



May 14, 2019

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

Mr. Mikhail Zhidkov
Office of Chief Counsel
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Internal Revenue Service
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Ms. La Vonne Fischer
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(EEE)
Internal Revenue Service
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Re: Notice 2018-99 – Parking Expenses for Qualified Transportation Fringes Under § 274(a)(4) and § 512(a)(7) of the Internal Revenue Code

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 under section 274(a)(4)¹ and the addition of section 512(a)(7) as enacted under Pub. L. No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA or “the Act”).

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”). This letter is in response to the request by the IRS and Treasury for comments on the rules described in the Notice.

Specifically, the AICPA provides comments and recommendations on the following issues related to the changes to section 274(a)(4) and the enactment of section 512(a)(7):

- I. Definitions
 1. Primary Use
 2. General Public

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.

- II. Parking Exclusively Reserved for Employee Use
- III. Taxpayer Pays a Third Party for Employee Parking
- IV. Other Methods to Determine the Use of Parking and Related Expenses Allocable to Employee Parking
 - 1. Parking Facilities
 - Lease Agreement when Parking Expenses Not Separately Stated
 - Lease of Part of a Multi-Tenant Building
 - Parking Provided to Resident Employees of Rental Building
 - Multi-Use Parking Facility
 - 2. Employee Payments for Parking
- V. Other
 - 1. Use of a Professional Employer Organization
 - 2. Administrative Burden

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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 Jeffrey Martin, Chair, AICPA Employee Benefits Taxation Technical Resource Panel at 202-521-1526, Jeffrey.Martin@us.gt.com; Richard Locastro, Chair, AICPA Exempt Organizations Taxation Technical Resource Panel at (301) 951-9090, rlocastro@grfcpa.com; Elizabeth Young, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9247, or elizabeth.young@aicpa-cima.com; Kristin Esposito, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9241 or me at (408) 924-3508, or annette.nellen@sjsu.edu.

Sincerely,



Annette Nellen, CPA, CGMA, Esq.
Chair, AICPA Tax Executive Committee

cc: The Honorable David J. Kautter, Assistant Secretary for Tax Policy, Department of the Treasury
Mr. Stephen LaGarde, Attorney-Advisor, Office of Benefits Tax Counsel, Department of the Treasury

The Honorable Charles P. Rettig, Commissioner, Internal Revenue Service
The Honorable Michael Desmond, Chief Counsel, Internal Revenue Service
Mr. Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation
Ms. Veena Murthy, Legislation Counsel, Joint Committee on Taxation

AMERICAN INSTITUTE OF CPAs

Notice 2018-99 – Parking Expenses for Qualified Transportation Fringes Under § 274(a)(4) and § 512(a)(7) of the Internal Revenue Code

May 14, 2019

BACKGROUND

Under section 274(a)(4) as amended by Pub. L. No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA), no deduction is allowed for the expenses of any qualified transportation fringe benefit (QTF) provided by a taxpayer to an employee. Under section 512(a)(7) as added by the TCJA, the unrelated business taxable income (UBTI) of tax-exempt organizations is increased by any amount paid or incurred by the organization for any QTF that is nondeductible under section 274(a)(4). However, the TCJA did not address how taxpayers should determine the amount of any QTF expense.

Under section 132(a)(5), the value of QTFs are excluded from the employee's gross income. Under section 132(f)(2) the excluded amount cannot exceed a maximum monthly dollar amount, adjusted for inflation, which is \$260 for 2018 (\$265 for 2019). There are two separate \$260 thresholds (one for parking and the other for transportation benefits). To the extent an employer provides reimbursement to employees or provides parking for employees with a fair market value that exceeds the limitation, the excess amount is included in the employees' income and is deductible by the employer.

In Notice 2018-99, the IRS provided guidance on how to determine the amount of the parking expenses that are nondeductible when employers provide qualified parking to their employees. However, the Notice does not specifically address how to determine the precise QTF expense that is nondeductible under section 274. The method of determining the nondeductible amount relates to the expense of providing a QTF (not its value) to an employee and depends on whether the taxpayer pays a third party to provide parking for its employees or owns or leases a parking facility where the employees park.

