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CHURCH ALLIANCE

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February 22, 2019

By electronic submission (http://www.regulations.gov)

Internal Revenue Service
Attention: CC:PA:LPD:PR (Notice 2018-99)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Comments in Response to Notice 2018-99; Parking Expenses for Qualified Transportation Fringes Under Sections 274(a)(4) and 512(a)(7) of the Internal Revenue Code ("Code")

To Whom It May Concern:

I. Introduction

The Church Alliance is a coalition of the chief executive officers of 37 church benefits organizations, which are affiliated with mainline and evangelical Protestant denominations, three Jewish entities, and Catholic schools and institutions. These church benefits organizations provide employee benefits to approximately one million participants (ministers and lay workers, hereinafter "church workers") serving over 155,000 churches and synagogues (hereinafter "churches") and church-affiliated organizations such as schools, universities, nursing homes, children's homes, homeless shelters, food banks and other ministries (hereinafter "ministries"). The church benefits organizations, churches and ministries are tax-exempt organizations.

The Church Alliance ("we") commented previously on Code Section 512(a)(7). In our letter of June 26, 2018, we requested a delay in implementation of changes related to Code Sections 512(a)(6) and (7). We also wrote on August 7, 2018, reinforcing our request for a delay and also asking for other relief specifically related to Code Section 512(a)(7). In that letter, we noted that parking at most churches and ministries primarily is available to visitors and other "customers".

We are grateful for the relief provided in Notice 2018-100 and appreciate the interim guidance provided in Notice 2018-99 ("Notice"), which will provide relief for some churches and ministries.

We are writing to request clarification and additional relief, including reinforcing the need for a delay in implementation until further guidance is released on parking and other qualified transportation fringe benefits. It is important to note, however, that we are fundamentally and strongly opposed to the taxation of churches and church-related ministries, which is being imposed despite the absence of unrelated business activity. We urge that enforcement relief or a delay in enforcement be granted at least to churches and integrated auxiliaries of churches. Due to First Amendment concerns, Forms 990 have never before been forced upon churches. In the event such relief cannot be granted, we request certain clarifications and other relief as detailed in the remainder of this letter.

II. Total Parking Expenses

The section of the Notice on "Interim Guidance on QTF Parking Issues" lists the types of expenses to be included in total parking expenses, such as repairs, utility costs, insurance, property taxes and interest. However, the Notice did not explain how an organization should determine the share of those costs that apply to parking versus the share that should apply to the building(s) and land. We request that future guidance specify that any reasonable method may be utilized for these expense allocations.

III. Self-Employed Ministers

Per the Notice, the term "employee" for purposes of a qualified transportation fringe ("QTF") is defined in Treas. Reg. sections 1.132-1(b)(2)(i) and 1.132-9(b). The Notice explains that, while "employee" includes common law employees and other statutory employees, other individuals such as partners, sole proprietors and independent contractors are not employees for purposes of Code Section 132(f).

Certain ministers, members of religious orders and Christian Science practitioners and readers are, at least with respect to a portion of their services, self-employed individuals who are considered employees within the meaning of Code Section 401(c)(1). These individuals may be performing services as a common law employee (for example, as an employee of a church) and may perform other services (funerals, weddings) for which they are compensated as an independent contractor. Parking for such individuals should be considered "employee parking" only with respect to the services performed as a common law employee and not for services performed as a self-employed individual.

For example, if Minister X, an employee of Y Church, arrives at Y Church to minister to a grieving family and parks in the church's lot, that clearly is employee parking. However, if Minister X then remains parked in that spot to officiate a wedding for which he receives self-employment earnings from the couple to be married, we believe such parking no longer should be employee parking.

We request that in such situations, churches and ministries be allowed to apply any reasonable method of allocation between employee parking and "non-employee" parking. We suggest that a

similar reasonable allocation method also be allowed with respect to other types of QTFs, when guidance is issued on such other benefits, since the Notice describes the definition of "employee" for purposes of QTFs, not just for parking.

IV. Owned or Leased Parking Facility

A. Who is the General Public?

The Notice includes a 4-step methodology that is to be applied to an owned or leased parking facility. Step 1 is to calculate the disallowance for reserved employee spots. Step 2 is to determine whether the primary use of the remaining spots in a parking facility is to provide parking to the general public. The Notice states that 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 concept of "general public" appears to be very broad. However, the Notice states that facilities are not made available to the general public if they are made available only to an exclusive list of guests. We request that future guidance clarify that the term "general public" includes any person who is not an employee, as long as parking is not made available only to an exclusive list of guests.

