NOTICE 2018-99 AND THE DEDUCTION DISALLOWANCE FOR EMPLOYER PARKING: THE STRAW THAT BROKE THE CAMEL'S BACK

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While the international provisions of the Tax Cuts and Jobs Act (the TCJA) as well as a handful of domestic provisions, such as Sections 199A and 451, have attracted significant taxpayer attention, the IRS notices on Section 162(m),[1] meals and entertainment,[2] and Section 45S's credit for family and medical leave[3] have attracted little to no public comments or complaints. Who would have thought it would be the IRS' notice on the deduction disallowance under Section 274 for employer parking that would be the guidance that broke the camel's back and finally brought attention to the regulatory burden being imposed on taxpayers by the compensation-related changes made in the TCJA?

Summary of the Parking Notice

As background, section 13304(c) of the TCJA disallowed employer deductions for the expenses of qualified transportation fringe benefits as defined in Section 132(f), including employer provided parking, by adding Section 274(a)(4) to the Code. Until Notice 2018-99[4] was issued, many taxpayers did not seem to fully understand the impact of this provision on their employee parking expenses.[5]

Notice 2018-99 provides guidance for determining the amount of parking expenses that should be treated as nondeductible as well as the amount to be treated as increasing unrelated business taxable income (UBTI). Depending on who provides the parking for employees, Notice 2018-99 provides two separate calculations that are deemed to be reasonable allocations of a taxpayer's parking expenses to employee parking. If the employer pays a third party to provide parking for employees, Notice 2018-99 provides that Section 274(a)(4) disallows a deduction for that expense up to the annual limitation on an employee's excludable parking benefits.[6] Any amount over the excludable limitation will be treated as compensation to the employee and thus deductible by the employer.

Unfortunately, for parking provided by the employer, Notice 2018-99's guidance is not so simple. Of note, Notice 2018-99 provides that any reasonable method may be used to calculate the Section 274(a)(4) disallowance. The Notice sets forth a four-step method as one reasonable method that can be used. While much attention has been given to the need under the Notice's four-step method to count parking spaces, the bigger issue really is, once the spaces are counted, how to allocate costs to the employee spaces for purposes of the deduction disallowance.

The four-step method in Notice 2018-99 provides as follows. First, the employer must determine the percentage of parking spots re-

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served for employee use in relation to the total number of parking spots. Second, the employer must determine the primary use of the remaining parking spots. If the primary use, greater than 50%, is for the general public then the remaining spots may be disregarded for purposes of the deduction disallowance. The Notice carves out parking spots primarily used for "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" by including them in the definition of general public. Next, if the primary use determined under the second step is for employees, the employer must calculate the percentage of spots reserved for non-employee use to determine the portion of the parking lot subject to deduction disallowance. Lastly, as a catch-all for any remaining spots, an employer must determine the use of the remaining parking spots. Once the spots are fully counted, and the employee portion of the parking spaces is determined, the taxpayer must reasonably allocate expenses to the employee parking spots. The following expenses are listed in Notice 2018-99 as a non-exhaustive list to be allocated to employee parking spots: repairs; maintenance; utility costs; insurance; property taxes; interest; security; cleaning and landscape costs; parking lot attendant expenses; removal of snow, ice, leaves, and trash; and rent or lease payment or portion of payment.[7]

The Regulatory Reform Agenda

As discussed in prior columns, the current administration has emphasized a regulatory reform agenda in order to simplify the tax laws and reduce burdens on taxpayers.[8] Pursuant to Executive Orders, agencies, such as the IRS and Treasury, have been required to convene a regulatory reform task force and identify regulations that impose an undue burden on taxpayers. Additionally, the Office of Management and Budget has been given more authority to review tax regulations to assess the costs and benefits of the approach being taken, as well as other approaches.

