November 25, 2020

Mr. Patrick M. Clinton
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(IT&A)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Mikhail Zhidkov
Office of Chief Counsel
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Internal Revenue Service
1111 Constitution Avenue, NW
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Ms. La Vonne Fischer
Office of Chief Counsel
(EEE)
Internal Revenue Service
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Re: Notice of Proposed Rulemaking on Qualified Transportation Fringe, Transportation and Commuting Expenses under Section 274 [REG-119307-19]

Dear Mr. Clinton, Mr. Zhidkov, and Ms. Fischer:

The American Institute of CPAs (AICPA) appreciates the efforts of the Department of the Treasury ("Treasury") and the Internal Revenue Service (IRS) to address the need for guidance related to the changes to qualified transportation fringe benefits as well as transportation and commuting expenses under section 274[1] as amended by Pub. L. No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA).

On December 10, 2018, Treasury and the IRS issued Notice 2018-99 – Parking Expenses for Qualified Transportation Fringes Under § 274(a)(4) and § 512(a)(7) of the Internal Revenue Code (the "Notice"). The AICPA submitted comments in response to the Notice.[2] Subsequently, on June 2, 2020, Treasury and the IRS issued notice of proposed rulemaking [REG-119307-19] (the "proposed regulations"). This letter is in response to the proposed regulations.

[1] Unless otherwise indicated, hereinafter, all section references are to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.

[2] https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/20190514-aicpa-comments-notice-2018-99-qtf.pdf.

Specifically, the AICPA provides comments and recommendations on the following issues related to the proposed regulations:

I. Definitions
    1. Geographic Location
    2. Peak Demand Period

II. Disaster Relief

III. Primary Use Methodology
    1. General
    2. Step 1 – Calculate the Disallowance for Reserved Employee Spaces and Step 2 – Determine the Primary Use of Available Parking Spaces

IV. Transportation and Commuting Benefits
    1. Definition of "Place of Employment"
    2. Section 274(e) Should not Apply
    3. Definition of Employee / Applicable Only to Employees
    4. Safety Exception
    5. Define the Term "Expense" for Section 274(l)

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We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact Deborah Walker, Chair, AICPA Employee Benefits Taxation Technical Resource Panel at (202) 257-5609, or dwalker@cbh.com; or Kristin Esposito, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9241, or kristin.esposito@aicpa-cima.com; or me at (612) 397-3071, or chris.hesse@CLAconnect.com.

Sincerely,

Christopher W. Hesse, CPA
Chair, AICPA Tax Executive Committee

cc: The Honorable David J. Kautter, Assistant Secretary for Tax Policy, Department of the Treasury
The Honorable Charles P. Rettig, Commissioner, Internal Revenue Service
The Honorable Michael J. Desmond, Chief Counsel, Internal Revenue Service

Mr. Thomas West, Tax Legislative Counsel, Department of the Treasury
Ms. Amber Salotto, Attorney Advisor, Department of the Treasury
Mr. Stephen Tackney, Deputy Associate Chief Counsel, Office of Chief Counsel, Employee Benefits, Exempt Organizations, and Employment Taxes, Internal Revenue Service

SPECIFIC COMMENTS

I. Definitions

1. Geographic Location

Overview

Many taxpayers have multiple parking facilities at various locations. The Notice provides that a taxpayer can aggregate parking spaces at multiple facilities within a single geographic location. However, no aggregation is allowed for spaces in facilities owned or leased in more than one geographic location. While the Notice did not define geographic location, it provided an example (Example 8) in which a taxpayer had multiple locations (manufacturing plant, warehouse, and office building) at a complex in one city and other parking facilities in other cities. The example stated that the taxpayer could aggregate the facilities at the complex but not facilities in other cities.

The proposed regulations retain the concept of aggregating facilities (at the choice of the taxpayer) in one geographic location if using the general rule, primary use methodology, or the cost per space methodology. Proposed Reg. § 1.274-13(b)(5) defines a geographic location as, "contiguous tracts or parcels of land owned or leased by the taxpayer. Two or more tracts or parcels of land are contiguous if they share common boundaries or would share common boundaries but for the interposition of a road, street, railroad, stream, or similar property. Tracts or parcels of land which touch only at a common corner are not contiguous."

