

The Nonprofit Parking Tax

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1. What is the Nonprofit Parking Tax?

- a. New provision in the Tax Cuts and Jobs Act signed into law in late 2017
- b. Applicable to employer-provided parking expenses paid or incurred from January 1, 2018 forward (the new tax also applies to employer-provided public transit passes – but this document focuses on the parking aspect)
- c. Tax-exempt employers (churches, charities, etc.) must treat as unrelated business taxable income (“UBTI”) the cost of providing parking to their employees, subject to IRS guidance
- d. If the total taxable cost of parking provided to employees, together with gross revenue from actual unrelated business activities (if any), exceeds \$1,000 in a taxable year, a tax-exempt organization is required to file a federal income tax return (Form 990-T)
 - ◆ State returns may also be required.

2. The new tax is controversial and some have questioned its constitutionality

- a. It is an income tax on expenses (not income)
- b. Applied to tax-exempt organizations
- c. For providing parking to their employees
- d. That perform the exempt functions of the organization
- e. There is an ongoing continuing effort to repeal it
 - ◆ But the repeal effort faces political challenges
 - ◆ ECFA, ADF, and BMWL have been leaders in calling for repeal

3. The IRS has recently issued guidance (Notice 2018-99, issued on December 10, 2018) on how to determine the cost of the parking provided to employees for purposes of computing this tax.

- a. The guidance is interim guidance that taxpayers may rely on until Regulations are issued.
- b. The guidance does not defer the effective date of the tax.

- c. The IRS did issue a separate notice (Notice 2018-100, also issued on December 10, 2018) granting very limited relief related to the timing of the payment of the tax for some organizations that are subject to it.
 - ◆ If the organization was not required to file Form 990-T in the prior year, and
 - ◆ The organization pays the tax by the original due date of the return (even if the return is extended)

4. Whether the parking has value is not relevant in determining whether the tax applies

- a. If the tax applies, it applies based on the expenses of providing parking for employees. The criteria for determining whether the tax applies has nothing to do with whether the parking has value or whether the parking is in an area where paid parking is prevalent. Some attorneys and CPAs took the position prior to the issuance of the Notice that if an organization's parking facilities are located in an area where paid parking is prevalent (e.g., in a downtown urban area), the tax might apply, but if the organization's parking is in an area where paid parking is not prevalent (e.g., in a suburban or rural area), the tax would not apply. That is not the standard used by the IRS in the Notice.

5. What the IRS guidance says (and means)

- a. First, some definitions and parameters
 - ◆ A "**parking facility**" includes indoor and outdoor garages and other structures, as well as parking lots and other areas where employees may park on or near the business premises of the employer or on or near a location from which an employee commutes to work (but not parking on or near the employee's residence).
 - ◆ An analysis is required for each "**geographic location**" maintained by an organization and the taxable amount for each location is added to determine the total taxable amount for the organization.
 - If a tax-exempt employer owns or leases more than one parking facility in a single geographic location, the employer may aggregate the number of spots in those parking facilities when using the IRS' safe harbor method outlined later. Parking facilities owned in more than one geographic location may not be aggregated.
 - The IRS guidance does not clearly define the term "geographic location" for this purpose.
 - i. If an organization has multiple offices or campuses within the same city but that are at distinctly separate locations, it would seem reasonable to consider the distinctly separate locations to be distinct "geographic locations."
 - ◆ When determining whether parking is provided to an "**employee**" or "**employees**," parking by **independent contractors** working for the organization and parking in its parking facilities is included.
 - ◆ In order to determine if the nonprofit parking tax applies, a tax-exempt employer must:

- Determine its **total parking expenses** and then
- Determine what portion of the total expenses is allocable to **employee parking** (more on this component later)

“Total parking expenses” include, but are not limited to, the portion of the following expenses allocable to the organization’s parking facilities that are paid or incurred during the tax year (but only from January 1, 2018 forward in the first year):

- Rent or lease payments
- Repairs
- Maintenance
- Utility expenses
- Insurance
- Property taxes
- Interest
- Snow and ice removal
- Leaf removal
- Trash removal
- Cleaning
- Landscape expenses
- Parking lot attendant expenses
- Security

- Note: The IRS guidance indicates that depreciation is not a parking expense for purposes of computing the nonprofit parking tax.
- Note: Costs to initially pave or construct a parking lot would generally be considered capital improvements and not a parking expense for purposes of computing the nonprofit parking tax.
- Note: Costs to repave, blacktop, re-stripe, etc., a parking lot may be considered capital improvements or non-capitalized expenses, depending on various factors. If non-capitalized, such costs would likely be includable as a parking expense for purposes of computing the nonprofit parking tax.

iv. Determining “total parking expenses” may be the most difficult aspect of compliance for most nonprofits.

