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Nonprofits May Face Costly Hurdles To Get Fringe Benefit Refunds

By **David van den Berg**

Law360 (January 29, 2020, 4:51 PM EST) -- Exempt organizations preparing amended returns seeking refunds of a repealed federal tax on their transportation fringe benefits may face challenges before getting the money, including the prospect of having to refile amended forms and delays in obtaining state refunds.

Congressional lawmakers of both parties introduced several measures to undo a tax on the transportation fringe benefits of exempt organizations before it was finally repealed in 2019 spending legislation. (AP)

The Internal Revenue Service released guidance Jan. 21 on how organizations should go about seeking refunds following lawmakers' repeal of the tax in the year-end spending bill. Congress had included the 21% tax on transportation fringe benefits provided by tax-exempt organizations in the Tax Cuts and Jobs Act, a move that roiled the tax-exempt sector. Lawmakers of both parties introduced several measures aimed at repealing the provision before ultimately finishing it off in the 2019 spending legislation.

Practitioners told Law360 the release of the guidance was helpful, but organizations may face several issues in getting the money back. For one, organizations may incur added costs applying for the refunds, along with the costs they already faced in determining and paying their tax liabilities, according to Alexander Reid of Morgan Lewis & Bockius LLP, former legislation counsel with the congressional Joint Committee on Taxation.

“Given this context, many of us were hoping the IRS would provide a more user-friendly and faster procedure for organizations to claim the refund,” Reid said. “Will there be errors? Of course there will. Meanwhile, the earnings on the tax continue to accrue to the government and are not available for use by the nonprofits to further their missions.”

Organizations report their unrelated business taxable income on Form 990-T. The transportation fringe benefit provision in the 2017 tax overhaul boosted unrelated business taxable income for organizations to the extent deductions weren't allowed for qualified transportation fringe benefits or parking facilities under Internal Revenue Code Section 274, according to the JCT.

The IRS guidance was helpful in that it gave tax-exempt organizations specific directions to follow after having to report the tax on different versions of Form 990-T, one for 2017 and another for 2018, said Ofer Lion of Seyfarth Shaw LLP. Lion also noted some organizations had set up quarterly estimated tax payments but will need to pull back from them.

“Others may have already filed amended returns that might not strictly comply with these directions and now must wonder whether to file a second batch,” he said.

The IRS guidance instructs organizations to write “amended return” on both the 2017 and 2018 forms that organizations refile and to specifically indicate that they're amending returns because of the repeal of the tax, if that's the only reason for filing. Organizations were also told how to revise each year's forms and to attach a statement listing changed line numbers and the reason they were changed, such as the repeal of IRC Section 512(a)(7), the transportation fringe benefit provision some called the parking tax.

Nonprofits will have to eat the costs of filing the amended returns if they want to get their refunds, though. The average administrative cost for filing Form 990-T with additional unrelated business income tax owed for transportation benefits is about $1,346, according to a survey commissioned by Independent Sector, an advocacy group for nonprofits.

That might not seem like much, but David Thompson, vice president of public policy for the National Council of Nonprofits, said 92% of all nonprofits have revenues of less than $1 million. Getting thousands of dollars back from the refunds is a significant amount of money, he said.

Nonprofits could file for refunds before the guidance came out if they had someone to tell to file the needed form, and big organizations like universities and hospital systems likely were already filing amended returns, he said. However, small organizations were likely waiting for the IRS to act, he said.

Most nonprofits “have to ask their pro bono accountant or they have to ask a board member who is also an accountant to do it for them to get back that $1,000 or the $10,000 or something along those lines,” he said.

Those exempt organizations with both transportation unrelated business taxable income and UBTI in other areas will face added complexity when filing amended returns, Thompson said. Ultimately, though, while there may be questions about timing, most organizations will get refunds from the federal government, he said.

However, he said there were concerns about what could happen at the state level.

Two large states are among those that decoupled their state codes from the federal transportation fringe benefit provision. Illinois Gov. J.B. Pritzker signed a bill in August that decoupled his state from it. New York Gov. Andrew Cuomo did the same in 2018.

“In states that decoupled from the parking tax, many nonprofits still paid state tax before the decoupling took effect. Some of those nonprofits can file for a state refund today,” said Benjamin Davidson, who teaches nonprofit tax law at the University of North Carolina School of Law and has written extensively on what he called the parking tax. “Others will need to wait for state legislation that conforms to the repeal before requesting a refund.”

Most organizations won't know whether or not they still face a state parking tax, and practitioners can help their clients by making clear whether they can file for federal or state refunds or both, he said. Industry groups may need to be mindful of the federal-state disparity in discussing refunds with their constituents too, he said.

“Announcements that do not distinguish between federal and state refunds may get some nonprofits in trouble,” he said.

--Editing by Tim Ruel and Robert Rudinger.