Recommendation

The AICPA recommends that Treasury and the IRS issue final regulations expanding the definition of geographic location to include a metropolitan statistical area (MSA), as defined by the United States Office of Management and Budget.

Analysis

The definition of geographic location in the proposed regulations is narrow. The Notice can be interpreted as allowing for aggregation within the same city, meaning that a geographic location is a city. The definition in the proposed regulations requires a taxpayer's parking facilities to be contiguous essentially only allowing aggregation at a single location. Many taxpayers that have expanded over time may have multiple locations in one MSA because their original location did not allow for expansion. Similarly, taxpayers may need to place certain aspects of their business in certain areas (e.g. due to zoning restrictions) while it may not be practical to put all aspects of

their business in that location. In these cases, the activities carried out at the multiple locations are part of the same trade or business and both are integral to that trade or business.

The intent of section 274(a)(4) is to disallow the expense of providing parking and other qualified transportation benefits. It is reasonable to assume the cost of parking will vary by geographic locale and that aggregating all locations may distort the overall expense and contrast with the intent of the legislation. However, restricting aggregation to contiguous parcels is too narrow and should be expanded to align more with the Notice. Using a specific definition such as the MSA will not provide an opportunity for taxpayers to abuse the rules while it more reasonably reflects an employer's costs than the contiguous rule outlined in the proposed regulations.

It is unreasonable to require tracts or parcels to be contiguous to meet the same geographic location test. Parking structures or lots may be separated by, for example, one or two city blocks but serve the same office or other employee service location of the organization. The separation may have been caused by availability of nearby land at the time of expansion of the organization's activities.

2. Peak Demand Period

Overview

The peak demand period is used to determine the total number of parking spaces used by employees on a typical business day. The proposed regulations define the peak demand period as "the period of time on a typical business day when the greatest number of the taxpayer's employees are utilizing parking spaces in the taxpayer's parking facility."[3] Taxpayers can use any reasonable methodology to determine the total number of spaces used by employees during the peak demand period on a typical business day (e.g., based on inspections or surveys).

As the preamble to the proposed regulations notes, the peak demand period could be affected by disasters or other national emergencies when there are significant variations in employee parking during the taxable year. Those variations should be taken into account in determining the peak demand period to ensure that no disallowed deduction occurs for parking spaces that are not used by employees, even though the spaces may be available parking spaces.

Recommendation

The AICPA recommends that Treasury and the IRS issue final regulations maintaining the reasonable method rule. We also suggest including examples of reasonable methods in the final regulations.

Analysis

It is important to maintain the "any reasonable method" rule for determining the peak demand period. There are certain circumstances (e.g., seasonal business) in which the peak demand period, determined over a period shorter than a taxable year, may be appropriate. The following example

[3] Prop. Reg. § 1.274-13(b)(14).

of a reasonable method, if included in the final regulations, would provide clarification to taxpayers considering using a peak demand period for a timeframe less than a taxable year.

Example

Employer A operates a beach resort and provides employee parking throughout the year. During 9 months of the year, 5 of the available 50 spaces are used by employees, with the remainder used as parking for the general public. During 3 months of the year, during peak demand periods during the day, 45 spaces are used by employees. Due to the seasonal nature of the business, the peak demand for 3 months of the year is significantly greater than the peak demand for the remainder of the year. Employer A can use the peak demand usage of 45 spaces for expenses for 3 months of the year. During the remaining 9 months of the year, there is no parking expense disallowance as the primary use of the facility is for the general public.

II. Disaster Relief

Overview

Businesses contemplate cost effective relief from ongoing business expenses in the event of a disaster. However, during disasters (e.g., a hurricane, wildfire, the coronavirus pandemic) many businesses are required to pay parking expenses that are not allocated to employees as they may not be able to work at the employer's physical location.

Recommendation

The AICPA recommends that Treasury and the IRS provide final regulations permitting employers to deduct parking expenses related to unused employee parking spaces if they are unused due to an inability of employees to work at the employer's physical location.