Taxpayer pays a third party for employee parking

If a taxpayer pays a third party an amount for employee parking at the third party's parking lot or garage, the section 274(a)(4) disallowance and the section 512(a)(7) UBTI generally is calculated as the taxpayer's total annual expense of employee parking paid to the third party. The disallowance is calculated only to the extent of the section 132(f)(2) limitation on the amount of the QTF exclusion (\$265 for 2019), as any additional amount is treated as compensation provided to the employee and not a QTF.

Taxpayer owns or leases all or a portion of a parking facility

Until regulatory guidance is issued, taxpayers and tax-exempt organizations that own or lease parking facilities where their employees park may use "any reasonable method" as provided by

the Notice to determine the amount of nondeductible expenses under section 274(a)(4) and, for tax-exempt organizations, the amount of the increase in UBTI under section 512(a)(7).

The Notice establishes the following four-step method as a safe harbor:

1. *Determine the percentage of parking spots reserved for employee use*
The percentage of parking expenses related to parking spots exclusively reserved for employee use is nondeductible under section 274(a)(4).
2. *Determine the primary use of remaining parking spots*
If the primary use of the remaining parking spots is for the general public, the remaining parking expenses are deductible.
3. *Determine the percentage of parking spots reserved for non-employee use*
If the primary use of the parking facility is not for the general public, the percentage of parking expenses attributed to spots reserved exclusively for non-employee use is deductible.
4. *Determine a reasonable allocation of remaining parking spots*
Taxpayers must reasonably determine the employee use of any remaining parking not specifically categorized as deductible or nondeductible based on a typical business day.

For tax years beginning on or after January 1, 2019, a method that fails to allocate expenses to reserved employee spots is not a reasonable method. However, the Notice provides that changes in employee reserved spot designations made by March 31, 2019 are treated as applying retroactively to January 1, 2018 for purposes of calculating nondeductible parking expenses. This special rule allows employers to retroactively reduce the amount of their nondeductible parking expenses if they change their parking arrangements to reduce or eliminate the number of parking spots exclusively reserved for employees by this date.

Also, for purposes of the Notice, 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 the employee commutes to work. The term does not include any parking on or near property used by the employee for residential purposes. If a taxpayer owns or leases more than one parking facility in a single geographic location, the taxpayer may aggregate the number of spots in those parking facilities. However, if a taxpayer owns or leases parking facilities in more than one geographic location, the taxpayer may not aggregate the spots in parking facilities that are in different geographic locations.

The changes are effective for amounts paid or incurred after December 31, 2017 to provide QTFs to employees after January 1, 2018.

SPECIFIC COMMENTS

I. Definitions

1. Primary Use

Overview

The term “primary use” for purposes of section 274(a)(4) and the Notice represents greater than 50% of actual or estimated usage of parking spots in a parking facility. Primary use (“the primary use test”) of the parking spots is tested during normal business hours on a typical business day or, in the case of an exempt organization, during the normal hours of the exempt organization’s activities on a typical day. There is an exception to section 274(a)(4) if the primary use of the remaining parking spots (other than reserved employee spots) in a parking facility is to provide parking to the general public.

Recommendation/Observation

The AICPA supports the definition of the term “primary use” to determine the extent to which parking is made available to the general public under section 274(e)(7) as set forth in the Notice.

Analysis

The metric of greater than 50% of actual or estimated usage of parking spots in a parking facility is fair and reasonable in order to determine if the primary usage of a parking facility is for the general public.

2. General Public

Overview

For purposes of section 274(a)(4) and the Notice, the term “general public” includes, but is not limited to, customers, clients, visitors, individuals delivering goods or services to the taxpayer, patients of a health care facility, students of an educational institution, and congregants of a religious organization. The term “general public” does not include employees, partners or independent contractors of the taxpayer.

Recommendation/Observation

The AICPA supports the definition of the term “general public” and its usage to determine the extent to which parking is made available to the general public under section 274(e)(7) as set forth in the Notice. However, when employers lease space in a multi-tenant building, we recommend clarifying the definition of “general public” to specifically include employees, partners and independent contractors of unrelated tenants with which the taxpayer shares the parking lot.

