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February 22, 2019

CC:PA:LPD:PR (Notice 2018-99)
Office of Associate Chief Counsel (Income Tax & Accounting)
Attention: Patrick M. Clinton and Mikhail A. Zhidkov
Internal Revenue Service
1111 Constitution Avenue N.W.
Washington, D.C. 20224

Via the Federal eRulemaking Portal

Re: Comments on Notice 2018-99, Parking Expenses for Qualified Transportation Fringes Under Section 274(a)(4)

Dear Sirs:

On behalf of Tax Executives Institute Inc., I am pleased to submit the enclosed comments and recommendations with respect to the interim guidance provided for taxpayers in Notice 2018-99, which was published in the *Internal Revenue Bulletin* on December 24, 2018. We appreciate this opportunity to contribute our input and engage constructively with the Service in the tax reform implementation process.

The enclosed comments were prepared jointly under the aegis of the Institute's Tax Reform Task Force and Federal Tax Committee, the respective chairs of which are Emily T. Whittenburg and John P. Orr, Jr. Watson M. McLeish, tax counsel for the Institute, coordinated their preparation. If you have questions regarding the enclosed comments, please contact Mr. McLeish at (202) 470-3600 or wmcleish@tei.org.

Respectfully submitted,

James P. Silvestri
International President

TAX EXECUTIVES INSTITUTE, INC.

COMMENTS ON NOTICE 2018-99, PARKING EXPENSES FOR QUALIFIED TRANSPORTATION FRINGES UNDER SECTION 274(a)(4)

Tax Executives Institute ("TEI") welcomes this opportunity to comment on Notice 2018-99, which was published in the *Internal Revenue Bulletin* on December 24, 2018 (the "Notice").[1] The Notice provides interim guidance for taxpayers to determine, inter alia, the amount of parking expenses for qualified transportation fringes that is nondeductible under section 274(a)(4) of the Internal Revenue Code ("Code").[2] Section 274 was amended by Public Law 115-97, colloquially known as the Tax Cuts and Jobs Act (the "Act"), effective for amounts paid or incurred after December 31, 2017.[3]

TEI commends the Department of the Treasury ("Treasury") and the Internal Revenue Service (the "Service") for releasing interim guidance and inviting stakeholder input on this matter of widespread concern to business taxpayers. The Notice is helpful in clarifying a variety of issues pertaining to the new deduction disallowance in section 274(a)(4), and we are especially pleased with the clarifications concerning deductions for allowances for depreciation and expenses paid for items not located on or in the parking facility. We likewise appreciate the confirmation that expenses for parking made available to the general public fall within the specific exception in section 274(e)(7). There are, however, certain aspects of the Notice that warrant clarifying or other changes to ensure successful implementation of the statute consistent with congressional intent. The following comments and recommendations address those aspects of the Notice that are of greatest mutual concern to TEI members as they work to apply, and comply with, new section 274(a)(4).

About TEI

TEI is the preeminent association of in-house tax professionals worldwide, with over 7,000 members representing 2,800 of the leading companies in North and South America, Europe, and Asia. TEI represents a cross-section of the business community, and is dedicated to the development of sound tax policy, uniform and equitable enforcement of tax laws, and minimization of administration and compliance costs to the mutual benefit of government and taxpayers. As a professional association, TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a cost-efficient manner.

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[1] 2018-52 I.R.B. 1067.

[2] Unless otherwise indicated, all references to "section" herein are to sections of the Internal Revenue Code of 1986, as amended.

[3] Act of Dec. 22, 2017, Pub. L. No. 115-97, § 13304, 131 Stat. 2054, 2124 (2017).

TEI members are responsible for administering the tax affairs of their companies and must contend daily with provisions of the tax law relating to the operation of business enterprises, including the rules governing the deductibility of ordinary and necessary business expenses. We believe that the diversity and professional experience of our members enable TEI to bring a balanced and practical perspective to the issues raised by the Notice, and we are eager to assist Treasury and the Service in their important, collective efforts to implement the Act.

Discussion

Section 274(a)(4) of the Code, as added by the Act, provides that no deduction will be allowed for the expense of any qualified transportation fringe (as defined in section 132(f)) provided to an employee of the taxpayer. Section 132(f), in turn, defines the term "qualified transportation fringe" to include "qualified parking," which means 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.[4] The Code is silent, however, as to how an employer should determine the amount of qualified parking expense that is nondeductible under section 274(a)(4). That question is the focus of the Service's guidance in the Notice and TEI's comments below.

