

KROKIDAS & BLUESTEIN

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CLIENT ALERT

TAX-EXEMPT EMPLOYER PARKING AND TRANSPORTATION BENEFITS: THE NEW TAX

The deadline is quickly approaching for tax-exempt employers to modify their employee parking arrangements to reduce or eliminate tax liability imposed under the Tax Cuts and Jobs Act of 2017. Any tax-exempt employer that provides any of the following to employees on a free, reimbursable or pre-tax basis may be subject to the new tax:

- Commuter highway vehicle benefits;
- Transit passes; or
- Parking benefits.

The new tax is referred to as an increase to the employer's unrelated business taxable income (UBTI) but it applies to all parking and transportation benefits provided to employees, even when the employees are engaged exclusively in related tax-exempt activities.

Pursuant to interim guidance issued by the IRS, employers subject to this new tax may reduce or eliminate their tax liability by modifying their parking arrangements by March 31, 2019. Any such modifications will be treated as applying retroactively to January 1, 2018.

Overview

The Tax Cuts and Jobs Act, which was enacted on December 22, 2017, amended § 274 of the Internal Revenue Code (Code) to disallow tax deductions for “qualified transportation fringes” (QTFs) provided by non-tax-exempt employers, and added a new § 512(a)(7) to the Code which requires tax-exempt employers to increase the amount of UBTI they report by the amount that would be disallowed under § 274. UBTI is reported on Form 990-T and is taxed at the corporate rate, currently 21 percent. These new provisions apply to costs paid or incurred after December 31, 2017.

The IRS issued Notice 2018-99 (the “Notice”) to provide interim guidance relative to QTFs until proposed regulations are issued. The Notice describes how to determine the amount of the QTF expense that must be treated as an increase in UBTI. Taxpayers may rely on the guidance set forth in the Notice until proposed regulations are issued.

Qualified Transportation Fringes

QTFs are 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. “Qualified parking” is defined 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. Parking is provided by an employer if: (1) the parking is on property that the employer owns or leases; (2) the employer pays for the parking; or (3) the employer reimburses the employee for parking expenses.

Calculating Unrelated Business Taxable Income for Parking Benefits

There are two ways in which employers provide parking benefits to employees. The first is by leasing spaces in parking garages or parking lots owned by third parties. The second is by permitting employees to park in an employer-owned garage or parking lot. The Notice provides some guidance as to how employers must calculate their UBTI for each type of parking benefit provided to employees.

A. Parking in Third Party Garages or Parking Lots

Section 512(a)(7) requires tax-exempt employers to increase UBTI by the amount that would be disallowed under § 274. For non-tax-exempt entities, the Code establishes a limit on the value of QTFs that an employee may exclude from gross income and permits an employer to deduct amounts in excess of that limit. As a result, tax-exempt organizations that pay third parties for employee parking must increase their UBTI except to the extent the payments exceed \$260 per employee per month for 2018 and \$265 per employee per month for 2019. (The excess would be taxable to the employees.)

B. Parking in Employer-Owned or Leased Garages or Parking Lots

When a tax-exempt employer provides parking to employees in employer-owned or employer-leased parking garages, lots or spaces, the employer’s “total parking expenses” may be considered UBTI, subject to tax. “Total parking expenses” include, but are not limited to costs associated with: repairs, maintenance, utilities, insurance, property taxes, interest, snow and trash removal, landscaping, parking attendant expenses, and rent.

The Notice recognizes that employer parking garages and lots may sometimes be used by a mix of employees and non-employees, and provides some guidance as to how the portion of the employer's total parking expenses considered to be QTFs should be calculated.

According to the Notice, any reasonable method may be used to calculate the increase in UBTI. The Notice does, however, provide a four-step process for calculating UBTI. Application of the methodology set forth in the Notice is deemed to be a reasonable method. The four steps are:

- (1) Calculate the expense associated with reserved employee parking spaces –

The employer must determine the percentage of spaces owned or leased by the employer that are dedicated to employee parking, then multiply that percentage by the employer's total parking expenses for that parking garage or lot;

- (2) Determine the primary use of remaining spaces –

If more than 50% of the remaining spaces are used by the general public, then the total remaining parking expenses are excepted from UBTI. For this purpose, the general public includes clients, visitors, students, and similar parties, but excludes independent contractors;

- (3) Calculate the cost of reserved non-employee spaces –

If the primary use of the remaining parking spaces is for employees (because 50% or fewer spots are used by the general public), the employer may exclude the expenses allocable to spots reserved to the general public; and,

- (4) Determine remaining use and allocable expenses –

If any parking spaces remain after completing steps 1-3, the employer must reasonably determine the use of the remaining spaces and the expenses allocable to those that are determined to be employee parking spaces.

C. Deductions

Section 512(b)(12) provides a deduction of \$1,000 as a modification to UBTI. As such, employers that have total UBTI (including parking benefits) of less than \$1,000 do not need to report or pay tax on parking benefits that constitute UBTI.

Retroactive Application of Modifications to Parking Arrangements

In Notice 2018-99, the IRS provided employers with a grace period for modifying their parking arrangements to plan for the impact of the new law. Based on this notice, modifications to parking arrangements made by March 31, 2019 will be treated as applying retroactively to January 1, 2018, the effective date of the new provisions. Tax-exempt employers that provide parking benefits to their employees or that own or lease parking facilities or parking spaces should review their practices promptly to determine whether modifications should be made prior to March 31.

If you have any questions about the application of the new tax or how it might be calculated, please do not hesitate to contact Attorneys Elka Sachs (esachs@kb-law.com) or Eric Reustle (ereustle@kb-law.com).