

Parking Expenses for Qualified Transportation Fringes Under § 274(a)(4) and § 512(a)(7) of the Internal Revenue Code.

Notice 2018-99

PURPOSE

This notice provides interim guidance for taxpayers to determine the amount of parking expenses for qualified transportation fringes (QTFs) that is nondeductible under § 274(a)(4) of the Internal Revenue Code (Code) and for tax-exempt organizations to determine the corresponding increase in the amount of unrelated business taxable income (UBTI) under § 512(a)(7) attributable to the nondeductible parking expenses. Sections 274 and 512 were amended by the Tax Cuts and Jobs Act, Pub. L. No. 115-97, §§ 13304 and 13703, 131 Stat. 2054, 2123, 2169 (2017) (the Act), effective for amounts paid or incurred after December 31, 2017. As amended by the Act, § 274(a)(4) generally disallows a deduction for expenses with respect to QTFs provided by taxpayers to their employees, and § 512(a)(7) generally provides that a tax-exempt organization's UBTI is increased by the amount of the QTF expense that is nondeductible under § 274. However, the Act does not address how to determine the amount of the QTF expense that is nondeductible or treated as an increase in UBTI.

This notice also announces that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to publish proposed regulations under §§ 274 and 512 (and under § 6012 with regard to the exempt organization's related filing requirement). The proposed regulations will include guidance on the determination of nondeductible parking expenses and other expenses

for QTFs and the calculation of increased UBTI attributable to QTFs. Until such guidance is issued, taxpayers and tax-exempt organizations that own or lease parking facilities where their employees park may use any reasonable method, as provided in section B of the Interim Guidance on QTF Parking section of this notice, to determine the amount of nondeductible expenses under § 274(a)(4) or the amount of the increase in UBTI under § 512(a)(7). Furthermore, until further guidance is issued, taxpayers may rely on the guidance in this notice to determine the amount of nondeductible parking expenses for QTFs under § 274(a)(4), and tax-exempt organizations may rely on the guidance in this notice to determine the amount of the increase in UBTI under § 512(a)(7).

BACKGROUND AND ANALYSIS

Section 274(a)(4), as added by the Act, provides that no deduction is allowed under Chapter 1 of the Code for the expense of any QTF (as defined in section 132(f)) provided by taxpayers to their employees. Section 132 generally excludes from employees' gross income the value of certain fringe benefits, including QTFs under § 132(f). Although the value of a QTF is relevant in determining the exclusion under § 132(f) and whether the § 274(e)(2) exception (discussed below) applies, the deduction disallowed under § 274(a)(4) relates to the expense of providing a QTF, not its value.

QTFs are defined in § 132(f)(1) 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.¹ Qualified parking is defined in § 132(f)(5)(C) as

¹ Although § 132(f)(1)(D) lists qualified bicycle commuting reimbursements as a QTF, § 132(f)(8) suspends the reference in § 132(f)(1)(D) for taxable years beginning after December 31, 2017, and before January 1, 2026. Thus, for 2018–2025, QTFs do not include bicycle commuting reimbursements.

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. The term does not include any parking on or near property used by the employee for residential purposes. The term “employee” for these purposes is defined in §§ 1.132-1(b)(2)(i) and 1.132-9(b) of the Income Tax Regulations, Q/A-5, as any individual who is currently employed by the employer; the term includes common law employees and other statutory employees, such as officers of corporations. Section 1.132-9(b), Q/A-24, explains that partners, 2-percent shareholders of S Corporations, sole proprietors, and independent contractors are not employees for purposes of § 132(f).

Section 132(a)(5) generally provides that gross income does not include any fringe benefit that qualifies as a QTF. Section 132(f)(2) provides that the amount of QTFs provided by an employer to any employee that can be excluded from gross income under § 132(a)(5) cannot exceed a maximum monthly dollar amount, adjusted for inflation. The adjusted maximum monthly excludable amount for 2018 is \$260.

An employer may provide QTFs as a supplement to an employee’s compensation, either in kind or through a bona fide cash reimbursement arrangement. In addition, § 132(f)(4) provides that QTFs may be provided via compensation reduction agreements. See *also* § 1.132-9(b), Q/A-11 through 15. Section 274(a)(4) disallows a deduction for expenses incurred for QTFs regardless of whether the benefit is provided by the employer in-kind, through a bona fide cash reimbursement arrangement, or through a compensation reduction agreement. Additional guidance regarding qualified parking and other QTFs is provided in § 1.132-9.