I. Qualified Parking Benefits with No, or a De Minimis, Fair Market Value

Many TEI members work for companies that own or lease parking facilities where they and their fellow employees park. For those taxpayers, until further guidance is issued, the Notice provides that the section 274(a)(4) disallowance may be calculated using any reasonable method.[5] And, to provide those taxpayers with some degree of certainty, the Notice describes a four-step methodology that the Service deems to be a reasonable method.[6] The Notice also states, however, that using the value of employee parking to determine the employer's parking expenses is not a reasonable method.[7] Thus, the Service's interim guidance would appear to impact an employer's deduction even in cases where the employer-provided parking has no, or a de minimis, fair market value. TEI believes that this approach would be problematic for a number of reasons and submits the following alternative recommendations.

a. In General

The Act's legislative history reveals that, as part of its broader tax reform effort in 2017, the Committee on Ways and Means believed that "certain nontaxable fringe benefits should not be deductible by employers if not includible in income of employees."[8] Alternatively stated, the

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[4] I.R.C. § 132(f)(5)(C). Section 132 generally excludes from employees' gross income the value of certain fringe benefits, including qualified transportation fringes under section 132(f).

[5] I.R.S. Notice 2018-99, 2018-52 I.R.B. 1067, 1069.

[6] *Id.*

[7] *Id.*

[8] H.R. Rep. No. 115-409, at 266 (2017).

Committee believed that a tax deduction for such expenses should be permitted only to the extent such items are reported as employee compensation.[9] It follows, therefore, that section 274(e)(2) provides an exception to the qualified transportation fringe expense disallowance in section 274(a)(4) to the extent that such expenses are treated by the taxpayer as compensation and wages to its employees under chapters 1 and 24 of the Code, respectively:

> Except as provided in subparagraph (B), expenses for goods, services, and facilities, to the extent that the expenses are treated by the taxpayer, with respect to the recipient of the entertainment, amusement, or recreation, as compensation to an employee on the taxpayer's return of tax under this chapter and as wages to such employee for purposes of chapter 24 (relating to withholding of income tax at source on wages).[10]

Although the language in section 274(e)(2) refers to a "recipient of entertainment, amusement, or recreation," Treasury and the Service have acknowledged that it applies as a specific exception to the application of section 274(a), which, as amended by the Act, includes the qualified transportation fringe expense disallowance in section 274(a)(4).[11]

According to the Notice, Treasury and the Service have determined that qualified transportation fringe expenses are included in the section 274(e)(2) exception to the extent that the fair market value of the fringe exceeds the section 132(f)(2) limitation on exclusion, which was $260 per month for 2018, and such excess amount is included in an employee's compensation under chapter 1 and wages under chapter 24.[12]

The valuation rules of Treasury regulations section 1.61-21(b) apply both for purposes of determining whether the amount of qualified transportation fringes exceeds the excludable amount and for purposes of determining the actual amount (if any) includible in income.[13] Under those rules, in general, the fair market value of parking provided by an employer to an employee is the amount (including taxes or other added fees) that an individual would have to pay to obtain parking at the same site in an arm's-length transaction.[14] The Service illustrated the rules' application in Notice 94-3:

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[9] *Id.* at 263.

[10] I.R.C. § 274(e)(2); *see also* Temp. Treas. Reg. § 1.162-25T(a) ("If an employer includes the value of a noncash fringe benefit in an employee's gross income, the employer may not deduct this amount as compensation for services, but rather may deduct only the costs incurred by the employer in providing the benefit to the employee.").

[11] I.R.S. Notice 2018-99, 2018-52 I.R.B. 1067, 1068; *see also* I.R.S. Notice 2005-45, 2005-1 C.B. 1228, 1229 (providing that section 274(e)(2) applies to all expenses subject to section 274(a)).

[12] I.R.S. Notice 2018-99, 2018-52 I.R.B. 1067, 1068.

[13] I.R.S. Notice 94-3, Q-10(a), 1994-1 C.B. 327, 330; *accord* Treas. Reg. § 1.132-9(b), A-20 (providing that Treasury regulations section 1.61-21(b)(2) applies for purposes of determining the value of parking).

[14] *See* Treas. Reg. § 1.61-21(b)(2).

