On December 22, 2017, H.R. 1, officially known as An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018 was signed into law. This law is commonly referred to as The Tax Cuts and Jobs Act (“the Act”) and provided several provisions that impacted tax-exempt organizations. In December of 2018 two of the most notable provisions affecting tax-exempt organizations received interpretative guidance in the forms of notices. Notice 2018-99 regarding Parking Expenses for Qualified Transportation Fringes Under §274(a)(4) and § 512(a)(7) and Notice 2019-09 providing Interim Guidance Under Section 4960. The following articles provide summary of the two recently issued notices.

UBTI for Parking Expense for Qualified Transportation Fringe

The IRS released Notice 2018-99 (the Notice) which provides interim guidance to determine the amount of nondeductible parking expenses for Qualified Transportation Fringes (QTFs) under § 274(a)(4) of the Internal Revenue Code and § 512(a)(7) for tax-exempt organizations to determine the corresponding increase in the amount of unrelated business taxable income (UBTI) attributable to nondeductible parking expenses. Until regulations are issued, taxpayers and tax-exempt organizations that own or lease parking facilities may use guidance as outlined in the Notice.

Find it Fast
UBTI for Parking Expense for Qualified Transportation Fringe
Notice on Excise Tax on Excess Compensation
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QTF is defined under § 132(f)(1) to include any employer provided: (1) transportation in a commuter highway vehicle between the employee’s residence and place of employment, (2) transit pass, and (3) qualified parking. § 132(a)(5) generally excludes the value of a QTF from employees’ gross income. While the value of a QTF may be generally excluded from employees’ gross income, the unrelated business income amount of parking expenses is based on the expense of providing a QTF, not on the value of a QTF.

The Notice provides guidance, including examples, for calculating the unrelated business income amounts for parking expenses related to qualified parking under two general scenarios: (1) Taxpayers paid a third party for employee parking spots, and (2) Taxpayer owns or leases all or part of the parking facilities provided to employees, which use a 4-Step methodology.

If an employer owns or leases all or a portion of one or more parking facilities where its employees park, the taxpayer may use any reasonable method to calculate the unrelated business income. However, a method that does not allocate costs to “reserved employee spots” cannot be a reasonable method. The Notice provides a 4-Step methodology that is deemed to be a reasonable method. This methodology is summarized as follows:

The 4-Step methodology revolves around an allocation of total parking expenses based on available parking spots. The steps are as follows:

• **Step 1:** Total parking expenses allocated to employee **reserved** spots are identified and the allocated costs are considered UBTI. Changes in reserved employee spot designations made by March 31, 2019, may be treated as applying retroactively for purposes of the Notice. See examples provided in the Notice.

• **Step 2:** The primary use of remaining spaces is determined. If greater than 50% of the remaining parking spots in the parking facility are provided to the general public, the remaining total parking expenses are not included in unrelated business income. If less than 50%, go to Step 3.

• **Step 3:** The organization would need to calculate the allowance for reserved nonemployee spots, if the primary use is not above 50%. The cost allocated to the reserved nonemployee spots are not considered UBTI.

• **Step 4:** The remaining unallocated parking expenses must be allocated between inclusion or exclusion as a UBTI activity based on estimated or actual usage for normal business days. The Notice defines “total parking expenses” to include repairs, maintenance, utility cost, insurance, property taxes, interest, snow and ice removal, leaf removal, cleaning, landscape costs, parking lot attendant expenses, security, and rent or lease payments or a portion of rent or lease payments (if not broken out separately), and any other expense associated with providing parking. Additionally, the Notice clarifies that deductions for an allowance for depreciation on a parking structure owned by the taxpayer and used by taxpayer’s employees is not a parking expense for purposes of determining unrelated business income under § 512(a)(7).

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 and may be provided on property that the employer owns or leases. Lease or other payments to a third party for employee parking are considered unrelated business income.

Parking facilities in the same geographic location may be aggregated. In Example 8, parking lots and garages may be aggregated if all parking lots and garages are located one city, but aggregation is not allowed for parking lots and garages in different cities.

The Notice contains a reminder that if the parking has value to individual employees greater than the monthly limit provided in § 132(f)(2) (currently $260 per month), that the excess over the limit should be treated as compensatory to the employee and is not considered UBTI for purposes of § 512(a)(7).