Section 274(e) enumerates nine specific exceptions to § 274(a), two of which are

discussed in more detail below as applied to parking expenses. Deductions for expenses that are within one of the exceptions in § 274(e) are not disallowed under § 274(a).

Section 274(e)(2) provides an exception for 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 its employees under Chapter 1 and as wages to its employees under chapter 24. Although the language in § 274(e)(2) refers to a recipient of entertainment, amusement, or recreation, it applies as a specific exception to the application of § 274(a), which, as amended by the Act includes the QTF expense disallowance in § 274(a)(4). Thus, the Treasury Department and the IRS have determined that QTF expenses are included in this exception to the extent that the fair market value of the QTF exceeds the § 132(f)(2) limitation on exclusion and such excess amount is included in an employee's compensation under Chapter 1 and wages under chapter 24. See § 1.132-9(b), Q/A-8. This interpretation is consistent with Congressional intent. See H.R. Rep. No.115- 409, at 266 (2017) ("As part of its broader tax reform effort, the Committee believes that certain nontaxable fringe benefits should not be deductible by employers if not includible in income of employees.").

Section 274(e)(7) provides an exception for expenses for goods, services, and facilities made available by the taxpayer to the general public. When enacting § 274(n) in 1986 (limiting the deduction for meal and entertainment expenses), Congress acknowledged that a taxpayer's customers and potential customers are members of the general public for purposes of § 274(e)(7):

The reduction rule [in § 274(n)] does not apply in the case of items, such as samples and promotional activities, that are made available to the general public. For example, if the owner of a hardware store advertises that tickets to a baseball game will be provided to the first 50 people who visit the store on a particular date, or who purchase an item from the store during a sale, then the full amount of the face value of the tickets is deductible by the owner.

H.R. Rep. No. 99-426 (1986), reprinted in 1986-3 (Vol. 2) C.B. 1, 124, and S. Rep. No. 99-313(1986), reprinted in 1986-3 (Vol. 3) C.B. 1, 72. Thus, the Treasury Department and the IRS have determined that expenses for parking made available to the general public are within this exception. The regulations under § 274(e)(7) further explain the general public exception:

Expenditures for entertainment of the general public by means of television, radio, newspapers and the like, will come within this exception, as will expenditures for distributing samples to the general public. Similarly, expenditures for maintaining private parks, golf courses and similar facilities, to the extent that they are available for public use, will come within this exception. For example, if a corporation maintains a swimming pool which it makes available for a period of time each week to children participating in a local public recreational program, the portion of the expense relating to such public use of the pool will come within this exception.

Section 1.274-2(f)(2)(viii). However, goods, services, and facilities are not made available to the general public if they are made available only to an exclusive list of guests. See *Churchill Downs, Inc. v. Commissioner*, 307 F.3d 423 (6th Cir. 2002).

Generally, § 274 is not applicable to tax-exempt organizations except with regard to determining their deductions connected with unrelated trades or businesses.

However, under § 512(a)(7), as added by the Act, the UBTI of organizations described in § 511(a)(2) (“tax-exempt organizations”) is increased by any amount for which a deduction is not allowable by reason of § 274 and which is paid or incurred by such organization for (1) any QTF as defined in § 132(f), (2) any parking facility used in connection with qualified parking as defined in § 132(f)(5)(C), or (3) any on-premises

athletic facility as defined in § 132(j)(4)(B).

INTERIM GUIDANCE ON QTF PARKING ISSUES

The Treasury Department and the IRS have received questions about how to determine the amount of parking expenses that is nondeductible or treated as an increase in UBTI. This notice provides guidance to determine the nondeductible amount of parking expenses, as well as the amount treated as increasing UBTI. The method of determining the nondeductible amount depends on whether the taxpayer pays a third party to provide parking for its employees or the taxpayer owns or leases a parking facility where its employees park.

A. Taxpayer Pays a Third Party for Employee Parking Spots

If a taxpayer pays a third party an amount so that its employees may park at the third party's parking lot or garage, the § 274(a)(4) disallowance generally is calculated as the taxpayer's total annual cost of employee parking paid to the third party. However, if the amount the taxpayer pays to a third party for an employee's parking exceeds the § 132(f)(2) monthly limitation on exclusion, which for 2018 is \$260 per employee, that excess amount must be treated by the taxpayer as compensation and wages to the employee. As a result, the total of the monthly amount in excess of \$260 that is treated as compensation and wages is excepted from the taxpayer's § 274(a) disallowance amount by § 274(e)(2).