Analysis

During disasters and, less frequently, at other times, employees cannot reasonably be expected to use their employer's parking facility at the employer's physical work location. Therefore, an employer should be permitted to deduct the cost of the parking facility allocated to the unused employee parking spaces.

III. Primary Use Methodology

1. General

Overview

The language "for each parking facility" as used in Prop. Reg. § 1.274-13(d)(2) and Prop. Reg. § 1.274-13(d)(2)(ii)(B) is inconsistent. Proposed Reg. § 1.274-13(d)(2) states "A taxpayer **may**

choose to use the general rule or any of the following methodologies for each taxable year and **for each parking facility**" [emphasis added]. Proposed Reg. § 1.274-13(d)(2)(ii)(B) related to the primary use methodology states: "A taxpayer that uses the primary use methodology in this paragraph (d)(2)(ii)(B) **must use** the following four-step methodology to calculate the disallowance of deductions for qualified transportation fringe parking expenses **for each parking facility**" [emphasis added].

Recommendation

The AICPA recommends that Treasury and the IRS issue final regulations that add the language "for which the taxpayer uses the primary use methodology" after the language "for each parking facility" in Prop. Reg. § 1.274-13(d)(2)(ii)(B).

Analysis

The use of the language "for each parking facility" in Prop. Reg. § 1.274-13(d)(2)(ii)(B) could be interpreted to mean the primary use methodology must be used "for each parking facility." This interpretation is not consistent with the choice afforded to taxpayers in Prop. Reg. § 1.274-13(d)(2). Adding the language "for which the taxpayer uses the primary use methodology" would clarify that the primary use methodology is not required to be used for each parking facility, but when it is used, the four-step methodology must be used to calculate the disallowance for that particular parking facility.

2. Step 1: Calculate the Disallowance for Reserved Employee Spaces and Step 2: Determine the Primary Use of Available Parking Spaces

Overview

The proposed regulations provide three simplified methodologies for determining the disallowed expenses for employer provided parking. Proposed Reg. § 1.274-13(d)(2)(ii)(B) provides for one of those methodologies (the Primary Use Methodology), which is similar to the four-step method included in the Notice. This method looks to whether the parking spaces are primarily provided to the general public.

In Step 1, related to calculating the disallowance for reserved employee spaces, the taxpayer must determine the number of parking spaces reserved for employees and allocate expenses to the reserved spaces. In Step 2, related to determining the primary use of available parking spaces, the taxpayer must perform an analysis to determine the primary use of the remaining parking spaces. Proposed Reg. § 1.274-13(b)(11) provides that the primary use of parking spaces is based on greater than 50% (actual or estimated) use of the available parking spaces in the parking facility. If the primary use (greater than 50%) of the available spaces is to provide parking to the general public, the remaining parking expenses may be deducted, even those provided to employees.

Primary use of available parking spaces is based on the number of available parking spaces used by employees during the peak demand period. Peak demand period is the period of time on a typical business day when the greatest number of the taxpayer's employees are using the largest

number of the taxpayer's parking spaces. Non-reserved parking spaces available to the general public and empty during "normal business hours on a typical business day" are treated as provided to the general public. The term "general public" includes, but is not limited to, clients, customers, vendors, visitors, individuals delivering goods to the taxpayers, students of an educational institution, and patients of a healthcare facility.

If the primary use of the parking spaces is not to provide parking to the general public, a deduction allowance for the non-employee reserved spaces must be calculated in Step 3 in a similar manner to how the disallowance for reserved employee spaces is calculated. If any parking spaces remain unaccounted for, the employer may allocate the remaining expenses in Step 4 by determining how many of the available parking spaces are used by employees during the peak demand period and disallowing the expenses allocable to those parking spaces.

Proposed Reg. § 1.274-13(d)(2)(ii)(B) provides an exception to the Step 1 allocation of expenses to reserved employee parking spaces if the primary use of the parking is for the general public and there are only a limited number of reserved employee spaces if:

- The primary use of the parking is for the general public;
- There are five or fewer employee reserved parking spaces; and
- The employee reserved spaces are 5% or less of the total parking spaces.