The Notice addresses specific aspects of § 274(a)(4) in relation to tax-exempt organizations. The Notice states that § 512(a)(7) does not apply to the extent that the amount is paid is directly connected with an unrelated trade or business that is regularly carried on by the organization. In this case the activity is included in UBTI, the amount of QTF expenses is disallowed under §274(a)(4).

IRC Section 512(a)(7) references on-premises athletic facilities, but no corresponding disallowance under §274 was included except for athletic facilities provided primarily for the benefit of the organization’s employees and does not discriminate for the benefit of highly compensated employees. Therefore, costs associated with on-premises athletic facilities that do not discriminate for the benefit of highly compensated employees, do not result in UBTI.

The Notice states that the increase in UBTI under § 512(a)(7) does not constitute a trade or business under § 512(a)(6), which means that an organization that only has one unrelated trade or business under § 512(a)(6) does not have a second trade or business due to increase of UBTI for QTF expenses. Therefore, for taxable years beginning after December 31, 2017, an exempt organization with only one unrelated trade or business can reduce the increase in UBTI under § 512(a)(7) to the extent that the unrelated trade or business generates a loss. The $1,000 specific deduction under § 512(b)(12) can be used to offset the increase in UBTI under § 512(a)(7) and if the organization has less than $1,000 of QTF the organization is not required to file a Form 990-T.

Additionally, the IRS released Notice 2018-100 which provides certain tax-exempt organizations a waiver of the addition to tax for underpayment of estimated tax payments required to be made on or before December 17, 2018, where the underpayment results from changes to the tax treatment of transportation benefits and unrelated business income for certain fringe benefits for which deduction is disallowed. The waiver applies to organizations that provide QTF to an employee for which an estimated tax payment is required to be made on or before December 17, 2018, and the organization was not required to file a Form 990-T for the taxable year preceding the organization’s first taxable year after December 31, 2017. The waiver is limited to organizations that timely file and timely pay the amount reported on the taxable year for which the waiver was granted.
Notice on Excise Tax on Excess Compensation

On December 31, 2018, the IRS released Notice 2019-09 (the Notice) which provides interim guidance on Internal Revenue Code (IRC) Section 4960 which imposes a 21% excise tax on the amount of remuneration in excess of $1 million and any excess parachute payment paid by an applicable tax exempt organization to a covered employee. Until regulations are issued, taxpayers can rely on this Notice as a reasonable good faith interpretation of IRC Section 4960.

Notably, the Notice provides that the excise tax is imposed on the excess remuneration or excess parachute payment that is made in the calendar year ending with or within the taxable year of the employer. Transition rules are provided for fiscal year end organizations.

Who is Liable for the tax?
The common-law employer, as determined generally for federal tax purposes, is liable for the excise tax. A common-law employer may not avoid liability under IRC Section 4960 by reason of a third-party payor arrangement, such as arrangements with a payroll agent, common paymaster, statutory employer, certified professional employer organizations or other similar arrangements. A payment to an employee from a third-party payor or on behalf of a common-law employer are considered paid by the common-law employer for purposes of IRC Section 4960. For disregarded entities, the sole owner is treated as the common-law employer.

Applicable Tax-Exempt Organization and Related Organization
An applicable tax-exempt organization (“ATEO”) is any organization that for the taxable year:
- Is exempt from taxation under IRC Section 501(a),
- Is a farmers’ cooperative organization described in IRC Section 521(b)(1),
- Has income excluded from taxation under IRC Section 115(1), or
- Is a political organization described in IRC Section 527(e)(1).

Certain government entities which have received a determination letter recognizing exemption under IRC Section 501(a) are considered ATEOs. A government entity may relinquish its IRC Section 501(c)(3) status pursuant to section 3.01(12) of Rev. Proc. 2019-5 and not be subject to the excise tax, as long as its income is excluded from US income tax pursuant to an IRC Section other than IRC Section 115(1).

Remuneration includes any amount that is paid by a related organization, whether taxable or tax-exempt. An organization is considered related if it:
- controls, or is controlled by, the organization;
- is controlled by one or more persons which control the organization;
- is a supported organization as defined in IRC Section 509(f)(3);
- is a supporting organization described in IRC Section 509(a)(3) during the taxable year with respect to the organization; or
- in the case of an organization which is a voluntary employees’ beneficiary association described in IRC Section 501(c)(9), establishes, maintains, or makes contributions to such voluntary employees’ beneficiary association.

