

New Guidance Issued by IRS on the Parking Tax

As a result of a provision in the Tax Cuts and Jobs Act, for 2018 and beyond, tax-exempt entities (including churches) are required to report and pay taxes on amounts spent to provide parking and other qualified transportation fringe benefits (“QTFs”) to employees, under new section 512(a)(7) of the tax code (“Parking Tax”). Bills to repeal the Parking Tax have been introduced in Congress, and it is possible that one of these bills may pass this year. The Church Alliance has been urging lawmakers to repeal the Parking Tax.

On December 10, 2018, the IRS issued two Notices that provide interim guidance on the Parking Tax and provide some relief from one of the penalties that otherwise could have been imposed. The guidance is complex, is only temporary and provides limited relief. **Therefore, the Church Alliance continues to support full repeal of the Parking Tax.**

The Church Alliance would, however, like to receive any comments you may have on the interim guidance provided by the Notices, so that feedback can be shared with the IRS. A summary of the two Notices follows.

IRS Notice 2018-99

This Notice provides limited guidance on QTFs in general and specific guidance on employee parking. It describes the maximum monthly amount of QTFs that can be excluded from employee compensation (for 2018 \$260). Moreover, it states that employer expenses for QTFs that are included as compensation and wages (e.g., the excess over \$260 per employee reported on Forms W-2) do not increase unrelated business taxable income (UBTI).

The Notice provides specific guidance to assist tax-exempt entities in determining the amount of parking expenses that, starting after December 31, 2017, may create or increase UBTI. The method for determining that amount depends on whether the organization pays a third party to provide parking for its employees or owns or leases a parking facility where its employees park.

The Notice is helpful in determining what portion of parking expenses increases UBTI for a tax-exempt organization. The Notice does not, however, provide guidance on how to determine total parking expenses (for entities that own or lease all or a portion of a parking facility or lot). The Notice requests comments for future guidance, in particular regarding the determination of whether a parking facility’s or lot’s “primary use” is by the “general public,” and how those terms are defined.

Organization Pays a Third Party for Employee Parking Spots

Under the Notice, if an entity pays a third party an amount so that its employees can park at the third party’s lot or garage, such expense results in an increase in UBTI for tax-exempts. This is the case, however (as described above), only up to the maximum monthly exclusion amount,

which for 2018 is \$260 per employee. Parking expenses in excess of that amount must be treated by the tax-exempt employer as compensation and wages, and those excess amounts then will not increase UBTI for tax-exempts.

Organization Owns or Leases All or a Portion of a Parking Facility/Lot

Until further guidance is issued, an organization that owns or leases all or a portion of one or more parking facilities/lots where its employees park may calculate the increase in UBTI using any reasonable method. Thus, tax-exempts that have already adopted reasonable methods in 2018 may continue to follow such methods, subject to some exceptions. The Notice then provides a four-step safe harbor method that is deemed to be a reasonable method for determining the portion of total parking expenses that are allocable to employee parking. Before the first-step is applied, however, the organization must calculate “total parking expenses.” This includes, but is not limited to:

“Repairs, maintenance, utility costs, insurance, property taxes, interest, snow and ice removal, leaf removal, trash removal, cleaning, landscape costs, parking lot attendant expenses, security, and rent or lease payments or a portion of a rent or lease payment (if not broken out separately).”

Significantly, the Notice fails to provide guidance on how to calculate the portion of these expenses (such as mortgage interest or insurance) that is attributable to the parking facility or lot, as opposed to the portion attributable to buildings or other land.

Once an organization has determined total parking expenses, the first step in the safe harbor is to calculate the amount generating UBTI for any reserved employee spots. The percentage of parking spots reserved for employees, multiplied by the total parking expenses, equals a portion of the parking expenses that increase UBTI for tax-exempts. The Notice provides a limited period of time, until March 31, 2019, during which tax-exempts with reserved parking spots may change their parking arrangements (by changing signage, access, etc.) to decrease or eliminate their reserved employee spots and treat those as non-reserved, retroactively to January 1, 2018.

The second step is to determine the number of remaining parking spots (those not reserved for employees), and whether their primary use is to provide parking to the general public. If their primary use is to provide parking to the general public, then the remaining total parking expenses are not subject to the UBTI increase. “Primary use” means greater than 50 percent of actual or estimated usage of the parking spots by the general public, tested during normal business hours on a typical business day. Non-reserved parking spots that are available to the general public but empty during normal hours on a typical day are treated as provided to the general public. “General public” includes, but is not limited to, customers, clients, visitors, individuals delivering goods or services, patients, students, and congregants; it does not include employees, partners or independent contractors.

