had long been in the habit of including certain commuting-related perks – for instance, paid parking or reimbursement of public-transportation passes – into their employees' fringe-benefits packages. Nonprofit workers appreciated and relied on them.

For the first time ever, the TCJA imposed a tax on those fringe benefits. More specifically, it added a statute to the unrelated business income tax (UBIT) section of the Internal Revenue Code. New section 512(c)(7) imposed the unrelated business income tax on the expenses of nonprofits that provide employees with transportation benefits including transit passes and parking. To make matters worse, it went into effect immediately on January 1, 2018, just days after the bill was signed at the White House.

This new 21% tax on expenditures, not income, was an unwelcome and costly shock to many nonprofits around the nation – including small organizations. This provision "had no friends in the charitable sector …. Not only did this provision defy logic by taxing expenses rather than income, it forced the filing of an income tax return (Form 990-T) upon thousands of nonprofits that before 2018 had only filed a Form 990 informational return, but not a 990-T, not to mention countless churches that don't even need to file the Form 990."

It's been infuriating to learn after-the-fact that many GOP lawmakers also were surprised and dismayed when they eventually discovered that this odd provision was packed into the TCJA they had supported.

Outrage and Opposition at Tax

In *Surprise Tax Hits Churches, Other Nonprofits* (October 23, 2018), as well as in several other posts in 2018 and 2019 including here, here, and here, we explained that the backlash came immediately. There were "howls of protest" that continued unabated for almost two years. Led valiantly by the major nonprofit agencies including the National Council of Nonprofits, the repeal effort was also spurred on heavily by religious groups and other organizations that were hard-hit by its provisions.

A lead article in NCN's excellent newsletter *Nonprofit Advocacy Matters* (January 6, 2020) links to a detailed account of the 24-month heavy-lift involved in reaching the goal. In *Repealing the Tax on Tax-Exempts Was the Work of (Many, Many) People* (December 23, 2019), NCN's David Thompson graciously spreads around the credit, naming names to highlight the hard work of each. "The repeal," he writes, "is a community-wide accomplishment to celebrate, thanks to thousands of

individuals and organizations united in common purpose."

Mr. Thompson also lauds the work of legislators of both parties. "From the outset, let's be clear that repeal of the tax on tax-exempt organizations was a bipartisan affair." In particular, he mentions Senators James Lankford (R-OK) and Chris Coons (D-DE). "Early on, [they] prodded the Treasury Department to lessen the impact of the tax through regulations and cajoled their congressional colleagues toward repeal."

By the summer of 2019, there were no less than six bipartisan bills for repeal of this "onerous" provision rolling around the halls of Congress. There were (unsuccessful)hopes that one of them at least might be tossed into the mid-year budget negotiation packages. A bill sponsored by Senators Lankford and Coons was "the clearest and cleanest bill" of the bunch, and was the one that made its way into the late December legislative package signed by the White House.

"It's fair to say that by the time repeal happened, there was not a single Member of Congress – Senator or Representative – who believed taxing the transportation benefits provided to nonprofit employees was a good idea. Indeed, all agreed repeal was the only answer. But getting to a unanimous view was only the result of aggressive, persistent advocacy by thousands of nonprofits across the country."

To the end, the process was excruciating. Mark Hrywna of The Nonprofit Times gives a detailed account of the last-minute efforts. Even as repeal of the hated tax was being seriously considered behind Congressional doors during the December 2019 budget negotiations, it wasn't disclosed until the last possible minute that it was a done deal.

Mr. Hrywna also notes the frustrations expressed by legislators about the entire ordeal. Senator Lankford is quoted as lenting how he and several of his colleagues had "… worked for months to correct a small provision in the 2017 tax reform bill that required some churches and nonprofits to pay a tax on employee benefits, which could include items that have never been previously accounted for, such as a parking space." Lankford also makes the point that "[m]ost nonprofits were neither equipped to handle the additional administrative burdens or compliance costs, nor intended to be a source of revenue for the federal government."

Retroactive Repeal

The repeal of the "nonsensical and unpopular tax on qualified transportation fringe benefits" tax applies retroactively; that is, it's been "stricken from the law as if it never existed."

That's great, but no one's sure exactly how organizations that have already paid the tax can easily get a refund. They can amend the previously filed Form 990-Ts, of course, but that's an added hassle. There are hints that the IRS may "develop a process" for claiming these refunds and " guidance should be forthcoming." But any such process "is not yet clear" and what's "not retroactive is the expense that charities might have incurred to calculate the tax."

The National Council of Nonprofits also echoes this frustration that nonprofits will never get back the "administrative and accounting expenses" they incurred. NCN hopes that the IRS can be "… convinced to develop an alternative or streamlined approach … in the near future" for claiming the

refund.

*[**Update 1/8/20**] House Ways and Means Chair Richard Neal (D-MA) and Oversight Subcommittee Chair John Lewis (D-GA) officially call on IRS Commissioner Charles Rettig to "provide tax-exempt organizations with the guidance they need to claim and receive the refunds they are due."*

Conclusion

This parking-tax saga has been a massive headache as well as a waste of time and money for nonprofits and legislators who have tried to fix it since New Year's Day 2018. It was legislative malpractice to include it at all in the TCJA – especially without a transition phase or any real opportunity for amendment or elimination as soon as it became clear that it was a terrible idea.

It should not happen again but – in the current dysfunctional Congressional climate – that's not be a realistic hope.

There is one bit of good news, though, in this Christmas-package tale. The private foundation excise tax on net investment income, imposed by Section 4940(a) f the Internal Revenue Code, has been simplified from the current two-tiered system to a single flat rate. So – poof! – that law is gone. Of course, it's only been on the wish-list of the nation's private foundation for a decade or so.

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