The definition of control generally aligns with the annual reporting requirements of Schedule R of Form 990.

Covered Employee
IRC Section 4960(c)(2) defines a covered employee to be any employee who is one of the ATEO’s five highest-compensated employees for the current taxable year or was a covered employee of the ATEO or a predecessor for any preceding taxable year beginning after December 31, 2016. Once an employee is a covered employee, the individual continues to be a covered employee for all future tax years. Generally, there is no minimum threshold to be considered a covered employee, so it is possible that a covered employee may have remuneration less than $1 million. The remuneration used to determine the covered employee is the amount that corresponds to the calendar year that falls within the employer’s taxable year. For example, an employer with a June 30, 2019 year end, uses remuneration from calendar year 2018.

Remuneration paid for medical or veterinary services is not considered in determining covered employee status. Remuneration paid on behalf of an ATEO by separate organizations, whether or not related, is treated as remuneration paid by the ATEO.

The Notice provides a limited services exception if the employer does not pay at least 10% of the total remuneration paid to the employee. If there are no ATEO’s that pay at least 10 percent of the employee’s total remuneration for the calendar year, the exception does not apply to the employer who paid the individual the most remuneration during the calendar year.

The five highest-compensated employees are determined separately for each ATEO, and not on an aggregate basis for a group of related organizations. Therefore, each ATEO will have its own five highest-compensated employees for a given year and will need to separately maintain a list of covered employees.

Excess Remuneration
The excise tax under IRC Section 4960 is based on remuneration paid (other than excess parachute payments discussed later) by an ATEO to a covered employee in excess of $1 million for the taxable year. Remuneration under IRC Section 4960 means wages under IRC Section 3401(a), but includes certain adjustments, such as exclusion of designated Roth contributions under IRC Section 402A(c) and inclusion of amounts included in gross income under IRC Section 457(f). “Wages” under IRC Section 3401(a) generally means all remuneration for services performed by an employee for his/her employer, including FMV of all noncash payments. Remuneration also includes parachute payments that are not considered excess parachute payments separately subjected to excise tax. Certain retirement payments under IRC Section 3401(a)(12) and certain director fees may be excluded from consideration as remuneration.

Any vested remuneration that is treated as paid before IRC Section 4960 is applicable is not subject to the excise tax, although earnings after the effective date on those amounts that are vested but not paid, are treated as remuneration paid for purposes of IRC Section 4960. Vested amounts treated as remuneration before the year in which an employee first becomes a covered employee are not considered remuneration for IRC Sec. 4960 purposes, and therefore not subject to the excise tax.
In the case of a covered employee employed by more than one related organization, each employer is liable for its proportionate share of the IRC Section 4960 excise tax. An ATEO is liable for the greater of the excise tax it would owe as an ATEO or the excise tax it would owe as a related organization with respect to the covered person. If there is a change in relationship of organizations during the year, only the remuneration paid for services performed while the organizations maintain a relationship is included in calculating the liability.

Medical and Veterinary Services
Remuneration and parachute payments that relate to the performance of medical or veterinary services by a licensed medical professional or veterinarian are excluded under IRC Section 4960. A licensed professional is an individual who is licensed under state or local law to perform medical or veterinary services. Generally, this includes physicians, veterinarians, dentists and nurses and may include other individuals depending on state or local law. Medical services excluded under IRC Section 4960 include services for the diagnosis, cure, mitigation, treatment, or prevention of disease and services that affect any structure or function of the body. The services for veterinarians are analogous. Activities related to non-medical services such as administrative, teaching and research are not medical services, unless the employee provides medical care in the course of these activities. The employer may use any reasonable, good faith method to allocate remuneration between medical services and other services, such as an employment agreement, internal time reporting, or representative sample of records (patient, Medicare/Medicaid, insurance).

