Pennsylvania Institute of Certified Public Accountants  
Committee on Federal Taxation

February 22, 2019

The Honorable Charles P. Rettig  
Internal Revenue Service  
Room 5203  
Ben Franklin Station  
Washington, DC 20044

Re: Comments on Parking Expenses for Qualified Transportation Fringes under Section 274(a)(4) and Section 512(a)(7) of the Internal Revenue Code

Dear Commissioner Rettig,

This correspondence is a response to the request for comments by the Treasury Department and Internal Revenue Service with respect to IRS Notice 2018-99, Parking Expenses for Qualified Transportation Fringes, under Sections 274(a)(4) and 512(a)(7) of the Internal Revenue Code (IRC).

Background

H.R. 1, Public Law No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA) and signed into law on Dec. 22, 2017, added IRC Sections 274(a)(4) and 512(a)(7) to the IRC. Section 274(a)(4) disallows a tax deduction to an employer for the expense of any qualified transportation fringe benefit (QTF), defined in IRC Section 132(f), provided to employees. IRC Section 512(a)(7), which was added to provide parity between taxable and tax-exempt organizations, provides that a tax-exempt organization’s unrelated business taxable income (UBTI) is increased by the amount of the QTF expense that is not deductible under IRC Section 274(a)(4). Both of these IRC sections, which became effective as of Jan. 1, 2018, are collectively referred to as “disallowed QTFs” herein.

IRC Section 132(f) excludes from an employee’s gross income the value of a QTF defined to include (1) transportation in a commuter highway vehicle between the employee’s residence and place of employment, (2) any transit pass, and (3) qualified parking. IRC Section 132(f)(5)(C) defines qualified parking as parking provided to an employee on or near the business premises of the employer, or on or near a location from which the employee commutes to work.
The term “employee” for this purpose includes any individual who is currently employed by the employer, including common law employees and other statutory employees, such as corporate officers. Treasury regulations Section 1.132-9 provides that partners, 2 percent shareholders of an S corporation, sole proprietors, and independent contractors are not employees for this purpose.

IRC Section 132(a)(5) provides that generally gross income does not include any fringe benefit that qualifies as a QTF. In addition, IRC Section 132(f)(2) provides that the amount of QTFs provided by an employer to an employee that can be excluded from income cannot exceed a maximum monthly dollar amount disallowed for inflation. Treasury regulation 1.132-9(a)(3) provides that qualified transportation benefits may be provided to employees pursuant to a wage reduction agreement, hereafter referred to as a pretax wage reduction.

Initial Guidance

On Feb. 22, 2018, the IRS released Publication 15-B, Employer’s Tax Guide to Fringe Benefits, which provided the first guidance with regard to complying with IRC Section 274(a)(4). The “TIP” included in Publication 15-B reads, in part, as follows:

 Qualified transportation benefits aren’t deductible. Section 13304 of P.L. 115-97 provides that no deduction is allowed for qualified transportation benefits (whether provided directly by you, through a bona fide reimbursement arrangement, or through a compensation reduction agreement) incurred or paid after Dec. 31, 2017. Also, no deduction is allowed for any expense incurred for providing any transportation, or any payment or reimbursement to your employee, in connection with travel between your employee’s residence and place of employment, except as necessary for ensuring the safety of your employee, or for qualified bicycle commuting reimbursements as described in Section 132(f)(5)(F) (even though the exclusion for qualified bicycle commuting reimbursements is suspended, as discussed earlier). While you may no longer deduct payments for qualified transportation benefits, the fringe benefit exclusion rules still apply and the payments may be excluded from your employee’s wages as discussed earlier.

The only subsequent guidance released since the 2018 Publication 15-B was Notice 2018-99, released on Dec. 10, 2018.

Notice 2018-99 Commentary

Conflicting Interim Guidance

IRS Publication 15-B provides, in part, “that no deduction is allowed for qualified transportation benefits (whether provided directly by you, through a bona fide reimbursement arrangement, or through a compensation reduction agreement) incurred or paid after Dec. 31, 2017.” On the other hand, Notice 2018-99 provides that the determination of disallowed QTFs depends upon (1) whether the employer pays a third party to provide parking for the employees, or (2) whether the employer owns or leases the parking facility where its employees park.
Within Notice 2018-99, the treatment of a pretax wage reduction is only addressed in the method that applies to an employer’s payment made to a third party for employee parking. The fact a pretax wage reduction was not addressed in the method applicable when the employer owns or leases the parking facility implies that an employee’s pretax wage reduction is not a disallowed QTF when the employee is paying the employer to park in an employer-owned or leased facility.

Based upon Notice 2018-99, it is reasonable to conclude that a pretax wage reduction is not a disallowed QTF when the employee is paying the employer for parking in an employer’s parking facility. Otherwise, treating the pretax wage reduction in this instance as a disallowed QTF when the employer is already treating the expenses of the parking facility as a disallowed QTF results in effectively taxing the same QTF benefit twice.

Employees using pretax dollars to pay for parking in an employer-owned or leased facility is not uncommon. For example, many employers, particularly large tax-exempt organizations such as institutions of higher education and hospitals, require employees to purchase a permit to park in the employer’s facilities. Such permits may be monthly or annually, and the cost may be nominal or at fair market value. Often the employer offers a qualified transportation fringe benefit plan that allows the employee to pay for the permit with pretax dollars.

The current guidance in IRS Publication 15-B that states a pretax wage reduction is a disallowed QTF to the employer, and the guidance in Notice 2018-99 that implies that the treatment of a pretax wage reduction as a disallowed QTF only applies when the employer pays a third party for the benefit, is not consistent guidance. As a result, the inconsistency between Publication 15-B and Notice 2018-99 has caused much confusion for certain taxpayers. Publication 15-B should be modified to clearly correspond with the guidance set forth in Notice 2018-99.

