ECFA WEBINAR

# A Federal Parking Tax on Churches and Other Nonprofits? Is This for Real? Webinar Transcript

**Dan Busby:**
This is Dan Busby. It's my privilege to serve as ECFA's President. Welcome to today's webinar as we present "A Federal Parking Tax on Churches and Other Nonprofits? Is This for Real?" Michael Batts is with me today for this important webinar, and we are so glad that you have joined us. Over 1,500 individuals have signed up for today's free webinar and recording.

Mike Batts is a CPA and the President and Managing Partner of Batts Morrison Wales & Lee, a national CPA firm dedicated exclusively to protecting nonprofits and their leaders across the United States. He is a member of the ECFA board and its current chairman. Mike has more than twenty-five years of experience serving nonprofit organizations. He is a national speaker, an author, having written three books and numerous professional articles on matters related to the nonprofit sector.

Mike, in February and March of this year, we highlighted the Nonprofit Parking Tax in forums that we conducted across the United States. We were hopeful that the Nonprofit Parking Tax would be repealed in a tax reform corrections bill, but that did not happen. In retrospect, we now can see the tax writers intended the Nonprofit Parking Tax. Therefore, they did not believe there was anything that needed correction.

The new tax is of significant concern to all types of nonprofits, including churches of many types and sizes. ECFA members provide over 150,000 parking spaces to their employees in the United States, and when you think of all nonprofits in the United States, they provide about 15 million parking spaces to their employees.

So, this new tax is a really big deal. In recent days, we have communicated with a number of law firms and government officials about this matter, and the only thing that is clear is that the Nonprofit Parking Tax provisions are not clear. But we will provide as much clarity today as possible. So, Mike, take it away.

**Michael Batts:**

Well, thank you very much, Dan. It is always great to be with you and great to be involved in the work of ECFA. In the interest of time, we are going to jump right in.

I'd like to just give some context for this issue so that everybody understands where it came from. In the big tax reform law that Congress passed at the end of 2017, there was a provision that disallows tax deductions for businesses for the expenses that they incur in providing what the law calls "qualified transportation fringes" to their employees, including "qualified parking."

So, this was a provision that disallowed a deduction for businesses for "qualified transportation fringes." Now, that term includes benefits like transit passes and some other commuter expense benefits.

The term "qualified parking" is defined as parking provided to an employee on or near the business premises of the employer. So, our common definition is parking provided by the employer to the employee at work. That is "qualified parking." So, the Nonprofit Parking tax was part of the Tax Reform bill in which Congress reduced the top marginal corporate tax rates for businesses from 35% to 21%.

The Tax Cuts and Jobs Act added a new Section to the Internal Revenue Code, 512(a)(7). It states that tax-exempt organizations must treat as unrelated business income, which is subject to Federal Income Tax, any amounts paid or incurred after December 31, 2017 for such benefits if they would be disallowed for businesses.

We've been told more than once and one of the spokespeople for one for the key members of Congress was quoted in a *Politico* article saying that some members of Congress felt that creating a new tax for nonprofits was necessary to "level the playing field" between businesses and tax-exempt organizations. Well, there are a lot of us who don't believe that that premise is appropriate. There are some fundamental differences between businesses and nonprofit organizations, and one of the main purposes of tax exemption for nonprofits is that they don't have the same playing field when it comes to the tax burdens.

Now, the law says that the "Secretary," referring to the Treasury Secretary, practically meaning the Treasury Department or the IRS, shall issue guidance "as may be necessary or appropriate to carry out the purposes of this paragraph, including regulation or other guidance providing for the appropriate allocation of depreciation and other costs with respect to facilities used for parking…"

So, let me translate all that into plain English, plain language. What it is saying is first, businesses are not able to deduct the expenses that they incur for qualified transportation fringes, and that includes, at least ostensibly, qualified parking. This new Section 512(a)(7) says that for any expense of that type that businesses no longer can deduct; nonprofit organizations have to treat those same types of expenses as unrelated business income subject to Federal Income Tax. Then you wrap that up with the language in the statute that says that the Treasury

Department or the IRS must issue guidance, essentially providing information on how we are to apply this new tax, how we are to calculate the amount subject to tax.

No guidance has been issued yet, as of this morning, and that presents a conundrum for nonprofit organizations because the law is effective now. As we mentioned, the law says it applies to amounts paid or incurred after December 31 of 2017. So, what this means, and the IRS has indicated that this is their position on the IRS website, it means that even if you have a fiscal year, and your fiscal year ends in 2018, that part of your fiscal year that includes 2018 is subject to this tax, if it applies. And so, it's not like it applies to tax years beginning after December of 2017, it applies to any period beginning January 1, 2018, any period that includes any part of 2018. So, bottom line is, it is effective now, and that does present a problem because the IRS has not issued this guidance that the statute says that they have to issue.