Analysis

There is an exception to section 274(a)(4) if the primary use of the remaining spots (other than reserved employee spots) in a parking facility is to provide parking to the general public. The proposed regulations should clarify that in testing the taxpayer's use of parking spots in a multi-tenant building, the spots available on an unreserved basis to employees, partners and independent contractors of the taxpayer and unrelated employers, and the customers and guests of the taxpayer and unrelated employers, are all counted as spots available for use by the "general public."

We further explore this treatment in our discussion related to parking facilities in Section IV. 1., Lease of Part of a Multi-Tenant Building. Example 5 of that section discusses the specific treatment.

II. Parking Exclusively Reserved for Employee Use

Overview

The Notice states that for taxable years beginning on or after January 1, 2019, a method to calculate the disallowed deduction under section 274(a)(4) and the UBTI under section 512(a)(7) that fails to allocate expenses to reserved employee spots (within the meaning of Step 1 in section B of the Notice) is not a reasonable method. Step 1 in section B of the Notice requires a taxpayer who owns or leases all or a portion of a parking facility to identify parking spots exclusively reserved for the taxpayer's employees and determine the percentage of reserved employee spots in relation to the total parking spots. The percentage is multiplied by the taxpayer's total parking expenses to determine the amount of the taxpayer's total parking expense that is not deductible or that increases UBTI. Pursuant to this rule, if an employer owns or leases a lot that is entirely reserved for employee use, the total expense for the lot is not deductible. This approach does not consider that a QTF is provided separately to each employee and each QTF has a separate expense associated with it. This approach overstates the QTF when employees do not use the entire reserved parking area on a typical business day.

Recommendation

The AICPA recommends that for purposes of Step 1 of the four-step safe harbor calculation provided for in the Notice, and determining whether any method is reasonable, the expense treated as nondeductible under section 274(a)(4) or UBTI under section 512(a)(7) is limited to the amount of the expense associated with employee reserved spots that are used by employees on a typical business day.

Analysis

Section 274(a)(4) disallows the deduction for the expense of any QTF (as defined under section 132(f)) provided to an employee of the taxpayer. Pursuant to section 132(f)(1), a QTF includes qualified parking provided to an employee. Sections 132(a)(5) and 132(f) exclude the value of qualified parking from the income of each individual employee, not a group of employees as a whole. Because section 274(a)(4) disallows the deduction for the expense of providing a QTF to

an individual employee, the taxpayer should identify the expense for each QTF provided to each individual employee when determining the amount that is nondeductible (or that increases UBTI).

The section 274(a)(4) disallowance should not apply to the extent the taxpayer incurs a parking facility expense that is not used to provide a QTF to an employee. The expense associated with employee reserved spots that are not used by employees on a typical business day should remain deductible and not increase UBTI. In some cases, an employer is required to lease (or owns) more parking spots than needed on a typical business day and must reserve the entire space for employees for use in the future. Depending upon the location of the facility, it may be impractical to provide reserved employee parking for less than the cost of the entire parcel owned or leased. A taxpayer's expense related to the number of spots in a parking facility not used by an employee should not be included in the number of employee reserved spots in Step 1 of the safe harbor calculation when determining the amount of the taxpayer's total parking expense that is disallowed under section 274(a)(4) or that increases UBTI under section 512(a)(17). The calculation should focus on employee use regardless of whether the spots not used by employees are exclusively reserved for employee use because the expense associated with those spots is not incurred to provide a QTF for an employee.

Example 1

Organization AA owns a parking lot that includes 500 spots. Organization AA exclusively reserves all 500 parking spots for employees through the use of signage and a gate. Visitors and contractors are permitted to park in a different lot. During normal business hours on a typical business day, 300 of the parking spots are used by employees, while the remaining 200 spots are unused. Only 300 spots (3/5 of the lot) are used to provide a QTF to employees. The nondeductible portion of the expense under section 274(a)(4) (or increase to UBTI under section 512(a)(7)) related to the parking facility should correlate to 3/5 of the total parking expense for the lot and not 100% of the parking lot. The remaining 2/5 of the parking lot and associated expense is not used to provide a QTF to employees, therefore, the related expense should remain deductible.