Request for Comment on Sale of QTF to Employee

Notice 2018-99 specifically requests commentary on the application of IRC Section 274(e)(8) to expenses for any goods or services that constitute QTF sold by the employer to the employee in a bona fide transaction for an adequate and full consideration in money or money’s worth and the circumstances under which such a transaction should be excluded from the term QTF for purposes of IRC Section 274(a)(4). Interestingly, the request for comment suggests that the value of a QTF be quantified, yet the notice specifically states that the deduction disallowed under IRC Section 274(a)(4) relates to the employer’s expense of providing a QTF, not its value.

The methodology in Notice 2018-99 provides that when the employer owns or leases the parking facility, applicable operating or lease expenses are disallowed under IRC Section 274(a)(4) or includible in UBTI in the case of a tax-exempt employer. To be consistent with this methodology, it is reasonable to conclude that when such expenses are disallowed QTFs, the sale of parking to the employee will not fall under the QTF rules. Rather, any revenue from the sale of parking to an employee would be treated as another revenue stream in arriving at the employer’s gross income.

Request for Comments on Other Methods for Determining Use
Multitenant Leases: Many employers that lease space in office or retail facilities are “allocated” a number of parking spots. With respect to multitenant leases, generally such leases do not provide for a specific rent attributable to the allocated parking spots. Rather, the lease is based upon square footage of the rented area within the building. Sometimes parking spaces are specifically reserved for tenants, whereas other leases only provide for a number of allocated parking spaces.

Guidance is needed with regard to a method to use when identifying disallowed QTFs in these circumstances, as it would be unreasonably burdensome for a landlord to provide a tenant with expenses associated with allocated parking spaces. To arrive at the expense associated with parking by dividing the total lease expense by the square footage of the interior area and the parking spaces would not yield an accurate expense. Such guidance should also address circumstances where the lease does not specify an amount attributable to allocated parking spaces, and the primary use of the landlord’s parking facility is for the general public.

Parking Facilities Owned or Leased by Members of Affiliate Group: It is unclear as to whether affiliated entities should be treated as a single employer when the parking facility is owned or leased by one affiliate and the QTF is provided to employees of a separate affiliated organization. It may be reasonable to assume that affiliated organizations are treated as one employer for purposes of determining disallowed QTFs. However, specific guidance is needed with regard to identifying affiliated organizations as the determination as to whether two entities are related is defined differently for various federal income tax purposes.

Request for Comments on Determining Primary Use – Parking as UBTI

The Merriam-Webster Dictionary defines the adjective “primary” as first in rank, importance, or value. Accordingly, it is reasonable that a definition of “greater than 50 percent of actual or estimated usage of the parking spots in the parking facility” constitutes the primary use of the facility. We agree with the definitions for “primary use.”

However, Notice 2018-99 provides that the primary use test be based upon 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. With regard to tax-exempt organizations, Notice 2018-99 provides IRC Section 512(a)(7) does not apply to the extent the amount paid or incurred is directly connected with an unrelated trade or business that is regularly carried on by the organization.

The guidance within Notice 2018-99 provides that if the actual or estimated usage of the parking spots varies significantly between days or the week or times of the year, the taxpayer may use any reasonable method to determine the average actual or estimated usage. However, additional specific guidance is needed as to what constitutes a reasonable method that can be used when the parking facility has a dual use. That is, when the facility is used by employees during normal business hours and then used in an unrelated trade or business outside normal business hours.

For example, some tax-exempt organizations lease their parking facility to the general public outside normal business hours, such as evenings or weekends. In these instances, parking
revenue received from the general public is generally taxable as UBTI to the exempt organization. In such an instance, the tax exempt organization is taxed on the disallowed QTF expenses as UBTI based on normal business hour usage and then taxed again on revenue generated from a secondary use of the same parking facility for having rented the same space after hours to the general public. A reasonable method should take into consideration dual use of a parking facility.

Other Commentary

Government-Mandated Commuter Benefits: A number of communities have enacted ordinances that require certain employers to provide commuter benefits to some or all of their employees. Such mandated benefits are not optional. Notice 2018-99 is silent as to whether a QTF includes government-mandated commuter benefits, as such benefits are not voluntary QTFs and were not necessarily contemplated by the TCJA’s passage of IRC Sections 274(a)(4) and 512(a)(7). In an effort to be equitable in applying the disallowed QTF rules, it would seem reasonable to exempt any government-mandated commuter benefit from the definition of a QTR.

Exempt Organization Reporting Only QTF: Exempt organization filing Form 990-T, Exempt Organization Business Income Tax Return, solely to report UBTI from QTF should be permitted to deduct the expenses of tax compliance incurred in connection with such reporting. For example, the expense to prepare Form 990-T should be permitted as a deduction on such return as the expense is only incurred in connection with complying with the QTF disallowed expense rules. The same would apply to any expense incurred in connection with accounting for the QTF taxable as UBIT. Future guidance should address deductions permitted in this circumstance.

Conclusion

Although the interim guidance provided in Notice 2018-99 provides two methods to determine QTF for purposes of IRC Sections 274(a)(4) and 512(a)(7), there are many uncommon arrangements not addressed within the notice. In addition, there is conflicting guidance when the content of Notice 2018-99 is compared to language contained with IRS Publication 15-B. Since disallowed QTFs affect so many employers and their workers, priority guidance should be given to providing adequate proposed Treasury regulations.

Sincerely,

Sean Brennan, CPA, MBA
Chair, Federal Taxation Committee

Michael D. Colgan, CAE
CEO & Executive Director