B. Taxpayer Owns or Leases All or a Portion of a Parking Facility

Until further guidance is issued, if a taxpayer owns or leases all or a portion of one or more parking facilities where its employees park, the § 274(a)(4) disallowance may be calculated using any reasonable method. The methodology described in Steps

1-4 of this section B is deemed to be a reasonable method. Using the value of employee parking to determine expenses allocable to employee parking in a parking facility owned or leased by the taxpayer is not a reasonable method because § 274(a)(4) disallows a deduction for the expense of providing a QTF, regardless of its value. Furthermore, for taxable years beginning on or after January 1, 2019, a method that fails to allocate expenses to reserved employee spots (within the meaning of step 1 in this section B) cannot be a reasonable method; however, see the rule later in this notice providing that changes in employee reserved spot designations made by March 31, 2019, may be treated as applying retroactively for purposes of this notice.

For purposes of this notice, a “parking facility” includes indoor and outdoor garages and other structures, as well as parking lots and other areas, where employees may park on or near the business premises of the employer or on or near a location from which the employee commutes to work. The term does not include any parking on or near property used by the employee for residential purposes. If a taxpayer owns or leases more than one parking facility in a single geographic location, the taxpayer may aggregate the number of spots in those parking facilities when using the methodology in this section B. However, if a taxpayer owns or leases parking facilities in more than one geographic location, the taxpayer may not aggregate the spots in parking facilities that are in different geographic locations. See example 8 below.

For purposes of this notice, “total parking expenses” include, but are 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). A deduction for an allowance for depreciation on a parking structure owned by a taxpayer and used for parking by the taxpayer's employees is an allowance for the exhaustion, wear and tear, and obsolescence of property, and not a parking expense for purposes of this notice. Compare § 274(a)(1) (disallowing deductions for any "item" with respect to entertainment activities or facilities) to § 274(a)(4) (disallowing deductions for the "expense" of any QTF). See also *W.L. Schautz v. United States*, 567 F.2d 373, 376 (Ct. Cl. 1977) (noting that § 274(a)(1) applies to deductions broadly, not to expenses), and *Gordon v. Commissioner*, 37 T.C. 986, 987 (1962) ("Any allowance for depreciation is not an 'expense paid' or 'amount paid.'"). Expenses paid for items not located on or in the parking facility, including items related to property next to the parking facility, such as landscaping or lighting, also are not included.

Step 1. Calculate the disallowance for reserved employee spots

A taxpayer that owns or leases all or a portion of one or more parking facilities must identify the number of spots in the parking facility, or the taxpayer's portion thereof, exclusively reserved for the taxpayer's employees ("reserved employee spots"). Employee spots in the parking facility, or portion thereof, may be exclusively reserved for employees by a variety of methods, including, but not limited to, specific signage (for example, "Employee Parking Only") or a separate facility or portion of a facility segregated by a barrier to entry or limited by terms of access.

The taxpayer must then determine the percentage of reserved employee spots in relation to total parking spots and multiply that percentage by the taxpayer's total parking expenses for the parking facility. The product is the amount of the deduction for

total parking expenses that is disallowed under § 274(a)(4) for reserved employee spots. Until March 31, 2019, taxpayers that have reserved employee spots as defined in this notice may change their parking arrangements (changing signage, access, etc.) to decrease or eliminate their reserved employee spots and treat those parking spots as not reserved employee spots for purposes of this notice retroactively to January 1, 2018.

Step 2. Determine the primary use of remaining spots (the “primary use test”)

The taxpayer may identify the remaining parking spots in the parking facility and determine whether their primary use is to provide parking to the general public. If the primary use of the remaining parking spots in the parking facility is to provide parking to the general public, then the remaining total parking expenses for the parking facility are excepted from the § 274(a) disallowance by the general public exception under § 274(e)(7). For purposes of § 274(a)(4) and this notice, “primary use” means greater than 50 percent of actual or estimated usage of the parking spots in the parking facility. Primary use of the parking spots is tested during normal business hours on a typical business day, or in the case of an exempt organization during the normal hours of the exempt organization’s activities on a typical day. Non-reserved parking spots that are available to the general public but empty during normal business hours on a typical business day, or in the case of an exempt organization, during the normal hours of the exempt organization’s activities on a typical day, are treated as provided to the general public. In addition, if the actual or estimated usage of the parking spots varies significantly between days of the week or times of the year, the taxpayer may use any reasonable method to determine the average actual or estimated usage.