III. Taxpayer Pays a Third Party for Employee Parking

Overview

According to the Notice, if a taxpayer pays a third party an amount to provide parking to its employees at the third party's parking lot or garage, the section 274(a)(4) disallowance (or increase to UBTI under section 517(a)(7)) generally is calculated as the taxpayer's total annual expense of employee parking paid to the third party. This approach is reasonable for situations where a taxpayer pays a third party for a parking spot for separately identified employees or a group of spots separately assigned to individual employees. However, one could interpret this rule to include a situation where the employer pays a third party for a group of spots not assigned to specific employees, which is similar to a lease addressed in section B of the Notice.

Recommendation

The AICPA recommends that future guidance clarify that there is a distinction between an employer paying a third party for individual parking spots assigned to specified employees and an employer paying a third party for a group of spots (including a portion of a lot or garage), that are not assigned to specific employees.

Analysis

Future guidance should specifically distinguish between the following two fact patterns: (1) a taxpayer pays a third party for specific parking spots each specifically assigned to an individual employee; and (2) a taxpayer pays a third party for a group of spots available to employees but not assigned to individual employees.

When a taxpayer pays a third party for individual parking spots for certain employees, a QTF is provided to that individual employee, and the cost associated with that spot is nondeductible under section 274(a)(4) (or increases UBTI under section 512(a)(7)). In this situation, the cost for that specific parking spot is easily identifiable. Alternately, when an employer pays a third party for a group of parking spots, with no parking spots assigned to individual employees, the facts are similar to a lease addressed in section B of the Notice. In that case, taxpayers should use a reasonable method to determine the expense associated with providing each employee who uses the parking with a QTF.

Example 2

Organization BB pays a third party an amount for three parking spots assigned individually to employees A, B and C. The amount paid for each parking spot is not in excess of the monthly dollar limit in section 132(f)(2). Organization BB provides a QTF to employees A, B and C, therefore, the amount paid for the parking spots is nondeductible under section 274(a)(4) or the amount increases UBTI pursuant to section 512(a)(7).

Example 3

Organization CC pays a third party a single amount for the use of 25 parking spots (out of a total of 225 spots in a parking facility) which are not assigned to specified employees. During normal business hours on a typical business day, 20 of the parking spots are used by employees. No spots are designated for use only by non-employees. Since Organization CC provides a QTF to the 20 employees who use the parking, 20/25 of the total amount paid to the third party for the parking spots up to the section 132(f) limitation is nondeductible under section 274(a)(4) or increases UBTI pursuant to section 512(a)(7).

IV. Other Methods to Determine the Use of Parking and Related Expenses Allocable to Employee Parking

Overview

Until regulatory guidance is issued, taxpayers and tax-exempt organizations that own or lease parking facilities where their employees park may use any reasonable method as provided by the Notice to determine the amount of nondeductible expenses under section 274(a)(4) or the amount of the increase in UBTI under section 512(a)(7). The Notice requests comments on other methods for determining the use of the parking spots and the related expenses allocable to employee parking.

Recommendations and Analysis

The AICPA recommends that the IRS and Treasury include the following methods or examples in the proposed regulations for organizations to use in determining their parking expense related to lease agreement arrangements.

1. Parking Facilities

Lease Agreement when Parking Expenses are Not Separately Stated

Recommendations

We recommend that under a lease agreement where no parking expense allocation is specifically provided, future guidance permits organizations to use one of the following reasonable methods to determine their parking expense:

- Compare lease payments to comparable leases without parking;
- Allocate the lease payment based on the value of the leased building (including amenities) in the same location without parking and the value of a leased building with a parking facility or parking spots; or
- Use the market rate for parking (e.g., the rate charged by the landlord for non-tenant parking) when fees are charged for parking in the facility (i.e. parking is not free). This method is consistent with Examples 1 and 2 of the Notice where an entity pays a third-party for employee parking spots.