Determining the appropriate portion of such expenses to allocate to parking facilities will most certainly require estimates and approximations.

b. Methods for allocating total parking expenses to employee parking

◆ **Situation 1 – Tax-exempt employer pays a third party for parking spots provided exclusively to employees**

Under the IRS guidance, the cost of employee parking that is subject to tax under this Situation equals:

- The total cost of employee parking paid by the tax-exempt employer to the third party during the tax year (but only from January 1, 2018 forward in the first year), reduced by
- The total amount of parking fringe benefits (if any) that are treated as taxable wages on Forms W-2 for the year.
 - i. Note – The fair market value of qualified parking fringe benefits provided to an employee is excludable from an employee’s wages, up to certain limits. The amount of qualified parking excludable from wages is limited to \$260 per employee per month for 2018 (\$265 for 2019). The value of qualified parking exceeding this monthly tax-free threshold is generally a taxable fringe benefit, reported as taxable wages on the employee's Form W-2.
 - 1. Generally, parking provided in a location where there is not normally a charge for parking in the surrounding area would not be considered to have value for this purpose.
 - 2. IRS Notice 94-3 provides detailed guidance on determining the value of employer-provided parking for this purpose.

◆ **Situation 2 - Tax-exempt employer owns or leases all or a portion of one or more parking facilities where its employees park**

Under the IRS guidance, the cost of parking that is subject to tax in this Situation may be calculated using any reasonable method.

- The guidance stipulates that using the value of employee parking to determine the amount subject to the nonprofit parking tax is not a reasonable method.
- The guidance further states that, for tax years beginning on or after January 1, 2019, a method that fails to allocate expenses to reserved employee parking spots is not a reasonable method.
- A “reserved employee parking spot” is a spot in the parking facility that is exclusively reserved for employee use. The spots may be reserved by a variety of methods, including, but not limited to:
 - i. Specific signage (“Employee Parking Only”)
 - ii. A separate lot/facility or portion of a lot/facility segregated by a barrier to entry or limited by terms of access

• **Therefore, if an organization has reserved parking spaces for employees, a portion of the organization’s total parking expenses will be subject to the tax.**

• **The only way an organization that has reserved employee parking can avoid the tax and the federal Form 990-T filing requirement entirely is if the sum of the following is less than \$1,000:**

- i. **Parking expenses allocable to reserved employee parking,**

ii. The taxable amount from unreserved parking spaces (see below), and

iii. Gross revenues from any actual unrelated business activities.

Steps for computing the tax:

- Determine the total number of all parking spaces, including those reserved for employee use.
- Determine the total number of parking spaces reserved for employee use.
- Determine the taxable portion of total parking expenses attributable to both (a) employee use of reserved parking spaces, and (b) employee use of spaces other than those reserved for employee use.

The IRS provides a “safe harbor” methodology that, if followed, is deemed to be a reasonable method for computing employee parking expenses subject to the nonprofit parking tax.

- Basic premise –
 - i. Allocate a portion of total parking expenses to reserved employee parking.
 1. This amount would generally be subject to the tax.
 - ii. Determine if the remaining portion of the parking facility is primarily (more than 50%) used to provide parking to the general public. **If so, then no parking expenses related to the unreserved parking spaces are subject to the nonprofit parking tax.**
 1. For purposes of this tax, the term “general public” means anyone other than employees and independent contractors of the organization.
 2. Usage is tested during the normal hours of the exempt organization’s activities on a typical day.
 3. If the actual or estimated usage of the parking facility varies significantly between days of the week or times of the year, the tax-exempt employer may use any reasonable method to determine the average use.
 4. Unreserved parking spots that are available to the general public but empty during normal hours on a typical day are considered to be used by the general public.
 - iii. Alternatively, if the primary use of the remaining spots is to provide parking to employees (including independent contractors), then determine the portion of the total parking expenses that are allocable to the employees’ use of the unreserved portion of the parking facility.

