Patrick M. Clinton

Office of Associate Chief Counsel (Income Tax & Accounting)

Internal Revenue Service

1111 Constitution Avenue, NW

Washington, DC 20224

(Notice 2018-99)

Dear Mr. Clinton,

I write regarding IRS notice 2018-99 regarding ‘Parking Expenses for Qualified Transportation Fringes Under § 274(a)(4) and § 512(a)(7) of the Internal Revenue Code.’

Section 13304 of ‘Tax Cuts and Jobs Act’ (P.L 115-97) stipulates

“No deduction shall be allowed under this chapter for the expense of any qualified transportation fringe (as defined in section 132(f)) provided to an employee of the taxpayer”

It goes on to further stipulate,

“No deduction shall be allowed under this chapter for any expense incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer in connection with travel between the employee’s residence and place of employment, except as necessary for ensuring the safety of the employee.”

**‘Primary Use Test’ (Page 9)**

The guidance outlined by notice 2018-99, specifically regarding the ‘primary use test’ outlined by step 2 on page 9 creates an unauthorized policy not intended by the legislation. Specifically, we are concerned that the guidance promotes development of unused parking as a way of avoiding additional tax liability. Additionally, the policy would be an unfair burden on small business owners.

Under the general use test, a small business that uses 6 of its available 10 parking spaces for employees would be subject to the added tax liability whereby an employer with 10,000 available parking spots of which only 4,000 are used by employees would not have to pay taxes on parking expenses.

The ‘primary use test’ is a loophole that was not intended by Congress. Further, as written, it disproportionally impacts small businesses. Finally, allowing for unused parking spaces to count towards the total parking spaces available creates a land-use policy that supports the creation of empty parking spaces.

**‘Any Means Necessary’ (Page 11)**

Additionally, we have concerns regarding the ‘Any Means Necessary’ method of calculating the number of parking spaces used by employees. The process outlined in step 2 and step 4 allows for great opportunity for fraud and abuse. Many facilities have no need for public parking and the sole purpose of a parking lot is for employees. Because parking is easily available and plentiful, there is no need to reserve employee parking. The IRS should require employers who provide free parking, but do not ‘reserve it’ to assume that 90% of employees drive to work alone. Employers should be given the option to fully evaluate the percentage of employees who park and if that number is below 90% then they may use that number in generating the additional tax liability.

**Bundling of Parking into a Lease (Page 7)**

Finally, we are pleased with the way in which the guidance clearly spells out expenses which are to be considered a part of the calculation. However, the IRS needs to provide additional guidance as to how parking that is “bundled” into a lease should be considered. Across the nation a significant amount of parking is bundled into the cost of an office lease. While the guidance is correct in requiring parking expenses to be unbundled, it does little to offer solutions to employers or property managers on how to ‘unbundle’ those costs and equitably divide them between multiple tenants.

**Summary of Recommendations**

* **Eliminate the Primary Use Test –** The 50% ‘primary use test’ threshold creates an unintended loophole and should be eliminated as it is policy that is not authorized by Congress. We understand the need to accurately account for the percentage of parking expenses that should be attributed to employee parking, but a 50% primary use test Is an arbitrary number that is based upon a percentage of spaces used rather than additional tax liability**.** If the IRS believes that a primary use test is the best policy mechanism moving forward then we advise reducing the percentage to 10%.
* **Establish a ‘De Minimus’ Threshold –** Like other portions of tax law, establishing a de minimus threshold would be beneficial to small businesses.
* **Eliminate ‘Any Means Necessary’ method of counting cars –** The ‘Any Means Necessary’method to determine how many employees park should be replaced, and the additional tax liability should be determined by requiring employers to identify the actual number of people who park. If an employer does not wish to make this calculation, then they should be given the option to assume that 90% of their employees park at work. Calculating the number of employees who park is not burdensome and many employers already track these figures.
* **Create Clear Guidance on Bundled Parking:** Create guidance that offers property managers and employers a better understanding of how to unbundle parking expenses from leases that include parking.