Analysis

The following example and related scenarios illustrate the reasonable methods stated in our recommendations, to determine the use of parking and related expenses allocable to employee parking in cases where a lessee enters into a lease agreement with a lessor and the lease does not specifically identify expenses related to parking. In addition, the lessee is unable to obtain information regarding the parking expense from the lessor.

Example 4

Organization DD enters into a lease agreement in a multi-tenant building to house its operations. Parking for the employees of Organization DD is provided for in the lease arrangement; however, the parking expenses are not separately stated in the lease.

Scenario 1 – Allocation of Lease Payment Based on Value of Leased Building

While Organization DD requested specific parking expense information from the lessor, this information has not been provided.

The building leased by Organization DD has valuable amenities (e.g., inside security desk, cleaning crews, etc.). In addition, it has other favorable qualities (e.g., distance from transit stations, safety in the region, and the abundance of other parking in the area for a low rate). Based on these amenities and the building location, it is reasonable to conclude that the majority of the lease cost is allocated to the value of the building space rather than the parking facility. Therefore, it is reasonable for Organization DD to allocate a small percentage of total rent to parking expenses.

Scenario 2 – Comparison of Lease Payments

Organization DD is able to determine parking expenses for a facility comparable to the one that it leases from a commercial real estate developer in the same geographic region. It is reasonable for Organization DD to use the amount of parking expenses at the comparable facility to determine the expense per space for the parking spots included, but not separately stated, in its lease.

Scenario 3 – Market Rate

Organization DD is unable to obtain to reasonably obtain comparable parking expense information. In this situation, it is reasonable for Organization DD to use the market rate for parking. The market rate for non-tenant parking in the facility used by Organization DD is \$150 per month. Organization DD would use this information ($\$150 \times 12 \text{ months} \times \# \text{ of parking spots provided to Organization DD's employees on a typical business day}$) to calculate the QTF expense.

Lease of Part of a Multi-Tenant Building

Recommendations

We recommend that the proposed regulations provide that parking meets the general public criteria of section 274(e)(7) in the following situations: (1) the taxpayer leases space in a multi-tenant building that includes access to a parking facility for all tenants; (2) the number of parking spots

available to the taxpayer is not specifically identified in the lease; and (3) the taxpayer's employees use less than 50% of the parking spots available to all tenants in the facility.

We also recommend that with a multi-tenant scenario, the term "general public" specifically includes anyone who is not the taxpayer's employee, partner or independent contractor, such as the employee, partner or independent contractor of other unrelated tenants in the building.

Additionally, when a taxpayer has access to the entire parking facility and shares it with other unrelated tenants with no assigned spots, we recommend determining whether the 50% general public threshold is met for each tenant-taxpayer as follows: the numerator should include only the spots used by the taxpayer's employees on a typical business day and the denominator should include the parking spots available to all tenants.

Analysis

To determine whether more than 50% of a parking facility is used by the general public, a taxpayer must determine a numerator and denominator. Because section 274(a)(4) applies separately to each taxpayer, the numerator should include all spots in the facility other than spots specifically reserved for the taxpayer's employees or used by the taxpayer's employees on a typical business day. The denominator should include all spots that are available for the taxpayer's use, which includes all common area parking spots. It is appropriate to include all common area parking spots in the denominator because the taxpayer has no control over how the common parking area is used by other unrelated tenants of the lessor.

The following example provides an illustration of our recommendation of the determination of parking expenses when an organization leases space in a multi-tenant building and the lease does not specifically identify expenses related to parking.

Example 5

Organization EE enters into a lease agreement to occupy several offices in a multi-tenant building for its operations, and the lease includes parking in a connected facility. Many other unrelated companies also rent space within the building complex and have access to the parking facility. There are no marked parking spots or other access controls for any user (employees, visitors, customers, etc.) and no practical way to differentiate users. Organization EE has 40 employees and the parking facility includes 300 parking spots. The parking facility is generally more than half-full. However, Organization EE only uses 40 of the 300 spots for its employees on a typical business day.