For purposes of § 274(a)(4) and this notice, the “general public” includes, but is not limited to, 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. The general public does not include employees, partners or independent contractors of the taxpayer.

Step 3. Calculate the allowance for reserved nonemployee spots

If the primary use of a taxpayer’s remaining parking spots is not to provide parking to the general public, the taxpayer may identify the number of spots in the parking facility, or the taxpayer’s portion thereof, exclusively reserved for nonemployees (“reserved nonemployee spots”). For example, reserved nonemployee spots include spots reserved for visitors and customers, as well as spots reserved for partners, sole proprietors, and 2-percent shareholders of S Corporations.

The number of reserved nonemployee spots in the parking facility, or portion thereof, may be exclusively reserved for nonemployees by a variety of methods, including, but not limited to, specific signage (for example, “Customer Parking Only”) or a separate facility or portion of a facility segregated by a barrier to entry or limited by terms of access. A taxpayer that has no reserved nonemployee spots may go to Step 4.

If the taxpayer has reserved nonemployee spots, it may determine the percentage of reserved nonemployee spots in relation to the remaining total parking spots and multiply that percentage by the taxpayer’s remaining total parking expenses. The product is the amount of the deduction for remaining total parking expenses that is not disallowed under § 274(a)(4).

Step 4. Determine remaining use and allocable expenses

If the taxpayer completes Steps 1-3 in the methodology above and has any remaining parking expenses not specifically categorized as deductible or nondeductible, the taxpayer must reasonably determine the employee use of the remaining parking spots during normal business hours on a typical business day (or, in the case of an exempt organization, during the normal hours of the exempt organization's activities on a typical day) and the related expenses allocable to employee parking spots. Methods to determine employee use of the remaining parking spots may include specifically identifying the number of employee spots based on actual or estimated usage. Actual or estimated usage may be based on the number of spots, the number of employees, the hours of use, or other measures. See examples 7 and 8 below.

EXAMPLES

For each example, assume that the parking expenses are otherwise deductible expenses; that all or some portion of the expenses relate to a QTF under § 132(f); and that the § 132(f)(2) limitation on an employee's exclusion is \$260 per month. For examples 3-10, also assume that the taxpayer or tax-exempt organization uses the methodology described in Steps 1-4 in Section B of this notice, as applicable.

Example 1. Taxpayer A pays B, a third party who owns a parking garage across the street from A, \$100 per month for each of A's 10 employees to park in B's garage, or \$12,000 per year ($(\$100 \times 10) \times 12 = \$12,000$). The \$100 per month paid for each employee for parking is excludible under § 132(a)(5), and none of the § 274(e) exceptions apply. Thus, the entire \$12,000 is subject to the § 274(a)(4) disallowance.

Example 2. Assume the same facts as Example 1, except A pays B \$300 per

month for each employee, or \$36,000 per year ($(\$300 \times 10) \times 12 = \$36,000$). Of the \$300 per month paid for parking for each employee, \$260 is excludible under § 132(a)(5) and none of the § 274(e) exceptions apply to this amount. Thus, \$31,200 ($(\$260 \times 10) \times 12 = \$31,200$) is subject to the § 274(a)(4) disallowance.

The excess amount of \$40 per employee per month is not excludible under § 132(a)(5) and is treated as compensation and wages. As a result, the § 274(e)(2) exception applies to this amount. Thus, \$4,800 ($\$36,000 - \$31,200 = \$4,800$) is not subject to the § 274(a)(4) disallowance and remains deductible.

Example 3. Taxpayer C, a big box retailer, owns a surface parking lot adjacent to its store. C incurs \$10,000 of total parking expenses. C's parking lot has 500 spots that are used by its customers and employees. C usually has approximately 50 employees parking in the lot in non-reserved spots during normal business hours on a typical business day. C usually has approximately 300 non-reserved parking spots that are empty during normal business hours on a typical business day.

Step 1. Because none of C's parking spots are exclusively reserved for employees, there is no amount to be specifically allocated to reserved employee spots.