> *Example.* Employer *Z* operates an industrial plant in a rural area in which no commercial parking is available. *Z* furnishes ample parking for its employees on the business premises, free of charge. The parking provided by *Z* has a fair market value of $0 because an individual other than an employee ordinarily would not pay to park there.[15]

TEI believes that employer-provided parking with no, or a de minimis, fair market value, such as that provided by *Z* in the foregoing example, should be exempt from the qualified transportation fringe expense disallowance in section 274(a)(4). The rationale for this position is straightforward: employer-provided parking with no, or a de minimis, fair market value cannot amount to an excludable "fringe benefit" for purposes of section 132. That is, the employer cannot treat any amount of its parking expenses as an excludable qualified transportation fringe because the employee does not receive any item of value. Moreover, this treatment would be consistent with the Act's legislative history, described above, and in particular Congress's intent to prohibit perceivably abusive double-benefit situations where an otherwise taxable amount is excludable from an employee's income yet the employer is allowed a deduction.

TEI respectfully recommends that Treasury and the Service issue regulatory or other guidance exempting employer-provided parking with no, or a de minimis, fair market value from the qualified transportation fringe expense disallowance in section 274(a)(4).

b. Expenses Treated as Compensation

In *Sutherland Lumber-Southwest, Inc. v. Commissioner*,[16] the U.S. Tax Court addressed the scope of the section 274(e)(2) exception to the general disallowance rules of section 274(a). That case involved the deduction of expenses incurred by an employer in providing vacation flights to employees on an employer-provided aircraft, which the Service had partially disallowed. The taxpayer had calculated and included the value of the vacation flights in its employees' income using the Standard Industry Fare Level ("SIFL") rates in Treasury regulations section 1.61-21(g), however those valuations were significantly less than the cost of providing the vacation flights, for which the taxpayer had sought a full deduction. The section 274(e)(2) question at issue in *Sutherland* was "whether Congress intended the words 'to the extent that' to except taxpayers from section 274(a) or whether it limits a taxpayer's deduction to the amount of income includable by the employee."[17] The Tax Court adopted the former interpretation and held that "section 274(e) was intended to except *certain categories* of deduction from the effect of section 274."[18] Thus, the court concluded that "section 274(e)(2) acts to except the deductions in controversy from the effect of section 274, and, accordingly, [the taxpayer's] deduction for

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[15] I.R.S. Notice 94-3, Q-10(a), 1994-1 C.B. 327, 330.

[16] 114 T.C. 197 (2000), *aff'd*, 255 F.3d 495 (8th Cir. 2001), *action on dec.*, 2002-02 (Feb. 11, 2002).

[17] *Id.* at 202.

[18] *Id.* at 203 (emphasis added).

operation of the aircraft [was] not limited to the value reportable by its employees."[19] On appeal, the U.S. Court of Appeals for the Eight Circuit agreed with "the Tax Court's well-reasoned opinion," and affirmed on the basis of the analysis set forth therein.[20]

The Service ultimately acquiesced in *Sutherland*, stating that it "will no longer litigate this issue in cases in which a taxpayer demonstrates that it has properly included in compensation and wages the value of an employee vacation flight in accordance with Treas. Reg. § 1.61-21(g)."[21] The action on decision states that, in such cases, "the Service will allow the taxpayer a full deduction for the cost of the flight."[22]

As previously indicated, Treasury and the Service have acknowledged that section 274(e)(2) applies as a specific exception to the application of section 274(a), which, as amended by the Act, includes the qualified transportation fringe expense disallowance in section 274(a)(4).[23] Given the Service's acquiescence in *Sutherland*, this acknowledgment confirms that qualified transportation fringe expenses are a category of deduction that section 274(e) was intended to except from the effect of section 274(a).

As applied to employer-provided parking with no, or a de minimis, fair market value, *Sutherland* supports TEI's request for an exemption from the qualified transportation fringe expense disallowance in section 274(a)(4). Consider the example from Notice 94-3 above, in which the parking provided by taxpayer-employer *Z* had a fair market value of $0 because an individual other than an employee ordinarily would not pay to park there. Under *Sutherland*, section 274(e)(2) would not limit *Z*'s deduction to the amount of income includable by its employees; even if the parking provided by *Z* could be said to be a qualified transportation fringe (as defined in section 132(f)), section 274(e)(2) would effect a complete exception, removing from the application of section 274(a) *Z*'s total parking expenses, so long as the value of the parking is treated as compensation and wages to *Z*'s employees pursuant to the rules of Treasury regulations section 1.61-21(b)(2).[24]

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[19] *Id.* at 206; *accord* I.R.S. C.C.A. 200344008 (Jul. 1, 2003) (noting that the Tax Court in *Sutherland* read section 274(e)(2) as an exception to the section 274(a) disallowance rather than a limitation on the deductible amount).

[20] 255 F.3d 495, 497 (8th Cir. 2001).