As noted above in Section I. 2. related to the definition of general public, we suggest issuing guidance to indicate that if Organization EE utilizes only 40 of the 300 parking spots, the use of the space by the unrelated tenant employees, customers and visitors is treated by Organization EE as used by the general public. Since Organization EE's employees use less than 50% of the total spots in the parking lot, the primary use of the facility is to provide parking to the general public

resulting in no nondeductible expenses under section 274(a)(4) (or increase to UBTI under section 512(a)(7)).

The general public should include anyone that is not the taxpayer or the taxpayer's employees, such as other tenants in the building in a multi-tenant scenario. When a taxpayer's employees have access to the entire parking lot and share it with other tenants with no assigned spots, the denominator should encompass the common area parking available.

Parking Provided to Resident Employees of a Rental Building

Overview

The Notice provides that the term "parking facility" does not include parking on or near property used by an employee for residential purposes. Therefore, parking spots provided to resident employees of residential rental buildings are considered residential parking even if the parking is provided by the employer.

Under the Notice and Treas. Reg. § 1.132-9(b), Q&A 4(c), property used by the employee for residential purposes is excepted from the definition of qualified parking. Therefore, the amount of the expense associated with providing this parking is not subject to section 274(a)(4). The parking spots provided to resident employees of residential rental buildings are considered residential parking even if the parking is provided by the employer.

Recommendations

The AICPA recommends that the proposed regulations clarify that expenses associated with parking used by an employee for residential purposes is not subject to sections 274(a)(4) and 512(a)(7). In addition, we recommend that the parking spots used by resident employees should not be taken into account when determining whether, and to what extent, the remaining parking expense is subject to section 274(a)(4) or taxed under section 512(a)(7).

Analysis

The term "parking facility" within the Notice does not include any parking on or near property used by an employee for residential purposes; therefore, in the case of an employee who resides at a facility and does not commute to work, the provided parking is considered parking related to the residence. Examples include resident maintenance employees or security guards who live and work at the same facility, and campus housing and parking provided to resident medical professionals.

The following examples illustrate our recommendations.

Example 6

Organization FF owns an office building, which includes one residential unit used as a residence by the building property manager. This living arrangement allows

ease of access to the facility. The building property manager is considered a resident employee under the Notice. The unit is provided onsite so that the manager is available to tenants for emergencies, when inclement weather prevents travel, to address general building needs, and to provide living space for the property manager. The total expense related to this parking spot for the general manager is not part of the parking facility and should not be an expense subject to section 274(a)(4) or included as UBIT under section 512(a)(7). In addition, this parking spot is not taken into account when determining whether the remaining parking is for the use of the general public.

Example 7

A university provides a medical facility on campus for the benefit of students. A nurse lives on-site in a campus apartment building attached to the medical facility in order to assist students with medical issues that arise during different times of the day and night. The nurse is also assigned a parking spot. The total expense related to this parking spot for the nurse should not be an expense subject to section 274(a)(4) or included in income under section 512(a)(7). In addition, this parking spot is not taken into account when determining whether the remaining parking is for the use of the general public.

Multi-Use Parking Facility

Overview

Certain buildings and their related parking facilities are used for multiple purposes causing the actual or estimate usage of the parking spots to vary significantly between days of the weeks. Until further guidance is issued, the Notice states that taxpayers may use any reasonable method to determine the average actual or estimated usage of the parking spots.

Recommendations

We recommend that the proposed regulations allow organizations to use a “snapshot” method to determine average actual or estimated usage of their parking spots based on a specified typical timeframe. Once the snapshot timeframe is determined, the organization would use a weighted average of the snapshot days to determine the percentage of spots available to the general public for the disallowance calculation.

We also recommend allowing organizations to determine the date of the heaviest and most significant use of the parking lot that supports the main purpose of the organization and use that day as the only day for determining employee parking. The most significant use test could use a “snapshot” taken on that particular day, even though the parking spots are used for other purposes on different days of the week.