If the primary use of an tax-exempt's remaining parking spots is not to provide parking to the general public, then step three requires a determination of the number of spots exclusively reserved for non-employees (such as visitors and customers), if any. The parking costs related to these spots are excepted from the UBTI increase.

Lastly, if parking expenses remain for which the organization has not determined whether or not they increase UBTI after completing the first three steps, the fourth step requires a determination of the employee use of the remaining parking spots during normal hours and the related expenses allocable to employee parking spots. Methods to determine employee use of the remaining spots may include specifically identifying the number of employee spots based on actual or estimated usage.

Examples Provided

The Notice provides ten examples to illustrate the four-step approach. One example involves a religious organization that operates a church and a school, with a parking lot adjacent to its buildings. Under the example, the organization incurs \$10,000 of total parking expenses (no explanation is given as to how such amount is calculated). The parking lot has 500 spots used by congregants, students, visitors, and employees, with 10 spots reserved for certain employees. During normal hours of operation on weekdays, approximately 50 employees occupy non-reserved parking spots and approximately 440 non-reserved spots are empty. On weekends, approximately 400 non-reserved spots are occupied by congregants and another 20 by employees.

Under step one of the safe harbor approach, the organization determines that 2% of the total spots (10/500) are reserved for certain employees. As a result, \$200 of the \$10,000 in parking expenses (2% of \$10,000) is attributable to the spots reserved for employees, and results in a \$200 increase to UBTI.

Under step two, the organization must determine the primary use of the remaining 490 spots. Because usage of the lot varies significantly between days of the week, the organization uses a reasonable method to determine that the primary use is to provide parking to the general public because 90% (440/490) of the spots are used by the public during the weekdays and 95% (470/490) of the spots are used by the public on weekends. The empty, non-reserved parking spots are treated as provided to the general public. Thus, expenses allocable to these spots do not increase UBTI. Therefore, only \$200 of the \$10,000 parking expenses will result in an increase to UBTI.

Other Guidance in the Notice

The Notice clarifies that, for tax-exempt organizations, the general rule regarding UBTI increases does not apply to the extent any parking expenses are paid or incurred directly in connection with an unrelated trade or business that is regularly carried on by the organization. In

other words, if a tax-exempt organization is regularly engaged in an unrelated trade or business, and parking expenses are paid or incurred in connection with such unrelated trade or business, those expenses are subject to the deduction disallowance (i.e., disallowed as a deduction in calculating the UBTI attributable to such unrelated trade or business), rather than being subject to the UBTI increase. The Notice does not provide any guidance on how to determine what portion of parking expenses are paid or incurred in connection with a tax-exempt organization's unrelated trade or business.

Another clarification is that the increase in UBTI due to providing parking to employees does not itself constitute an unrelated trade or business. Therefore, an exempt organization with only one unrelated trade or business does not, due to an increase in UBTI under these rules, become an exempt organization with more than one unrelated trade or business (which would invoke new Code section 512(a)(6), requiring separate UBTI calculations for separate unrelated trades or businesses). This appears helpful for tax-exempts that have only one unrelated trade or business. Until further guidance is issued, such organizations can reduce the increase to UBTI to the extent that deductions directly connected with carrying on the unrelated trade or business exceed the gross income derived from such unrelated trade or business.

The Notice also addresses Form 990-T, which must be filed by tax-exempt organizations if they have gross income, included in computing UBTI, of \$1,000 or more. The Notice explains that this threshold amount also applies to UBTI resulting from the Parking Tax. Thus, organizations for which the sum of (1) gross income from unrelated trades or businesses and (2) the increase of UBTI under the Parking Tax is less than \$1,000 need not file a Form 990-T.

IRS Notice 2018-100

Notice 2018-100 provides for a waiver of penalties for certain tax-exempt organizations that have not made estimated payments of taxes due on QTFs provided to employees. Because this is a new tax, created by the Tax Cuts and Jobs Act, and may require tax-exempt organizations that have never had to file a tax return (Form 990-T) for UBTI to file this form for the first time, the Notice provides relief for tax-exempt organizations that were not required to file a Form 990-T for the previous filing season. Such organizations are given relief from underpayment of estimated taxes to the extent such underpayment was the result of the Parking Tax. To take advantage of the relief, however, the organization must timely file Form 990-T and timely pay the amount reported for the tax year. (It also must write "Notice 2018-100" on the top of its Form 990-T.) For organizations with a tax year ending December 31, the Form 990-T is generally due May 15 of the following year.