Step 2. The primary use of C's parking lot is to provide parking to the general public because 90% ($450/500 = 90\%$) of the lot is used by the public. The 300 empty non-reserved parking spots are treated as provided to the general public. Thus, expenses allocable to these spots are excepted from the § 274(a) disallowance by § 274(e)(7). Because the primary use of the parking lot is to provide parking to the general public, none of the \$10,000 is subject to the § 274(a)(4) disallowance.

Example 4. Taxpayer D, a manufacturer, owns a surface parking lot adjacent to

its plant. D incurs \$10,000 of total parking expenses. D's parking lot has 500 spots that are used by its visitors and employees. D usually has approximately 400 employees parking in the lot in non-reserved spots during normal business hours on a typical business day. Additionally, D has 25 spots reserved for nonemployee visitors.

Step 1. Because none of D's parking spots are exclusively reserved for employees, there is no amount to be specifically allocated to reserved employee spots.

Step 2. The primary use of D's parking lot is not to provide parking to the general public because 80% ($400/500 = 80\%$) of the lot is used by its employees. Thus, expenses allocable to those spots are not excepted from the § 274(a) disallowance by § 274(e)(7) under the primary use test.

Step 3. Because 5% ($25/500 = 5\%$) of D's parking lot spots are reserved nonemployee spots, up to \$9,500 ($\$10,000 \times 95\% = \$9,500$) of D's total parking expenses are subject to the § 274(a)(4) disallowance under this step.

Step 4. D must reasonably determine the employee use of the remaining parking spots during normal business hours on a typical business day and the expenses allocable to employee parking spots.

Example 5. Taxpayer E, a manufacturer, owns a surface parking lot adjacent to its plant. E incurs \$10,000 of total parking expenses. E's parking lot has 500 spots that are used by its visitors and employees. E has 50 spots reserved for management and has approximately 400 employees parking in the lot in non-reserved spots during normal business hours on a typical business day. Additionally, E has 10 reserved nonemployee spots for visitors.

Step 1. Because E has 50 reserved spots for management, \$1,000 $((50/500) \times \$10,000 = \$1,000)$ is the amount of total parking expenses that is nondeductible for reserved employee spots under § 274(a)(4).

Step 2. The primary use of the remainder of E's parking lot is not to provide parking to the general public because 89% $(400/450 = 89\%)$ of the remaining parking spots in the lot are used by its employees. Thus, expenses allocable to these spots are not excepted from the § 274(a) disallowance by § 274(e)(7) under the primary use test.

Step 3. Because 2% $(10/450 = 2.22\%)$ of E's remaining parking lot spots are reserved nonemployee spots, the \$200 allocable to those spots $(\$10,000 \times 2\%)$ is not subject to the § 274(a)(4) disallowance and continues to be deductible.

Step 4. E must reasonably determine the employee use of the remaining parking spots during normal business hours on a typical business day and the expenses allocable to employee parking spots.

Example 6. Taxpayer F, a financial services institution, owns a multi-level parking garage adjacent to its office building. F incurs \$10,000 of total parking expenses. F's parking garage has 1,000 spots that are used by its visitors and employees. However, one floor of the parking garage is segregated by an electronic barrier and can be entered only with an access card provided by F to its employees. The segregated floor of the parking garage contains 100 spots. The other floors of the parking garage are not used by employees for parking during normal business hours on a typical business day.

Step 1. Because F has 100 reserved spots for employees, \$1,000 $((100/1,000) \times \$10,000 = \$1,000)$ is the amount of total parking expenses that is nondeductible for

reserved employee spots under § 274(a)(4).

Step 2. The primary use of the remainder of F's parking lot is to provide parking to the general public because 100% ($900/900 = 100\%$) of the remaining parking spots are used by the public. Thus, expenses allocable to those spots are excepted from the § 274(a) disallowance by § 274(e)(7) under the primary use test, and only \$1,000 is subject to the § 274(a)(4) disallowance.

Example 7. Taxpayer G, an accounting firm, leases a parking lot adjacent to its office building. G incurs \$10,000 of total parking expenses related to the lease payments. G's leased parking lot has 100 spots that are used by its clients and employees. G usually has approximately 60 employees parking in the leased parking lot in non-reserved spots during normal business hours on a typical business day.

Step 1. Because none of G's leased parking spots are exclusively reserved for employees, there is no amount to be specifically allocated to reserved employee spots.