Analysis

The snapshot of a typical timeframe approach as well as the most significant use approach are both reasonable methods to determine the organization's overall parking available to employees. Each method under a multi-use parking scenario is demonstrated as part of Example 8.

Example 8

An urban church has 30 parking spots. Total parking expense for the facility is \$10,000. In addition to hosting several Sunday church services, the church operates a church affiliated day care facility during the week (Monday through Friday). The church also rents the building and parking lot to a company that provides high school tutoring on Saturdays, the income of which does not result in UBTI. There are no reserved employee spots. Employees of the daycare use up to 17 of the spots during a typical business day. The employees and customers of the tutoring company use most of the spots during the Saturday sessions. On Sundays, 28 of the 30 spots are used by congregants.

Scenario 1 - Snapshot of a Specified Typical Timeframe Method

Using a snapshot of a typical weekday and a typical Sunday and averaging the percentage of spots available to the general public for the six snapshot days (described below) is one reasonable approach to calculate the nondeductible expenses.

The tutoring company is not affiliated with the church and merely leases the space on a non-business day; it is reasonable that the use of the parking spots by the employees of the tutoring company are not treated as used by the church and do not factor into the church's analysis of taxable fringe benefits. For 5 days during the week, 43% (13/30) of spots are used by the general public. On Sunday, 93% (28/30) of spots are used by the general public, mostly non-employee congregants. Using the snapshot approach and a weighted average, the percentage of the six snapshot days provides for an overall percentage use by the general public of 51% (43% * 5 days + 93% * 1 day / 6 days). Overall, as none of the church's parking spots are exclusively reserved for employees, there is no amount specifically allocated to reserved employee spots. In addition, because the primary use of the church's parking lot is to provide parking to the general public based upon the 51% total average percentage as calculated above, none of the \$10,000 is included in UBTI under section 512(a)(7).

Scenario 2 - Heaviest and Most Significant Use Method

Another reasonable approach is to determine the heaviest and most significant use of the parking facility related to the main purpose of the tax-exempt organization. In this circumstance, the heaviest and most significant use of the church is on Sundays. This most significant use test reasonably supports a "snapshot" taken on Sunday, even though paid teachers may use parking spots during the workweek. In

this circumstance, there are no reserved employee spots and 93% (28/30) of the parking spots are available to the general public (congregants who are not employees). Therefore, all of the associated costs of those spots would be excluded from taxable transportation fringe benefits as more than half of the actual use of the remaining spots is to provide parking to the non-employee general public. In this situation all \$10,000 of parking expenses are excluded from UBIT under section 512(a)(7).

2. Employee Payments for Parking

Recommendation

We recommend that the proposed regulations provide examples which take into account employee payment for parking on a pre-tax and after-tax basis.

Analysis

Employees often reduce salary to pay for employer-provided parking. If this amount is a pre-tax salary reduction amount, the salary becomes a QTF up to the section 132(f)(2) limitation and is not taxable compensation. The reduced salary amounts are subject to the section 274(a)(4) disallowance or the section 512(a)(7) income inclusion. If this amount is an after-tax salary reduction, the payment remains compensation and the purchase is not a QTF.

Example 9

Organization GG purchases transit passes with employees' pre-tax dollars. The purchase of the transit passes by the employees from Organization GG results in a disallowed deduction or generates UBTI.

Example 10

In 2019, Organization HH provides employer parking at a cost of \$300 per month per space. The employees utilizing this parking are required to pay \$100 per month, on either a pre-tax or after-tax basis. If the employee pays \$100 per month on a pre-tax basis, the entire \$300 is employer provided parking, of which \$265² is disallowed or generates UBTI. If the employee pays \$100 per month on an after-tax basis, the employer provided parking is \$200, all of which would be disallowed.

² Under section 132(f)(2) the excluded amount cannot exceed a maximum monthly dollar amount, adjusted for inflation, which is \$265 for 2019.

V. Other

1. Use of a Professional Employer Organization

Overview

Many exempt organizations use professional employer organization (PEO) arrangements for human resource services, including the provision of employee benefits. Some PEOs are certified under section 3511, providing that for employment tax purposes, the PEO is the employer. This employer status does not apply for benefit plans.

