

The webcast will start at 1 p.m. Eastern

Please note:

- **Handout** – You can print or download the webcast handout at capincrouse.com/top-tax-issues-2019
- **CPE** – CPE certificates will be emailed to you within the next few weeks. To receive CPE credit you must respond to the polling questions, which are not available on mobile devices. Therefore, in order to receive CPE credit you must log in via a computer.
- **Recording** – A recording of today's webcast will be available at capincrouse.com/top-tax-issues-2019



Top Nonprofit Tax Issues: Minister's Housing Allowance, Parking Tax and More

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5.2.19



Agenda

- Minister's Housing Allowance Update
- The Parking Lot Tax
 - Key Takeaways
 - Overview of Statutory Change
 - IRS Notice 2018-99
 - IRS Notice 2018-100



Minister's Housing Allowance Update

Minister's Housing Allowance

- Seventh Circuit Holds Minister's Housing Allowance Constitutional!!!!!!
 - Court analyzed the challenge under two different Establishment Clause analytical frameworks
 - Under the three-part *Lemon* test the minister's housing allowance was found to:
 - Have been enacted with a secular legislative purpose
 - Avoid excessive entanglement with religion that would be required under the fact-intensive convenience-of-the-employer exclusion under section 119
 - Not have the primary effect of advancing religion on behalf of government, but rather allow churches to advance religion, which is their purpose
 - Avoid excessive entanglement with religion
 - The minister's housing allowance complies with the *historical significance test*

Minister's Housing Allowance

- Recent History
 - 2017 – Co-presidents Annie Laurie Gaylor and Dan Barker (a married couple) and president emerita Anne Nicol Gaylor (Mrs. Gaylor) refiled suit before Judge Crabb
 - From 2011 on, the Freedom from Religion Foundation designated a housing allowance for each of the plaintiffs
 - January 2015, Gaylor, Barker, and Mrs. Gaylor filed amended returns for 2013 claiming a housing allowance, which the IRS allowed as to Gaylor and Barker
 - March 2015, Gaylor and Barker filed an amended return for 2012 claiming a housing allowance, which the IRS denied
 - Judge Crabb found the plaintiffs had standing on the basis of the denied housing allowance from 2012

Minister's Housing Allowance

- Recent History (continued)
 - 2017 – Continued
 - Judge Crabb renewed her finding that the housing allowance under section 107(2) was unconstitutional
 - *Gaylor v. Mnuchin*, No. 16-CV-215-BBC, 2017 WL 4466621(DC WI 2017)
 - Judge Crabb stayed the effect of her ruling until 180 days after the final resolution of all appeals
 - 2018 – On February 8 the government filed its appeal in the case
 - On October 24, 2018, arguments were held in the appeal



The Parking Lot Tax

Key Takeaways

- Qualified transportation fringe benefit exclusion applies to expenses incurred after December 31, 2017
 - Fiscal year taxpayers will owe this tax for their expenses incurred in the 2018 portion of their fiscal year ending in 2018
- Since every nonprofit has employees, every nonprofit should be concerned
- Repeal could happen, but is not assured

Key Takeaways (continued)

- Transit passes and payments to third parties for employee parking will always add to UBTI
- Parking spaces reserved for employees will always add to UBTI
 - “Reserved for CEO”
 - “Employee Parking Only”
 - Removing reserved parking by March 31, 2019 is retroactively effective to January 1, 2018

Key Takeaways (continued)

- If more than 50% of the remaining (i.e., nonreserved) parking spaces are used by other than employees, no addition to UBTI
 - This should help retailers, churches, and higher education taxpayers, *except for their reserved employee parking*
- Must make good faith estimate of employee usage of parking
 - Count employee use on a “typical” business day

Key Takeaways (continued)

- Can't combine geographically diverse locations
- Parking expenses include a range of items such as:
 - Repairs, maintenance, security, landscaping, snow removal, leaf removal, sweeping, etc.
 - Parking expenses do not include **depreciation**
 - i.e., capitalized items not included in countable expenses

Key Takeaways (continued)

- Leased parking counts
 - If lease includes parking spaces, must allocate a portion of rent to parking
 - If lease doesn't include parking spaces, then you still have to allocate a portion to parking
 - Same rules regarding reserved/nonreserved and parking for general public apply

Key Takeaways (continued)

- There is some relief for failure to make estimated tax payments for periods after January 1, 2018 (Notice 2018-100)
- These rules apply to for-profit employers, too!
 - Including CapinCrouse!

Overview of Statutory Change

- TCJA added new IRC § 512(a)(7)
 - **(7) Increase in unrelated business taxable income by disallowed fringe.**
[UBTI] of an organization shall be increased by any amount for which a deduction is not allowable . . . by reason of section 274 and which is paid or incurred by such organization for any **qualified transportation fringe** (as defined in section 132(f)), any **parking facility used in connection with qualified parking** (as defined in section 132(f)(5)(C)) The preceding sentence shall not apply to the extent the amount paid or incurred is directly connected with an unrelated trade or business which is regularly carried on by the organization.
- Applies to expenses incurred after December 31, 2017

Overview of Statutory Change (continued)

- What is disallowed under IRC § 274?
 - IRC § 274(a)(4)
 - **(4) Qualified transportation fringes.**
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.

Overview of Statutory Change (continued)

- So what is a qualified transportation fringe?
 - IRC § 132(f)(1)

For purposes of this section, the term “qualified transportation fringe” means any of the following provided by an employer to an employee:

- (A) Transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee's residence and place of employment.
- (B) Any transit pass.
- (C) Qualified parking.