Step 1 - Calculate the Disallowance for Reserved Employee Spaces

Recommendation

The AICPA recommends that Treasury and the IRS provide final regulations related to the Step 1 exception in Prop. Reg. § 1.274-13(d)(2)(ii)(B) to state that "the reserved employee spaces are the greater of one reserved parking space or 5 percent or less of the total parking spaces."

Analysis

The requirements under the proposed regulations provide a *de minimis* exception for reserved parking. However, the exception applies only to taxpayer parking facilities with at least 20 parking spaces. A small employer with fewer than 20 parking spaces is not eligible to take advantage of this exception even if the primary purpose of the parking facility is to provide parking to the general public. We suggest that the final regulations provide that this *de minimis* exception applies to parking facilities with fewer than 20 parking spaces and not more than 1 employee reserved space. Therefore, the last bullet point in the Overview section above would change and the three conditions of the *de minimis* exception would instead be as follows:

- The primary use of the parking is for the general public;
- There are five or fewer employee reserved parking spaces; and
- The reserved employee spaces are the greater of one reserved parking space or 5% or less of the total parking spaces.

Example

Employer A is the sole owner of a parking lot with 18 parking spaces. The primary use of the parking spaces is for the general public. There is 1 reserved employee parking space. During the peak demand period there are 6 additional employees using parking spaces. The remaining 11 parking spaces are for the general public. Under the proposed regulations, Employer A is not eligible to use the exception for limited reserved parking because one parking space is greater than 5% of parking spaces. Under the revised rule, Employer A could use the exception for limited reserve parking because only 1 parking space is reserved.

Step 2 – Determine the Primary Use of Available Parking Spaces

Recommendation

The AICPA recommends that Treasury and the IRS provide clarification in the final regulations on the primary use methodology, Step 2, by consistently using the term "peak demand period." The proposed regulations use the term "peak demand period" when determining the parking space use by employees. However, Step 2 of the primary use methodology uses the term "normal business hours on a typical business day" to determine the general public use of parking.

Analysis

When performing the primary use analysis, the proposed regulations use the term "peak demand period" inconsistently for determining the number of employees using a parking lot versus the general public use of a parking lot. The determination of the number of employees is made during the peak demand period, which is the time during the business day when the greatest number of employees are using the parking facility. However, the determination of the spaces available for the general public is not made at the peak demand period, but instead during normal business hours on a typical business day. It would provide clarity and administrative simplicity if the term "peak demand period" was consistently used when determining both the employee and general public use of the parking lot.

IV. Transportation and Commuting Benefits

1. Definition of "Place of Employment"

Overview

Proposed Reg. § 1.274-14(a) states that "no deduction is allowed for any expense incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer in connection with travel between the employee's residence as defined in § 1.121-1(b)(1), and place of employment." While the proposed regulations define the term "residence," it does not define the term "place of employment."

Recommendation

We recommend that Treasury and the IRS provide final regulations that define the term "place of employment" analogous to a taxpayer's tax home (i.e., the general location of the primary place of work regardless of the place of residence). We also recommend that the final regulations provide examples to illustrate the definition of the term "place of employment."

Analysis

The term "place of employment" is not defined in the proposed regulations. Since taxpayers have many different places of employment, including employer locations that are infrequently visited and client sites, it is not clear how they should determine their place of employment. An individual's tax home is often used to determine if transportation and travel expenses are excluded from income as business expenses.[4] Therefore, we suggest defining the term "place of employment" as analogous to a taxpayer's tax home.

Example

Consultant regularly works in the Washington, DC office and lives in the Washington, DC metropolitan area (i.e., Consultant's tax home). Consultant periodically travels to New York for work for one or more days. Consultant's place of employment should be considered Washington, DC (same as Consultant's tax home). Consultant's transportation or travel expenses to work in New York should be deductible as business expenses and not considered non-deductible commuting expenses.

Example

Executive works on a regular basis at his employer's home office, located in New York (i.e., Executive's tax home). Executive lives 9 months of the year in Miami, Florida, and 3 months of the year in Southampton, New York. As part of the employment contract, travel between Executive's residence and company facilities is reimbursed. Occasionally, Executive travels to other locations of the employer before traveling to work in his New York office. The employer properly includes reimbursement or payment for travel between Executive's residence and the New York office in compensation income, subject to income and employment tax withholding. Travel between Miami or Southampton and New York should be nondeductible commuting expenses. Travel between Miami or Southampton and other business locations should be deductible business expenses and not considered commuting expenses.