Recommendation

We recommend that future guidance clarify that the QTF disallowance or UBTI should apply at the customer level rather than the PEO level when the QTF is provided to the customer's common law employees. The future guidance should apply equally to arrangements between customers and PEOs and certified PEOs.

Example 11

Organization II, a section 501(c)(3) organization, uses a certified PEO to provide human resource services to its employees. The certified PEO pays wages to its worksite employees, Organization II's common law employees, and provides them with benefits including QTFs on a pre-tax basis. Organization II pays the certified PEO the cost of all salary and benefits and an administrative charge. The amount paid by Organization II for salary that is reduced on a pre-tax basis by employees for a QTF is subject to section 512(a)(7) for Organization II.

Example 12

The same facts as Example 11 apply, except that the PEO is not a certified PEO. The same result occurs.

2. Administrative Burden

Overview

Pursuant to section 512(a)(7), tax exempt organizations are required to increase their UBTI by amounts disallowed as deductions under section 274(a)(4) which are paid or incurred for any QTF including parking facilities in connection with qualified parking. The increase in UBTI results in many tax-exempt organizations owing UBIT for the first time, creating a need for estimated tax payments for the first time.

Notice 2018-100, Relief from Additions to Tax for Underpayments of Estimated Tax for Tax-Exempt Organizations That Provide Certain Qualified Transportation Fringes, waives the addition to tax for certain tax-exempt organizations that provide QTFs or any parking facility used in

connection with qualified parking. The relief is available for tax-exempt organizations not required to file Form 990-T for any taxable year preceding the first year ending after December 31, 2017. Certain exempt organization taxpayers with tax years ending January 31, 2018 through December 31, 2018 are not subject to penalties for underpayment of estimated taxes.

Recommendation

We recommend extending the Notice 2018-100 relief to any tax year ending before December 31, 2019, allowing for relief for a year from the month that the guidance was issued in the Notice.

Analysis

The time, effort, and information required to properly meet the additional tax compliance burden imposed by section 512(a)(7) presents a significant burden on tax-exempt entities. Specifically, the burden is caused by the new filing requirements imposed as well as additional associated costs.

For example, many organizations will need to file Form 990-T for the first time. Form 990-T is complex and places a significant burden on smaller tax-exempt organizations (supported by the estimate that the average time needed to complete and file the entire form is 138 hours).³ For a large segment of the tax-exempt community, the issuance of the detailed guidance in the Notice was critical to understanding the impact of new section 512(a)(7) on their organization. Prior to the passage of the TCJA these tax-exempt organizations did not have a reason to focus on the complexities of QTFs.

In addition, a significant portion of the tax-exempt community has a fiscal year end of June 30th. These organizations were half-way through their second tax year after the imposition of the related UBTI arising from new section 512(a)(7) before substantive guidance was issued. Therefore, extending the penalty relief would provide fair and reasonable tax administration.

Many organizations will incur administrative time and effort to gather information on parking expenses, especially in cases of leased parking facilities. Gathering annual data on parking lot usage to support the tax reported is required. This administrative burden is further compounded by the first-ever imposition of a tax on cost as well as additional taxpayer preparation fees incurred as organizations seek professional tax assistance.

The following example identifies the administrative burden associated with an organization that has identified more than 160 separate parking lots and the substantial amount of due diligence required to support a public use percentage of more than 50%.

Example 13

Organization JJ has identified over 160 separate parking lots, the vast majority of which belong to small clinics scattered across multiple states. None of the lots have separate or segregated parking for employees and all are open to the general public. Even if accurately measuring the public use percentage is obtainable, it is unlikely that any of the clinics would have a public use percentage

³ See 2017 Instructions for Form 990-T (March 27, 2018).

of less than 50%. The level of due diligence required to document this position, however, is substantial. Testing 160+ parking lots across multiple states one or more times each year to calculate public use will require an excessive amount of time as well as expertise that the clinic employees lack. The Organization does not have a human resource department or accounting department in each clinic to assist with these determinations.