Step 2. The primary use of G's leased parking lot is not to provide parking to the general public because 60% ($60/100 = 60\%$) of the lot is used by its employees. Thus, G may not utilize the general public exception from the § 274(a) disallowance provided by § 274(e)(7).

Step 3. Because none of G's parking spots are exclusively reserved for nonemployees, there is no amount to be specifically allocated to reserved nonemployee spots.

Step 4. G must reasonably determine the use of the parking spots and the related expenses allocable to employee parking. Because 60% ($60/100 = 60\%$) of G's parking spots are used by G's employees during normal business hours on a typical

business day, G reasonably determines that \$6,000 ($\$10,000 \times 60\% = \$6,000$) of G's total parking expenses is subject to the § 274(a)(4) disallowance.

Example 8. Taxpayer H, a large manufacturer, owns multiple parking lots and garages adjacent to its manufacturing plant, warehouse, and office building at its complex in the city of X. H owns parking lots and garages in other cities as well. For purposes of applying the methodology in this notice, H chooses to aggregate the parking spots in the lots and garages at its complex in city X. However, H may not aggregate the spots in parking lots and garages in other cities with its parking spots in city X. H incurs \$50,000 of total parking expenses related to the parking lots and garages at its complex in city X. H's parking lots and garages at its complex in city X have 10,000 spots in total that are used by its visitors and employees. H has 500 spots reserved for management and has approximately 8,000 employees parking in the garages and lots in non-reserved spots during normal business hours on a typical business day at H's complex in city X.

Step 1. Because H has 500 reserved spots for management, \$2,500 ($(500/10,000) \times \$50,000 = \$2,500$) is the amount of total parking expenses that is nondeductible for reserved employee spots under § 274(a)(4).

Step 2. The primary use of the remainder of H's parking facility is not to provide parking to general public because 84% ($8,000/9,500 = 84\%$) of the remaining parking spots in the facility are used by its employees. Thus, expenses allocable to these spots are not excepted from the § 274(a) disallowance by § 274(e)(7) under the primary use test.

Step 3. Because none of H's parking spots are exclusively reserved for

nonemployees, there is no amount to be specifically allocated to reserved nonemployee spots.

Step 4. H must reasonably determine the employee use of the remaining parking spots during normal business hours on a typical business day and the expenses allocable to employee parking spots at its complex in city X. Because 84% ($8,000/9,500 = 84\%$) of the remaining parking spots in the lot are used by its employees during normal business hours on a typical business day, H reasonably determines that \$39,900 ($(\$50,000 - \$2,500) \times 84\% = \$39,900$) of H's total parking expenses is subject to the § 274(a)(4) disallowance.

INTERIM GUIDANCE ON SECTION 512(a)(7) ISSUES

As noted above, under the Act, tax-exempt organizations that have employees are required by § 512(a)(7) to increase their UBTI by any amount for which a deduction is not allowable by reason of § 274 for any QTF (as defined by § 132(f)), any parking facility used in connection with qualified parking (as defined in § 132(f)(5)(C)), or any on-premises athletic facility (as defined in § 132(j)(4)(B)). Because § 512(a)(7) increases UBTI for any QTF amount for which a deduction is disallowed by reason of § 274, the rules governing tax-exempt organizations necessarily mirror the rules for taxpayers under § 274. See H.R. Rep. No. 115-409, at 266 (2017) ("The Committee believes that aligning the tax treatment between for-profit and tax-exempt employers with respect to nontaxable transportation and gym benefits provided to employees will make the tax system simpler and fairer for all businesses."). However, § 512(a)(7) does not apply to the extent the amount paid or incurred is directly connected with an unrelated trade or business that is regularly carried on by the organization. In such

case, the amount of the QTF expenses directly connected with the unrelated trade or business is subject to the disallowance under § 274(a)(4) and, thus, is disallowed as a deduction in calculating the UBTI attributable to such unrelated trade or business under the general rule of § 512(a)(1).