Another aspect of this new law is that it creates an income tax on a cost. That is a novel concept. Most of us think of an income tax meaning a tax on income. What this does, is it creates a new income tax on the costs incurred by nonprofit organizations in providing these benefits, parking in particular.

The costs that are subject to tax include costs of employee parking in connection with their performance of the organization's exempt activities. And I point that out because the law states that this tax doesn't apply as it relates to employee parking in connection with an unrelated business activity. So, this is actually a tax on the cost of parking for employees who are doing the exempt work; the religious work, the educational work, the charitable work of the organization.

There are many questions that exist about the applicability and the methods for determining the costs that are subject to tax. It is clear under the law that it is "cost" that is subject to tax, not value. Because the law says that the tax applies to amounts paid or incurred, and again, this goes back to the fact that businesses are not allowed to take a deduction for their expenses related to providing parking and qualified transportation fringes. So again, on the business side, it is a disallowance for a deduction for expenses they incur. On the nonprofit side, it is a tax on those expenses. That's what we are taking about.

Now, depending on how the IRS or the Treasury Department drafts the guidance, this law has the potential to affect the nonprofit sector quite pervasively. And when we talk about the costs incurred for providing employee parking, we are talking about maintenance for the parking, (whether it is a parking lot or garage or whatever it may be) things like security, depreciation (which was specifically mentioned in the law), and other costs related to the employee parking. And, depending on how the Treasury drafts the guidance, what happens is, we take the costs that are subject to this tax, add them together with any revenue that the organization has from actual unrelated business activities and, if those exceed $1,000 in a year, then we are going to

have to deal with it. And that means that it would be unrelated business income and we would have to file a Form 990-T.

The federal corporate income tax rate is 21%. In many states there is also a state income tax. So, what you end up with is a combined tax rate. In many situations, this result in a total income tax of perhaps 24%, 25%, or 26% on these costs if, indeed, they apply to an organization. So, it's a big deal.

Organizations that are subject to the tax that have not previously been filing federal income tax returns using Form 990-T will have to do so. In many cases, that will create a new filing requirement plus the state-level corporate tax.

Now, when we get into these calculations, the calculations that will be necessary to determine the cost of employee parking could be quite complex depending on what the guidance says about it.

**Depreciation:** You think about things like depreciation. That's not simple because, in many cases, a parking lot or a parking garage is part of an overall building project. So, when we think about what is the depreciation attributed to the parking facility, we would have to determine that.

**Allocations:** Then we get on into issues like allocating the cost, including depreciation, based on time and usage because not all of the parking facility is used by employees, and not all the time.

**Indirect Costs:** And then we have questions about matters of indirect costs and overhead, insurance, utilities, that kind of thing. So, there are lots and lots of questions and, given that we don't have IRS guidance, there is a lot of confusion as to whether this tax applies, and, if so, how we will have to measure it.

**Applicability.** So, in terms of applicability, the law is written so as to apply quite broadly. Some practitioners, after analyzing the various code sections that come into play, have concluded that 512(a)(7), this new provision in the law, will only apply to employers that have parking lots or garages where the parking is deemed to have "value." That is, whether the organization or surrounding properties normally or typically charge for parking. Now where this is coming from is that there is a provision in Section 132 of the code that says that when an employer provides an employee with qualified parking, the employee is not taxed on that. That is an excludable fringe, meaning that it is not taxable to the employee, so long as the value of the parking provided to the employee doesn't exceed a limit. There is an inflation-adjusted limit to the value of employer-provided parking that employees can ignore. In 2018, that amount is $260 per month.

So, Section 132 says that if an employer provides an employee with parking on the premises, and the value of that parking is $260 a month or less, then the employee doesn't have to worry about treating that as a taxable benefit. That's why we care about the value of employee parking. And that's the only reason, before now, that we would have occasion to even try to figure out what the value of employee parking is. So, in those scenarios where an employer provides employee parking in a lot or a garage where it normally doesn't charge, and it is in an area where surrounding properties don't charge, there is IRS guidance and the best example of it is IRS Notice 94-3. It says that if that is your scenario, then the value of the parking being provided to the employee is zero. You can deem it to be zero.

Again, before now, the only reason that it mattered is that we just needed to know that the value, whatever it is, is less than $260 a month, and therefore, the employee can ignore it. That's the only reason we cared about it, or maybe cared about it, before now. But there are some who are saying that if you look at that issue and if you determine that the value of the employee parking is, indeed, zero, then you can ignore 512(a)(7).