1. This amount would be added to the parking expenses allocated to the reserved employee parking, and the sum would generally be subject to the nonprofit parking tax.
- iv. The taxable amount determined above is reduced by the value of parking (if any) that is reported as wages to the employees on Form W-2 (as discussed previously).

6. An easy out for some

Under the IRS guidance, a tax-exempt employer whose parking facilities:

a. Do not have any reserved employee parking, **AND**

b. Are not used primarily by employees,

Is not subject to the nonprofit parking tax!

7. Examples

Example 1 – A church has a parking lot containing 2,000 spaces, 100 of which are used by employees on a typical weekday and during worship services on the weekend. The lot has no reserved employee spaces. In this situation, because the parking lot has no reserved employee spaces and is not used primarily by employees (employee use is approximately 5%), then the parking lot is considered to be used primarily by the general public and none of the parking expenses are subject to the tax.

- ◆ Twist – what if one spot is reserved for the senior pastor?

1/2000th of the parking lot is considered to be employer-provided parking, and therefore 1/2000th of the church's total parking expenses is subject to the tax.

- However, if this amount is less than \$1,000, and the church has no other unrelated business activities, then it is not required to file a Form 990-T

Example 2 – A church located in the downtown area of a large city pays a third party who owns a parking garage across the street from the church \$100 per month for each of its 50 employees to park in the garage.

- ◆ Total parking expenses = \$100 * 12 months * 50 employees = \$60,000
- ◆ The entire \$60,000 is subject to the tax

Example 2a – Same facts as Example 2 above, but the monthly cost per employee is \$300 (which is also the fair market value of the parking). The church properly applies the \$260 (for 2018) limit to the amount of the parking benefit that is treated as a nontaxable fringe benefit to each employee, and includes the excess of \$40 per month in each employee's taxable wages.

- ◆ Total parking expenses = \$300 * 12 months * 50 employees = \$180,000
- ◆ Total parking expenses included in employee wages for the year = \$40 * 12 months * 50 employees = \$24,000
- ◆ Parking expenses subject to the tax = \$180,000 - \$24,000 = \$156,000

Example 3 – A nonprofit organization has a parking lot containing 40 spaces, 30 of which are used by employees on a typical weekday. The organization’s offices are closed on the weekend. The lot has no reserved employee spaces. The organization’s total parking expenses for the year are \$12,000. Since the organization’s parking spaces are used primarily for employee parking (30/40 = 75%), 75% x \$12,000 (or \$9,000) of the organization’s parking expenses are subject to the tax.

Example 4 – A church owns a 500-space parking lot adjacent to its buildings; 10 spaces are reserved for certain employees of the church. The church’s total expenses allocable to the parking lot are determined to be \$10,000. During the week, the church typically has 50 employees parking in the lot in unreserved spaces, and approximately 440 spots that are empty. On a typical Sunday, the church has 400 congregant vehicles and 20 employee vehicles parking in the lot in unreserved spots, leaving 70 unreserved spots empty.

- ◆ Under the IRS safe harbor, the parking expenses subject to the tax would be calculated as follows:
- ◆ Step 1 – Allocate the expenses applicable to the employee reserved spots
 - $\$10,000 * 10/500 = \200 – this amount is subject to the tax
- ◆ Step 2 – Determine, using a reasonable method, the primary use of the remaining spots
 - During the week – 440/490 are used by the general public = 90%
 - On Sundays – 470/490 are used by the general public = 96%
- ◆ Since the unreserved portion of the church’s parking lot is primarily used by the general public, no additional amounts are included in UBTI.
- ◆ If the church has no other unrelated business activities, then it is not required to file a Form 990-T, since the amount subject to the nonprofit parking tax is less than \$1,000

8. Can something be done to stop this bizarre new tax?

- a. Some members of Congress have been supportive and have filed legislation that would repeal the nonprofit parking tax.
- b. Passage of legislation to repeal the nonprofit parking tax faces a number of political hurdles.