

February 20, 2019

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,

On behalf of the Coalition for Smarter Transportation, 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."

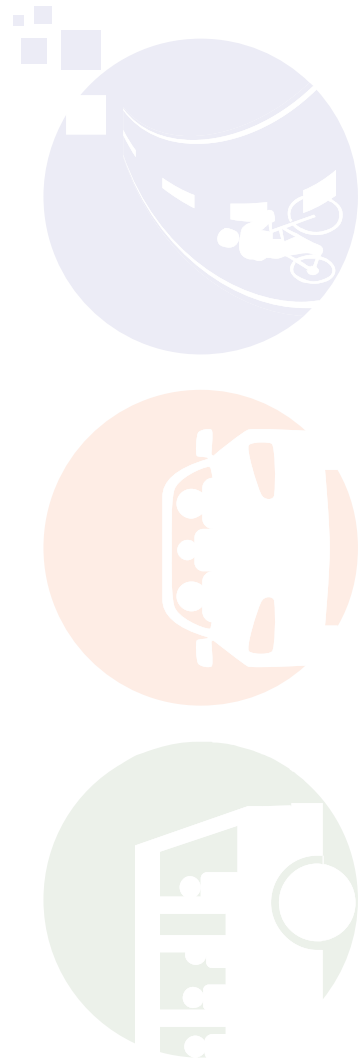
### **Non-Profit Organizations**

The Coalition for Smarter Transportation believes that the burden of adding commuting expenses to a non-profit's Unrelated Business Taxable Income (UBTI) is unfair and incredibly burdensome. While we work with Congress to amend this provision, we urge the Internal Revenue Service to use any and all of its authority to eliminate or mitigate the impact this policy will have on non-profit organizations.

### **'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 inadvertently creates policy that is not authorized or intended by the law. Specifically, we are concerned that the guidance promotes loop holes that can be exploited by the development of unused parking. Additionally, the policy would be an unfair burden on small business owners.

Currently, 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.



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### **'Primary Use Test' (continued)**

Additionally, the application of the primary use test provides significant concerns. Specifically, allowing for unused parking to count towards the total parking spaces in the 'primary use' calculation allows employers to distort the actual use of parking they have at their disposal. Calculations of the primary use test, if they are continued to be used, should compare actual use of facilities and as such directly compare the number of employees' spots used compared to spots used by others. Empty spaces should not factor into the equation.

For example:

**Employer A:**

Parking spots: 100

Employees who use spots: 30

Typical Number of Spits used by Guests/visitors: 10

Generally Empty Spots: 60

Employer A would not be subject to the additional liability based upon the general use test.

**Employer B:**

Parking spots: 50

Employees who use spots: 30

Typical Number of Spits used by Guests/visitors: 10

Generally Empty Spots: 10

Employer B would be subject to additional tax liabilities, the sole difference is Employer A has much more parking then they need. In each case, the general use of the parking lot is for employee parking and guidance should written so that both employers pay the same parking costs.

**Employer C:**

Parking spots: 100

Employees who use spots: 30

Typical Number of Spits used by Guests/visitors: 60

Generally Empty Spots: 10

Employer C, however, primary use of parking is for non-employee parking, and if the 'Primary Use' Test is to be applied, employer C should not have additional tax-liability.

We believe the 'primary use test' creates an policy that provides an exemption for some employers that is not authorized by the underlying legislation. We believe that the primary use test should be eliminated and replaced with a different way to exempt entities that have a di-minimis impact. Further, if a primary use test is used, it empty spaces should not be included in the calculation.

### **'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 use statistically valid measures to identify the actual 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**

- **Provide Relief for Tax-Exempt Organizations** – Adding commuting expenses to a non-profit's Unrelated Business Taxable Income (UBTI) is unfair and incredibly burdensome. We urge the Internal Revenue Service to use any and all of its authority to eliminate or mitigate the impact this policy will have on non-profit organizations.
- **Amend the Primary Use Test** –Including parking spaces that are generally empty or unused as a part of the 'primary use test' creates an unintended loophole and should be eliminated as it is policy that is not authorized by Congress. We believe in the need to accurately account for the percentage of parking expenses that should be attributed to employee parking but inclusion of generally empty and unused spots as a part of that equation is not appropriate.
- **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. We recommend that the IRS require land owners/property managers to calculate and identify parking expenses and equitably divide those parking expenses amongst their tenants

Submitted respectfully,

Jason Pavluchuk  
Policy Director  
Coalition for Smarter Transportation