[21] I.R.S. A.O.D. 2002-02 (Feb. 11, 2002) (acquiescence relating to whether a taxpayer that provides vacation flights to employees and includes the value of the flights in the employees' income using the SIFL rates in Treasury regulations section 1.61-21(g) may then deduct the full (higher) cost of providing the flights, notwithstanding the deduction disallowance provisions of section 274(a)).

[22] *Id.* Congress subsequently amended section 274(e)(2) to partially overturn the holding in *Sutherland* with respect to recipients who are "specified individuals." *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 907, 118 Stat. 1418, 1654–55. As amended, the section 274(e)(2) exception to the section 274(a) disallowance applies in the case of a "specified individual" only "to the extent that the expenses do not exceed the amount of the expenses" that are treated as compensation to the specified individual. *See* I.R.C. § 274(e)(2)(B).

[23] I.R.S. Notice 2018-99, 2018-52 I.R.B. 1067, 1068.

[24] This examples assumes that none of *Z*'s employees is a "specified individual" for purposes of section 274(e)(2)(B).

Consistent with the above, TEI respectfully reiterates its recommendation that Treasury and the Service issue regulatory or other guidance exempting employer-provided parking with no, or a de minimis, fair market value from the qualified transportation fringe expense disallowance in section 274(a)(4).

II. Administrability Concerns & Potential Solutions

Although TEI appreciates Treasury and the Service's efforts to provide taxpayers some certainty in the form of the Notice's four-step methodology to calculate the section 274(a)(4) disallowance, the interim guidance fails to address the most administratively burdensome step facing taxpayers that own or lease all or a portion of a parking facility: determining and allocating the taxpayer's total parking expenses for the parking facility.

a. Total Parking Expenses

For purposes of the Notice, the term "total parking expenses" includes, but is not limited to, repairs, maintenance, utility costs, insurance, property taxes, interest, snow and ice removal, leaf removal, trash removal, cleaning, landscape costs, parking lot attendant expenses, security, and rent or lease payments or a portion of a rent or lease payment (if not broken out separately).[25] As described below, many of these amounts are not practicably obtainable because they are not separately invoiced or otherwise accounted for separately from the employer's broader place-of-business property expenses. In short, determining and allocating total parking expenses under the method prescribed in the Notice would impose excessive and unduly burdensome recordkeeping requirements on affected taxpayers, and be extremely difficult, if not impracticable, for both taxpayers and the Service to administer.

The following comments, questions, and concerns derive from a group of experienced TEI members employed by companies representing a range of different industries from across the United States:

i. Maintenance

Determining the pool of costs and then allocating them to parking spaces would be a significant undertaking. In general, maintenance occurs via external vendors and in-house facilities department personnel. Contracts are entered into and negotiated for the entire property, and costs are not broken out separately. Most of the maintenance work is performed by in-house facilities department employees, who provide support for the entire campus, which would include all buildings and all exterior locations noted above. These individuals do not currently track their time. Would the pool of costs need to include an allocation of all salaries and benefits for those employees? If so, should it include only employees that perform the work? Many companies do not have systems

[25] I.R.S. Notice 2018-99, 2018-52 I.R.B. 1067, at 1069–70.

in place to make these determinations. In summary, the universe of relevant costs would be difficult to determine, and then, once determined, a cumbersome allocation methodology would need to be developed.

Many outdoor maintenance costs go beyond the maintenance of parking spaces. In the Midwest, for example, companies have snow-removal and ice-mitigation (e.g., salt) costs. And although such costs technically facilitate employee parking in employer-provided parking facilities, they are incurred primarily for employee safety and company liability protection, and yet, under the Notice, they would be disallowed as a cost of providing employee parking.

ii. Utility Costs

For many companies, the primary utility cost is lighting. Exterior lighting facilitates walking and driving through corporate campuses, for vendors and employees alike. Similar to maintenance costs, these costs should be viewed as incurred primarily for employee safety and company liability protection, not as costs of providing parking. And similar to property taxes, there is no simple or easy way for companies to break out the cost of lighting parking spaces.

iii. Insurance

One invoice is received for general property liability insurance. This invoice covers all company-owned parking facilities throughout the United States, many of which would be excludible under the Notice by meeting the specific exception in section 274(e)(7). There is no way to allocate the insurance invoice without going through an inordinate amount of data to determine a reasonable method to allocate the costs to a single facility. Once assigned to a particular property, that cost would need to be analyzed anew to allocate it to the land versus building(s), followed by a third allocation to employee parking versus non-employee parking. By the time the third allocation occurs, the amount would be de minimis. After applying the tax rate, the benefit to the Service would be inconsequential.