Excess Parachute Payments
IRC Section 4960 imposes an excise on any excess parachute payment, which is an amount equal to the excess of any parachute payment over the portion of the base amount allocated to such payment. Generally, a parachute payment is any payment in the nature of compensation to or for the benefit of a covered employee, if such payment is contingent of the employee's involuntary separation of employment from the employer and the aggregate present value of the payments contingent upon separation equals or exceeds three times the base amount. Involuntary separation from employment is a separation from employment due to independent exercise of the employee's unilateral authority to terminate the employee, other than due to the employee's implicit or explicit request, if the employee was willing and able to continue to perform services. A separation of employment would include a change in employee status to a bona fide independent contractor and subject to parachute payment analysis. The base amount is the employee's annualized compensation for the five most recent taxable years, which is subject to adjustments if the term is a short period or not a full five years.

Reporting Liability Under IRC Section 4960
The excise tax is reported on Form 4720, Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code. As described above, each employer is liable for its portion of the IRC Section 4960 tax. The return is due by the 15th day of the 5th month after the end of the taxpayer's taxable year. An employer may file a Form 8868, Application for Automatic Extension of Time to File an Exempt Organization Return, to request an automatic extension of time to file the Form 4720. The tax is due at the Form's original due date. The extension is not an extension for payment. No quarterly estimated taxes are required.

Miscellaneous Issues
The Notice notes there is no relationship between the liability under 4960 and liabilities under other excise tax provisions, such as IRC Section 4958, excess benefit transactions, or IRC Section 4941, self-dealing rules. If applicable, these excise taxes may be assessed in addition to the IRC Section 4960 excise tax. If any portion of remuneration is disallowed for any reason under IRC Section 162(m), the amount disallowed is not considered for purposes of IRC Section 4960.

Effective Date
The IRC Section 4960 excise tax is effective for the first taxable year beginning after December 31, 2017. Covered employees are determined for each year beginning after December 31, 2016.

Did you know?

IRS Releases Revenue Procedures
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**Business travel tax compliance: New opportunities on the horizon?**

*Feb 6 | 2 p.m. ET | 19:00 GMT*

Due to increased payroll tax audit activity, more organizations are taking action to address the potential risks arising from business travel, both domestically and abroad. Companies should understand benefits that can be derived from monitoring business travel. What are progressive companies doing? Participants will learn about innovative ways to address risks associated with business travel tax compliance.

**Register**

**Subchapter C update: Consolidated return aspects of tax reform**

*Feb 20 | 2 p.m. ET | 19:00 GMT*

The changes made to the Internal Revenue Code by the legislation commonly referred to as The Tax Cuts and Jobs Act have given rise to numerous questions related to the application of many of the new and amended provisions to consolidated groups. Participants will gain insights into the mechanisms through which the new and amended provisions may be implemented for consolidated groups, with a focus on potential opportunities and pitfalls.

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**Tax Controversy**

**IRS conversations: The current state of Large Business & International**

*Feb 26 | 2 p.m. ET | 19:00 GMT*

The 2017 tax legislation has created many compliance questions and issues. What is the current state of the IRS Large Business & International (LB&I) Division, what are important changes to key programs and initiatives, and how could these developments impact taxpayers and their representatives? Participants will gain insights from conversations with IRS LB&I senior-level executives regarding the latest developments in LB&I key programs and initiatives.

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**Business Strategy & Tax**

**US tax reform: Operations and planning impacts one year later**

*Feb 12 | 2 p.m. ET | 19:00 GMT*

The Tax Cuts and Jobs Act (TCJA) of 2017 was the biggest change in US tax law since 1986. A year into it, what are major impacts on various aspects of business operations and planning? Participants will learn new perspectives on how businesses are responding to the TCJA.

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**Federal Tax**

**Radically interoperable data: Powering the future of health**

*Feb 21 | 1 p.m. ET | 18:00 GMT*

Today, data and information sharing within the health care ecosystem is fragmented and disjointed. How can advanced data and analytics create a more connected health care system for the future? Participants will explore a future health care landscape and the data that’s needed to get them there.

**Register**

**Life Sciences & Health Care**

**The Wayfair sales tax ruling: Implications for private companies**

*Feb 27 | 1 p.m. ET | 18:00 GMT*

The US Supreme Court’s decision in Wayfair v. South Dakota (Wayfair) in June 2018 overruled the prior judicially created sales/use tax nexus standard of physical presence as it applied to South Dakota’s sales/use tax nexus statutes. What impact is this having on private companies with remote seller transactions involving the sale of goods and services? Participants will explore unfolding implications of Wayfair beyond sales tax and how private companies may respond.

**Register**

**Private Companies**
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