

Employee Benefits and Compensation

December 2018

IRS Issues Interim Guidance on Qualified Transportation Fringe Benefits

The IRS issued two pieces of interim guidance with respect to the new treatment of qualified transportation fringe benefits following the changes made by the Tax Cuts and Jobs Act (Tax Act). The Tax Act required parking provided by an employer to be treated either as a non-deductible expense by the employer (or as unrelated business taxable income (UBTI) in the case of a tax-exempt employer) or as taxable income by the employee. The interim guidance is intended to address certain concerns expressed by tax-exempt organizations regarding the penalties associated with failure to pay quarterly estimated taxes in 2018 in connection with the new tax treatment of qualified transportation fringe benefits.

The IRS issued (1) [Notice 2018-99](#), which provides interim guidance with respect to the calculation of parking expenses for qualified transportation fringes that are now nondeductible under Internal Revenue Code Section 274(a)(4) (the "disallowance"); and (2) [Notice 2018-100](#), which provides a waiver for certain tax-exempt organizations for the underpayment of estimated income tax payments resulting from the changes to the tax treatment of qualified transportation fringes.

NOTICE 2018-99

Notice 2018-99 states that until final regulations are issued, taxpayers and tax-exempt organizations that own or lease parking facilities where their employees park may use any reasonable method set forth in the Notice to determine the amount of nondeductible expenses, or the amount of the increase in UBTI in the case of tax-exempt organizations. The method of determining the nondeductible amount depends on whether the taxpayer pays a third party to provide parking for its employees, or the taxpayer owns or leases the property where its employees park.

In cases in which a taxpayer pays a third party for parking for its employees, the disallowance is generally calculated as the taxpayer's total annual cost of employee parking paid to the third party. However, to the extent the amount exceeds the monthly limitation on exclusion (for 2018, \$260), the IRS states the excess amount must be treated by the taxpayer as compensation and wages to the employee.

Where the taxpayer owns or leases all or a portion of the property where its employees park, the IRS guidance provides certain steps for the taxpayer to follow: (1) calculate the disallowance for reserved employee spots; (2) determine the primary use of remaining spots (e.g., general public parking); (3) calculate the allowance for reserved nonemployee spots; and (4) determine remaining use and allocable expenses. Whether a spot is a "reserved employee spot" is determined by conditions such as specific signage or a barrier or blockade providing limited access. Taxpayers have until March 31, 2019, to make changes concerning which spots are reserved employee spots, as defined in the

guidance.

Under the "primary use test" to determine the primary use of remaining spots, (e.g., whether spots are used for general public parking), "primary use" means greater than 50 percent of actual or estimated usage during normal business hours on a typical business day, or in the case of a tax-exempt organization, during the normal hours of the tax-exempt organization's activities on a typical day.

Notice 2018-99 also states that tax-exempt organizations may follow a "reasonable method" to calculate, and treat as UBTI, those expenses related to employee parking. If a tax-exempt organization meets the primary use test, the expenses associated with those parking spots are not to be included as UBTI. Although UBTI may be created due to a tax-exempt organization providing employee parking, the provision of parking does not create a new separate unrelated trade or business. In addition, tax-exempt organizations are permitted a specific deduction of \$1,000 for UBTI related to employee parking. Lastly, only those tax-exempt organizations with UBTI greater than \$1,000 must file a Form 990-T to report the UBTI related to parking.

NOTICE 2018-100

Notice 2018-100, which accompanied Notice 2018-99, provides relief for tax-exempt organizations that did not pay estimated income tax due to UBTI implicated by qualified transportation fringes (e.g., employee parking). Only those tax-exempt organizations that are not required to file a Form 990-T for the previous tax year, and that comply in a timely manner with the payment of tax due for the current year, may take advantage of this relief.

REGULATIONS FORTHCOMING

The IRS interim guidance states that the Department of Treasury and the IRS intend to publish proposed regulations, including guidance on the determination of nondeductible parking expenses and other expenses for qualified transportation fringes, and the calculation of UBTI attributable to such. However, taxpayers and tax-exempt organizations may rely on the guidance provided in the Notices until such proposed regulations are issued.

If you would like to discuss the impact of these new laws, please contact any member of the firm's [Employee Benefits and Compensation Group](#) listed below:

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