Section 512(a)(7) specifically requires UBTI to be increased by any amount for which a deduction is not allowable under § 274 for any parking facility used in connection with qualified parking (as defined in § 132(f)(5)(C)). Although parking facilities are not separately listed in § 274(a)(4), § 274(a)(4) disallows a deduction for QTFs (as defined in § 132(f)), and § 132(f)(1)(C) provides that QTFs include qualified parking. Under § 132(f)(5)(C) and § 1.132-9(b), Q/A-4, qualified parking means parking provided to an employee by an employer on or near the employer's business premises or at a location from which the employee commutes to work (other than property used by the employee for residential purposes) and may be provided on property that the employer owns or leases. Thus, the expenses for a parking facility referenced in § 512(a)(7) are those expenses related to the property an employer owns or leases, at or near the employer's business or at a location from which the employee commutes to work. Expenses for these parking facilities used in connection with qualified parking and as part of the provision of qualified parking are nondeductible under § 274(a)(4) as expenses for QTFs and result in an increase in UBTI under § 512(a)(7). Section 512(a)(7) mentions on-premises athletic facilities. However, the Act did not include a corresponding change to § 274 disallowing deductions generally for on-premises athletic facilities. Accordingly, a deduction for expenses paid or incurred for on-premises athletic facilities is not disallowed under § 274 if the athletic facility is primarily

for the benefit of the tax-exempt organization's employees and does not discriminate in favor of highly compensated employees. See § 274(e)(4); § 1.274-2(f)(2)(v).

The provision of QTFs that results in an increase in UBTI under § 512(a)(7) is not an unrelated trade or business. See Notice 2018-67, 2018-36 I.R.B. 409, which discusses and solicits comments regarding the calculation of UBTI under § 512(a)(6) for exempt organizations with more than one unrelated trade or business. Therefore, any increase in UBTI under § 512(a)(7) is not subject to § 512(a)(6), meaning that an exempt organization with only one unrelated trade or business and an increase in UBTI under § 512(a)(7) does not become an exempt organization with more than one unrelated trade or business subject to § 512(a)(6). Accordingly, for taxable years beginning after December 31, 2017, until further guidance is issued, a tax-exempt organization with only one unrelated trade or business can reduce the increase to UBTI under § 512(a)(7) to the extent that the deductions directly connected with the carrying on of that unrelated trade or business exceed the gross income derived from such unrelated trade or business.

Section 512(b)(12) generally provides a specific deduction of \$1,000 as a modification to the UBTI otherwise determined under § 512(a), which, after the Act, includes the increase in UBTI determined under § 512(a)(7). Furthermore, tax-exempt organizations are required to file a return on Form 990-T, *Exempt Organization Business Income Tax Return*, if they have gross income, included in computing UBTI, of \$1,000 or more. See § 1.6012-2(e). This threshold amount for filing Form 990-T also applies to UBTI calculated with respect to § 512(a)(7). Therefore, organizations for which the sum of (1) gross income from unrelated trades or businesses and (2) the

increase of UBTI under § 512(a)(7) is less than \$1,000 need not file a Form 990-T. Organizations for which this amount is \$1,000 or more must file a Form 990-T. The Treasury Department and the IRS intend to revise the regulations under § 6012 to clarify that amounts which increase UBTI under § 512(a)(7) are included in applying the \$1,000 threshold for filing the Form 990-T.

EXAMPLES FOR TAX-EXEMPT ORGANIZATIONS

The principles illustrated in examples 1 through 8 above apply to tax-exempt organizations. Accordingly, the amount of the deduction disallowed under § 274(a)(4) for each entity would, in the case of a tax-exempt organization with the same relevant facts, be the increase in UBTI under § 512(a)(7). These principles are further illustrated by the following examples:

Example 9. Tax-Exempt Organization J, a religious organization that operates a church and a school, owns a surface parking lot adjacent to its buildings. J incurs \$10,000 of total parking expenses. J's parking lot has 500 spots that are used by its congregants, students, visitors, and employees, and 10 spots that are reserved for certain employees. During the normal hours of J's activities on weekdays, J usually has approximately 50 employees parking in the lot in non-reserved spots and approximately 440 non-reserved parking spots that are empty. During the normal hours of J's activities on weekends, J usually has approximately 400 congregants parking in the lot in non-reserved spots and 20 employees parking in the lot in non-reserved spots.

Step 1. Because J has 10 reserved spots for certain employees, $\$200 ((10/500) \times \$10,000 = \$200)$ is the amount of total parking expenses that is nondeductible for reserved employee spots under § 274(a)(4). Thus, under § 512(a)(7), J must increase

its UBTI by \$200, the amount of the deduction disallowed under § 274(a)(4).