B. Primary Use – Use Should Encompass All Hours of Use

Step 2 of the 4 steps provides that primary use is to be tested during normal hours of the exempt organization's activities on a typical day. Use may be tested outside those hours if the usage varies significantly between days of the week or times of the year. However, with some churches and ministries, usage may not vary significantly, but may include substantial use by non-employees outside of the organization's normal hours. A parking facility, by its nature, can be a 24-hour, seven day-a-week facility and subject to use by unrelated parties. Thus, we recommend that future guidance allow, as an alternative, primary use to be tested based on all hours of use, not just during the normal hours of the exempt organization's activities.

C. Primary Use – Methodology

The Notice states that "until further guidance is issued", the Code Section "274(a)(4) disallowance may be calculated using any reasonable method". The previously described 4-step methodology is deemed in the Notice to be a reasonable method. In Step 2 of that methodology, primary use is defined as "greater than 50 percent of actual or estimated usage of the parking spots in the parking facility".

The Notice cites to Treasury regulations interpreting Code Section 274 in describing the exception for facilities made available to the general public. A fifty percent test is described in Treas. Reg. section 1.274-2(e)(4)(iii) in determining the primary use of a facility (for the

furtherance of trade or business). Perhaps these regulations were used as a model for testing primary use in Step 2.

However, such regulations also provide: "No single standard of comparison, or quantitative measurement, as to the significance of any such factor, however, is necessarily appropriate for all classes or types of facilities. For example, an appropriate standard for determining the primary use of a country club during a taxable year will not necessarily be appropriate for determining the primary use of an airplane". Treas. Reg. section 1.274-(e)(4)(i).

We hope that, similarly, "any reasonable method" may continue to be applied to determine primary use, even after further guidance is issued. Otherwise, certain types of ministries and churches would be disadvantaged by the 50 percent test in Step 2. An example of such churches and ministries are those that serve individuals who may not drive or have automobiles (e.g. those serving the homeless, children or individuals with certain disabilities (e.g. blindness)). Such ministries and churches may not be able to meet the 50 percent test in Step 2 because most of their parking may be for employees, simply because the entities' clients do not need or utilize parking (and it could be unwise and costly to have a larger lot for parking spots that remain vacant).

We note that in IRS Notice 94-3, a percentage test was not applied to determine whether parking was available primarily to customers. We realize this is not determinative, but it at least is illustrative of another method of determining primary use. Factors considered in Notice 94-3 were whether parking was reserved for employees and the availability and sufficiency of customer parking. We suggest that a facts and circumstances test is a reasonable method of determining primary use.

Moreover, we note that Code Section 274(e)(7) itself does not require "primary use". It only requires availability to the general public. We suggest that future guidance allow any availability to (or at least any use by) the general public to be sufficient to qualify parking for the Code Section 274(e)(7) exception.

V. $1,000 Deduction

The "Interim Guidance on Section 512(a)(7) Issues" in the Notice provides that tax-exempt organizations are required to file a return on Form 990-T if they have gross income, included in computing unrelated business taxable income ("UBTI"), of $1,000 or more. The Notice also specifies that UBTI for this purpose includes the increase in UBTI under Code Section 512(a)(7).

However, in addition to this $1,000 threshold, Code Section 512(b)(12) provides that "in the case of a diocese, province of a religious order, or a convention or association of churches, there shall also be allowed, with respect to each parish, individual church, district, or other local unit, a specific deduction equal to the lower of $1,000 or the gross income derived from any unrelated trade or business regularly carried on by such local unit". For purposes of this modification, UBTI under Section 512(a)(7) should be included in "gross income derived from any unrelated

trade or business regularly carried on by such local unit" (as described in Section 512(b)(12)(B)). In other words, if Treasury and the Internal Revenue Service believe that costs incurred by a church should be considered income for purposes of UBTI as defined in Section 512, then it should also be clear that the deduction for the church in Section 512(b)(12) is also fully applicable to such costs (as income).

VI. Conclusion

In conclusion, the Church Alliance respectfully requests that the suggestions in this letter be considered in drafting future guidance, to provide compliance certainty to our churches and ministries, thus helping to ensure that the resources of America's religious communities are properly directed and focused on their mission work. Thank you.

Sincerely,

Karishma Shah Page
Partner, K&L Gates LLP
On Behalf of the Church Alliance