So, how have we gotten to a point where an administration with a regulatory reform agenda issues guidance requiring employers to count parking spaces and allocate a portion of the company's utility bill to the lamp posts in the parking lot? The following factors likely have contributed to this sorry state of affairs.

- Tax legislation with little to no policy grounding it.[9]
- An underfunded IRS and Treasury stretched too thin to fully consider and develop the facts so as to understand what taxpayers are facing with the parking lot expense deduction disallowance, or to apply creative solutions to those factual scenarios.
- Lack of open communication and engagement between taxpayers, on the one hand, and the IRS and Treasury, on the other.

The most reasonable aspect of Notice 2018-99 is its treatment of retail parking lots. In the case of such lots, as long as parking spaces are not reserved for employees and the primary use of the spaces is for the general public, no deduction disallowance for employee parking expenses results. This issue of retail employee parking was raised early on, in a comment letter submitted in April 2018 by the AICPA, which recommended as follows: "Where an employer is a tenant in a mall and the mall, as part of the tenancy arrangement, provides free parking to all employees, customers and contractors (with no preferential parking), we suggest clarifying that there is no loss of deduction under Section 274(a)(4)." The basis for the sug-

[1] Notice 2018-68, 2018-36 IRB 418, discussed in Batter, "Reform Agenda, Meet the Tax Cuts and Jobs Act," 46 Corp. Tax'n 49 (Jan./Feb. 2019).

[2] Notice 2018-76, 2018-42 IRB 599.

[3] Notice 2018-71, 2018-41 IRB 548.

[4] 2018-52 IRB 1067.

[5] Notice 2018-99 is discussed in more detail in Dyson and Chittenden, "The TCJA, Notice 2018-99, and the Disallowance ofEmployee Parking Benefits" 46 Corp. Tax'n 60 (Mar./Apr. 2019).

[6] The limitation for excludable parking for tax year 2019 is $265 per employee per month. The limitation for tax year 2018 was $260 per employee per month.

[7] Interestingly, the Bluebook includes depreciation as an expense, but Notice 2018-99 provides that depreciation is not a parking expense. See Staff of the Joint Committee on Taxation, *General Explanation of Public Law 115-97*.

[8] Batter, "Reform Agenda, Meet the Tax Cuts and Jobs Act," 46 Corp. Tax'n 49 (Jan./Feb. 2019); Batter, "Impacting Compensation Policy Through the Regulatory and Tax Reform Process," 44 Corp. Tax'n 31 (Nov./Dec. 2017).

[9] The only explanation that begins to articulate a policy for disallowing the deduction for qualified transportation fringe benefits is that "certain nontaxable fringe benefits should not be deductible by employers if not includible in income of employees." H. Rep't No. 115-409, 115th Cong., 1st Sess. 266 (2017). Note that this rationale was not articulated in the Senate report describing the version of the legislation ultimately enacted. But, in any event, why is the employer's deduction of expenses for transit benefits objectionable on policy grounds when the deduction for pension benefits, health care, adoption assistance, education assistance, and many other excludable benefits is not objectionable? Could an alternative explanation for this deduction disallowance be that the Congress that passed the TCJA had a reflective dislike of the urban and coastal elites who travel on mass transit and van pools?

gestion was that employees who park at their workplace in such circumstances do not receive a valuable benefit and the expenses of the parking, thus, should not be subject to deduction disallowance. The retail industry issue with employee parking in customer lots was raised repeatedly over the course of the last year during panels including IRS and Treasury personnel, and the result was perhaps the one reasonable application of Notice 2018-99—an exemption for employee parking in public lots.

What Should Companies Do?