Step 2. Because usage of the parking spots varies significantly between days of the week, J uses a reasonable method to determine that the primary use of the remainder of J's parking lot is to provide parking to the general public because 90% ($440/490 = 90\%$) of the spots are used by the public during the weekdays and 95% ($470/490$) of the spots are used by the public on the weekends. The empty, non-reserved parking spots are treated as provided to the general public. Thus, expenses allocable to these spots are excepted from the § 274(a) disallowance by § 274(e)(7) under the primary use test, and only \$200 of the \$10,000 is subject to the § 274(a)(4) disallowance. Therefore, only \$200 of the expenses for the provision of the QTF will result in an increase to UBTI under § 512(a)(7).

If J does not have gross income from any unrelated trades or businesses of \$800 or more included in computing its UBTI (to reach the \$1,000 filing threshold), J is not required to file a Form 990-T for that year.

Example 10. Tax-Exempt Organization K is a hospital and owns a surface parking lot adjacent to its building. K incurs \$10,000 of total parking expenses. K's parking lot has 500 spots that are used by its patients, visitors, and employees. K has 50 spots reserved for management and has approximately 100 employees parking in the lot in non-reserved spots during the normal operating hours of the hospital.

Step 1. Because K has 50 reserved spots for employees, \$1,000 ($(50/500) \times \$10,000 = \$1,000$) is the amount of total parking expenses that is nondeductible for reserved employee spots under § 274(a)(4). Thus, under § 512(a)(7), K must increase its UBTI by \$1,000, the amount of the deduction disallowed under § 274(a)(4).

Step 2. The primary use of the remainder of K's parking lot is to provide parking to the general public because 78% ($350/450 = 78\%$) of the remaining spots in the lot are open to the public. Thus, expenses allocable to these spots are excepted from the § 274(a) disallowance by § 274(e)(7) under the primary use test, and only \$1,000 is subject to the § 274(a)(4) disallowance. Therefore, only \$1,000 of the expenses for the provision of the QTF will result in an increase in UBTI under § 512(a)(7).

K will need to add the \$1,000 increase of UBTI under § 512(a)(7) to its gross income from unrelated trades or businesses. K is required to file a Form 990-T because the \$1,000 increase to UBTI under § 512(a)(7) meets the filing threshold.

RELIANCE

Until further guidance is issued, taxpayers may rely on the guidance provided in this notice to determine the amount of expenses for QTFs that is nondeductible under § 274(a)(4) or treated as an increase in UBTI under § 512(a)(7).

REQUEST FOR COMMENTS

The Treasury Department and the IRS request comments for future guidance to further clarify the treatment of QTFs under §§ 274 and 512. In particular, the Treasury Department and the IRS request comments about the definitions of "primary use" and "general public" and whether primary use should be used to determine the extent to which parking is made available to the general public under § 274(e)(7). The Treasury Department and the IRS request comments on other methods for determining the use of the parking spots and the related expenses allocable to employee parking. The Treasury Department and the IRS also request comments on the applicability of § 274(e)(8) to expenses for any goods or services that constitute a QTF sold by the

taxpayer to an employee in a bona fide transaction for an adequate and full consideration in money or money's worth and the circumstances under which such a transaction should be excluded from the term QTF for purposes of § 274(a)(4).

WHERE TO SEND COMMENTS

Public comments should be submitted by February 22, 2019 and should include a reference to Notice 2018-99. Comments may be submitted electronically via the Federal eRulemaking Portal at www.regulations.gov (type IRS-2018-0038 in the search field on the **regulations.gov** homepage to find this notice and submit comments). Alternatively, submissions may be sent by one of the following methods:

- By Mail:

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2018-99)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

- By Hand or Courier Delivery: Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR
(Notice 2018-99)
1111 Constitution Avenue, NW
Washington, DC 20224

All recommendations for guidance submitted by the public in response to this notice will be available for public inspection and copying in their entirety.

DRAFTING INFORMATION

The principal author of this notice is Patrick M. Clinton of the Office of Associate

Chief Counsel (Income Tax & Accounting). However, other personnel from the Treasury Department and the IRS participated in its development. For further information about income tax issues addressed in this notice, please contact Patrick M. Clinton at (202) 317-7005; for further information about qualification as a QTF, please contact Mikhail Zhidkov at (202) 317-4774; and for further information about exempt organization issues addressed in this notice, please contact La Vonne Fischer at (202) 317-5800. These are not toll-free calls.