[4] *See Flowers v. Commissioner*, 326 US 465 (1946).

2. Section 274(e) Should not Apply

Overview

Section 274(l) disallows deductions for certain transportation and commuting expenses. Section 274(e) includes exceptions to expenses disallowed under section 274(a). The preamble to the proposed regulations states that the section 274(e) exceptions do not apply to section 274(l). However, the proposed regulations do not contain this language.

Recommendation

We recommend that Treasury and the IRS include language in the final regulations noting that the section 274(e) exceptions do not apply for purposes of section 274(l).

Analysis

Many taxpayers and tax practitioners are aware that commuting costs paid by an employer are taxable to the employee, therefore they believe that there should not be a disallowance of the commuting expense that is included in compensation. They are not aware that the section 274(e) exceptions do not apply to section 274(l). While the preamble to the proposed regulations states that the section 274(e)(2) exceptions do not apply to section 274(l), noting this is the final regulations would provide more clarity to taxpayers and practitioners

3. Definition of Employee / Applicable Only to Employees

Overview

Section 274(l) provides, "No deduction shall be allowed under this chapter for any expense incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer in connection with travel between the employee's residence and place of employment, except as necessary for ensuring the safety of the employee." However, the proposed regulations do not define the term "employee" for this purpose.

Recommendation

The AICPA recommends that Treasury and the IRS define the term "employee" for section 274(l) purposes by referencing Prop. Reg. § 1.274-13.

Analysis

In many areas of employee compensation and benefits, reference to the term "employee" is made, and the proper authority defines the term for such purpose(s). For example, partners are treated as employees for certain benefits, and in other cases, partners are not included in the group of individuals eligible for certain benefits.

Section 274(a)(4) disallows a deduction for the expense of qualified transportation fringe benefits

provided to an employee of the taxpayer. The proposed regulations include a definition of employee for this purpose. However, no definition of the term "employee" is provided for section 274(l). We suggest including a definition of the term "employee" in the final regulations.

4. Safety Exception

Overview

Proposed Reg. § 1.274-14 provides an exception for safety of the employees as follows:

> (b) *Exception*. The disallowance for the deduction for expenses incurred for providing any transportation or commuting in paragraph (a) of this section does not apply if the transportation or commuting expense is necessary for ensuring the safety of the employee. The transportation or commuting expense is necessary for ensuring the safety of the employee if a bona fide business-oriented security concern, as described in §1.132-5(m), exists for the employee.

Recommendation

We recommend that Treasury and the IRS define safety for purposes of section 274(l) consistent with the rules in Treas. Reg. § 1.132-6(d)(2)(iii)(C).

Analysis

Employees, including rank and file employees, often must travel between their place of employment and residence at times when travel is not safe (e.g., working outside of normal business hours when certain modes of transportation are unsafe). The safety exception to disallowed commuting expenses deductions should apply in instances related to the employee's safety, even if the bona fide business-oriented security concern rules of Treas. Reg. § 1.132-5(m) are not met.

5. Define the Term "Expense" for Section 274(l)

Overview

Section 274(l)(1) provides, "No deduction shall be allowed under this chapter for any **expense** incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer in connection with travel between the employee's residence and place of employment, except as necessary for ensuring the safety of the employee" [emphasis added]. However, no definition of the term "expense" has been provided in the proposed regulations for this purpose.

Recommendation

We recommend that Treasury and the IRS provide final regulations that define the term "expense" under section 274(l) consistent with the definition of "total parking expenses" in Prop. Reg. § 1.274-13(b)(12) (which excludes depreciation).

Analysis

It is not clear how to determine which expenses are disallowed for purposes of section 274(l) since the term "expense" is not defined. We suggest using the same definition for the term "expense" for purposes of section 274(l) as defined in Prop. Reg. § 1.274-13(b)(12). Using the definition as used in the qualified transportation proposed regulations will clarify the understanding and application of the rules.