iv. Property Taxes

Our company's main corporate campus has over one million square feet under roof, in eight buildings, including office buildings, light manufacturing buildings, a warehouse/distribution facility, garages, et cetera. In general, all parking is non-reserved employee parking with no public parking. In addition to parking lots for employees, there are private roads between the buildings, sidewalks and walking paths, as well as truck routes to the distribution center's loading dock. The township treats this as one parcel for property tax purposes, and the company receives a single property tax assessment and one property tax bill for the entire campus. Allocating an assessed value

to the parking spots for each building would likely require time, effort, and some valuation expertise, either from an outside party or by working with the local tax assessor's office. Appraisals are costly and would need to be done periodically as the relative value of each of the components changes.

v. Interest

Most companies incur debt at one entity and then allocate it across many entities. It would be difficult to come up with a methodology to allocate interest expense by location, let alone to a very small subset of property within a location, for a multinational company—especially under the new section 163(j) regime, which might defer the deduction for such expense for many years.

vi. Rent or Lease Payments

On 100-percent business-leased property, in areas where there is no general public parking, there is little guidance on how to allocate the lease payment to the parking lot associated with a leased building. For example, should we disallow a portion of the lease payment based on square footage of building to parking? Could we discount that in cases where the primary purpose of the lease is the building but the parking lot takes up a larger share of square footage (e.g., one parking space is larger than our office space)? Would it be possible to specify a safe harbor (e.g., allocate *x* percent of a lease to parking)?

Companies would need to go back to landlords and request them to modify the lease agreements so that a separate rental amount exists for automobile parking. In addition to the attorney's fees involved for modifying the lease, landlords typically want compensation for agreeing to modify a lease, and this would be no exception. This also assumes that the Service would respect the amounts allocated to parking in lease agreements.

vii. Parking Area

Paved areas include more than just employee and visitor (e.g. customer or vendor) parking. For example, our distribution centers have paved areas that include private roads to enter the facilities, areas for truck and equipment parking, and dock spaces so that inbound freight trailers can be offloaded and freight on outbound trucks can be onloaded. Invoicing for general repairs and snow removal are for the entire paved area. It would be difficult for vendors to bill separately for each paved area (e.g. automobile parking, truck and equipment parking, docking, private roads) that they service. Automobile parking encompasses only a small portion of the area, thus only a small fraction of the costs incurred should be disallowed. However, since the distribution centers are many years old, records do not exist that would allow us to make a

meaningful allocation on a non-subjective basis (e.g., based on square footage). In order to avoid arguments with IRS agents as to what portion of the area represents automobile parking, the company would have to hire surveyors to calculate the relative square footage of the paved areas (e.g., automobile parking, truck and equipment parking, docking, and private roads).

viii. Allocation of Parking Area

Consider the case where employer-owned parking in a suburban corporate office park is available to employees, lessees, and contractors/vendors (e.g., a corporate IT campus), and where the total number of employees, lessees, and contractors/vendors both fluctuates greatly throughout the year and significantly exceeds the total number of available parking spots. How should the taxpayer allocate costs to "employee spots"? As of year-end? Using monthly averages? On some other basis?

b. Safe-harbor Proposals

To aid Treasury and the Service in their efforts to provide taxpayers with guidance that is both administrable and consistent with the statute, TEI proposes the following alternative, safe-harbor approaches to address some of the issues arising under the Notice. Each would apply to the extent that a taxpayer's parking expenses are not otherwise excepted from the qualified transportation fringe expense disallowance in section 274(a)(4). TEI would also welcome the opportunity to work with Treasury and the Service in developing other alternative guidance with which taxpayers could comply—and the Service could administer—at a reasonable cost, commensurate with the intended policy and revenue benefits of the Act.

i. Employer-owned Facilities

TEI proposes an elective safe-harbor approach to mitigate the numerous allocations of bundled expenditures. For the measurement of non-directly attributed parking costs, employers may elect to treat $100 per parking spot annually as the deemed indirect costs of providing employee parking. This amount plus the directly attributed costs of providing employee parking (such as a lease of parking spots from third parties in an urban setting) would constitute the taxpayer's "total parking expenses" subject to the allocation steps between employees/others.

ii. Employer-leased Facilities

TEI proposes a safe harbor for employer-leased facilities, whereby five percent of the taxpayer's rent or lease payments would be deemed attributable to parking in cases where the lessee's parking expense is not billed or otherwise accounted for separately.