Companies should keep commenting and engaging. The nonprofits have been at the forefront of commenting on this parking issue as it affects their UBTI calculations.[10] They have sought a moratorium on the application of the parking rules to UBTI and have lobbied for the repeal of the parking rule as applied to nonprofits, on the basis that the provision is exceedingly complicated and burdensome and takes away from the ability of nonprofits to fulfill their charitable missions.[11] The same is surely true of for-profit businesses, for whom the deduction disallowance is a nuisance that unnecessarily distracts from their mission of acting as job-creating engines of the economy. Given the lack of policy basis for the provision and the minimal revenues that will be raised by it, at great burden to companies, Congress should seriously consider repealing the changes made in section 13304(c) of the TCJA. In the meantime, the administration should seriously consider how to reduce the burdensome impact of the parking expenses deduction disallowance, and taxpayers should help the administration find a way to do so. It is likely that the writers of Notice 2018-99 did not understand that larger manufacturing, retail, and distribution businesses have dozens, hundreds, and in some cases, thousands of manufacturing facilities and distribution centers in small towns, industrial parks, and rural areas where parking has little or no value and where no one would pay to park. In these circumstances, the IRS and Treasury should clarify that the deduction disallowance does not apply because the benefit has been fully included

[10] See, most recently, the comment letter on Notice 2018-99 submitted February 20, 2019, by the National Council of Nonprofits.

[11] The nonprofits have also vigorously disputed the notion that employee pre-tax contributions to pay for transit benefits should be treated as a nondeductible employer payment for qualified transportation, describing such a view "as a tortured interpretation of congressional intent." The statutory provision can easily and should be interpreted as not covering such employee contributions, whether made by employees of nonprofits or for profit businesses. (Perhaps the best part of this comment letter is a description of the "audible gasps of incredulity" when the view was shared at a tax law conference.)

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in income at a zero value and the exception to deduction disallowance in Section 274(e)(2) shields the deduction from disallowance. To the extent the IRS and Treasury need information to help them formulate such an exception, taxpayers should stand ready to provide it.

Similarly, taxpayers may want to provide information to the IRS and Treasury that would help them develop safe harbors for allocating expenses to the employee parking, where that parking does have some significant value and that value is not imputed into employee income. It should be possible to locate or develop information regarding the utility and property tax expenses that are associated with a manufacturing, distribution, or office building, compared to the parking lot, which could potentially be used to develop reasonable safe harbor rules. Clearly, the utility expenses of the building (which is heated and cooled, lit, and powers various forms of computer and other equipment) will far exceed those of the parking lot, even on a per square foot basis. The same would be true of property tax assessments based on the value of the building versus the parking lot.

In the meantime, taxpayers will need to apply some reasonable method to calculate the Section 274(a)(4) disallowance amount. For facilities in geographic locations where parking is not something people pay for, it should be reasonable to take the position that the parking benefit has no value and the exception to deduction disallowance in Section 274(e)(2) applies when a zero value is imputed for the parking. The same should be true if the value is de minimis since a de minimis and difficult to determine value for parking would otherwise be exempt under Section 132(e) without the need to rely on Section 132(f). Where such a position cannot be taken because the parking benefit has significant discernable value, and expenses do need to be allocated to parking, one possible method for allocating expenses would be to not disallow a deduction for expenses that are de minimis and burdensome to calculate when allocated to the parking lot, but to disallow a deduction for those expenses more directly attributable to the parking lot. For example, perhaps it would be reasonable to capture the expenses of specific personnel who man the parking booth, or a specific repair project related to the parking area, even if the expense also has some relationship to parts of the workplace unrelated to parking (such as private roads leading to the parking). By contrast, it would seem reasonable to ignore de minimis utility, insurance, and property tax costs associated with the parking lot, as those are likely to be small and almost impossible to allocate to the parking lot with any precision.

As noted in Notice 2018-99, Treasury intends to publish further guidance in proposed regulations. What can we hope for in further guidance? Companies may want to consider what kinds of empirical evidence can be developed to help move that guidance in a more sensible direction—one involving generous safe harbors and de minimis rules. Reliance on and use of such information by the IRS and Treasury would be in line with the regulatory reform agenda's goals of reducing regulatory burdens on taxpayers. ■