Well, it is unknown whether the guidance that the IRS will hopefully issue will conform to that conclusion. One of the reasons that it is unknown is that the law says that the costs incurred in providing the qualified parking is what is non-deductible for a business and taxable to a nonprofit. The law doesn't say that that is true, but only if the parking is deemed to have value. Now, that might be a very reasonable way for the IRS to draw the guidance, and many of us would say that would be better than having it apply to everybody, but it is not known yet until the IRS issues guidance that that is the position that they are going to take. Even if that were the position they take, determining whether the parking has value or not by looking at surrounding properties, whether there are meters in the area and that kind of thing could be challenging. And even then, even if that were not too big of a problem, this law, if it were applied only to parking that is deemed to have some value, because it is in a metro area, an urban area; you still have a massive impact on churches, ministries, charities that are located in areas where parking usually costs something.

So, it would still be a very, very big burden to a huge host of organizations. For those of you who are technically inclined and who want to know more about those technical tax code details and why there is, indeed, uncertainty about how some of these code sections interact, there is a very good podcast that has been put out by the law firm of Ropes and Gray, which is a very large, international law firm: https://bit.ly/2mILzSX. You can either listen to the podcast or read the printed transcript of it. And those attorneys get into the details of why this area isn't clear yet and won't be until we have IRS guidance.

As I mentioned earlier, questions definitely abound regarding the applicability and the measurement issues. Numerous organizations have requested guidance and even deferral of the effective date. And, even though we have absolutely no guidance from the IRS on how to

apply the tax, the IRS has a blurb on their website that clearly says that if you have an organization with a fiscal year that ends in 2018, you are supposed to add the cost of the parking you provide to your employees to your 990-T and report it as taxable income. So, right now, they have not provided for any deferral.
Numerous organizations have offered comments and submitted questions. One of the best comment letters that I have seen is one from the National Council of Nonprofits. The reason I think it is one of the best is because it is kind of an omnibus communication. It actually reflects and refers to comments and questions from many other organizations, including ECFA: https://bit.ly/2Lh1A0Z. They take a lot of other organizations' comments and roll them into theirs, complete with a lot of links to those other comments, just to help everybody understand how much confusion there is about this issue.

So, let's talk for a minute about ECFA's position on this issue. We are very concerned about it, especially given that there is the potential for the IRS to apply it extremely broadly. We believe that the law is fundamentally absurd because it is an income tax on a cost incurred by tax-exempt organizations for doing their charitable, religious, or educational work. That doesn't seem appropriate. Whether it is applied only to organizations whose employee parking is determined to have value, or whether it is applied more broadly, it still has the potential to have a massive impact and to be a massive burden and cost.

As a result, ECFA has been working diligently to try to have this Code section repealed, ether by Congress or effectively by Regulation. In other words, one of the purposes of ECFA's initiative has been to put pressure on members of Congress and on the Treasury Department so that if we can't get it repealed, when there is guidance, then the guidance will be as narrow as possible.

Well, let's talk about the legislation that has been filed. There are a couple of bills that have been filed in Congress that would actually completely fix this issue. H.R. 6037 by Congressman Michael Conaway out of Texas, and H.R.6460 by Congressman Walker out of North Carolina would both do away with it. What's interesting is that the Chairman of the House Ways and Means Committee, Kevin Brady, has not been committal in his position on the legislation, so he definitely needs convincing, and he is in a position to make a big difference.

ECFA has a sign-on position statement on their website: https://www.ecfa.org/DocSig.aspx. More than 2,500 organizations have signed on and that position statement, along with the list of organizations that have signed on, has been delivered to key members of Congress and to the Treasury Department.

So, in terms of what we can do at this point, number one, we all need to be watching for the guidance that we hope comes out; but we want to try and preempt this. Some actions that those of you who are on this webinar today can take that really will make a difference is to

reach out to Congressman Kevin Brady's office, especially if you are in or near his district in Texas, which is just north of Houston. It's the 11th Congressional District. If any of you on the webinar happen to be in The Woodlands area of Texas, then you are right in there. But anybody who is anywhere near there reaching out to him would make a difference.

**Congressman Kevin Brady (R-TX)**
Chairman of the House Ways and Means Committee
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https://kevinbrady.house.gov/

And also, contact members of the House Ways and Means Committee and the Senate Finance Committee. Contact information is:

**Members of the House Ways and Means Committee** (link to contact information and representatives' websites)
**Members of the House Ways and Means Committee** (PDF)
**Members of the Senate Committee on Finance** (link to contact information and senators' websites)
**Members of the Senate Committee on Finance** (PDF)
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