Ordinarily, qualified transportation expenses include qualified bicycle commuting reimbursement. But these reimbursements are not excluded from gross income between January 1, 2018 and December 31, 2025, so they are excluded from the definition of qualified transportation fringe benefits during this period.

Overview of Statutory Change (continued)

- **Commuter Highway Vehicle** = any highway vehicle —
 - the seating capacity of which is at least 6 adults (not including the driver), and
 - at least 80% of the mileage use of which can reasonably be expected to be —
 - for purposes of transporting employees in connection with travel between their residences and their place of employment, and
 - on trips during which the number of employees transported for such purposes is at least ½ of the adult seating capacity of such vehicle (not including the driver).

Overview of Statutory Change (continued)

- **Transit Pass =**

- any pass, token, farecard, voucher, or similar item entitling a person to transportation (or transportation at a reduced price) if such transportation is on mass transit facilities or a highway commuter vehicle.

- **Qualified Parking =**

- parking provided to an employee on or near the business premises of the employer or on or near a [mass transit facility or commuter highway vehicle facility], in a commuter highway vehicle, or by carpool. Such term **shall not** include any parking on or near property used by the employee for residential purposes.

Overview of Statutory Change (continued)

- **Qualified bicycle commuting reimbursement =**

- any employer reimbursement during the 15-month period beginning with the first day of such calendar year for reasonable expenses incurred by the employee during such calendar year **for the purchase of a bicycle and bicycle improvements, repair, and storage, if such bicycle is regularly used for travel between the employee's residence and place of employment.**
- Reimbursement amount is \$20/month

Application to For-Profit Enterprises

- Note that IRC § 274(a)(4) applies to for-profit enterprises
 - It disallows a deduction in arriving at taxable income
 - It is this disallowed deduction that provides the rationale for IRC § 512(a)(7)

Notice 2018-99

- Purpose of notice
 - How to compute the amount of the deduction disallowed under IRC § 274(a)(4)
 - How to compute the corresponding increase under IRC § 512(a)(7) attributable to nondeductible parking expenses

Notice 2018-99 (continued)

- General rule
 - Taxpayers and exempt organizations that own or lease parking facilities where their employees park may use *any reasonable method* to determine the amount of the nondeductible parking expenses/increase to UBTI
 - Methods laid out in Notice 2018-99 may be relied upon until further guidance is provided

Notice 2018-99 (continued)

- Fair market value vs Cost
 - Fair market value is relevant in determining the amount that is excludible from an employee's wages under IRC § 132(f)
 - IRC § 132(f) provides a monthly exclusion of \$260 (2018) or \$265 (2019) for transportation passes or qualified parking
 - The deduction disallowed under IRC § 274(a)(4) relates to the cost of providing the benefit, not its value

Notice 2018-99 (continued)

- The lost deduction applies to **employees**, not:
 - Partners
 - Independent contractors
 - Sole proprietors
 - 2-percent (or less) shareholders of S-corporations

Treas. Reg. § 1.132-9(b), Q/A-24

Notice 2018-99 (continued)

- Qualified transportation fringe benefits (QTFs) may be provided:
 - In-kind (employer hands out mass transit pass)
 - Bona fide cash reimbursement (employee turns in receipt)
 - Compensation reduction agreement (similar to health FSA)

Notice 2018-99 (continued)

- With respect to compensation reduction agreements:
 - **Qualified transportation benefits aren't deductible.** Section 13304 of P.L. 115-97 provides that no deduction is allowed for qualified transportation benefits (whether provided directly by you, through a bona fide reimbursement arrangement, or through a compensation reduction agreement) incurred or paid after 2017.

Notice 2018-99 (continued)

- Where QTFs are included in an employee's wages by the employer, the employer may deduct the expenses associated with the QTF
 - QTF expenses in excess of the monthly sec. 132(f) limit are required to be included in compensation
 - Thus such expenses are deductible even if they relate to QTFs
 - Employer could choose to treat all QTF related expenses as compensation

Notice 2018-99 Parking Lot Tax Guidance

- The notice identifies 2 parking scenarios:
 - A taxpayer pays a third party for employee parking spots
 - A taxpayer owns or leases all **or a portion** of a parking facility
- The notice does not specifically address:
 - An office lease that includes parking but does not apportion the lease cost to the parking
 - Multi-tenant facilities where all tenants share equal access to parking

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Payment to third party
 - Amount disallowed for-profit employers (included exempt employer UBTI) is the annual amount paid to the third party for employee parking
 - Reduce this amount by any portion that is included in employee compensation

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Payment to third party (continued)

- **Example**

- During 2019, Considine Mortgage Co. pays Elite Parking \$300 per month per employee for its 15 employees to park in a parking garage
 - The annual expense is $\$300 \times 15 \text{ employees} \times 12 \text{ months}$, or \$54,000
 - Of this amount, \$35 per month ($\$300 - \265) is includible in each employee's wages, or $\$35 \times 15 \text{ employees} \times 12 \text{ months} = \$6,300$ per year
 - Thus the annual expense that is nondeductible is $\$54,000 - \$6,300 = \$47,700$

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking

- Parking facility =

- Indoor and outdoor garages and other structures
 - Parking lots where employees may park on or near:
 - the business premises of the employer
 - a location from which employees commute to work

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Parking facilities in the same geographic region may be aggregated
 - “Geographic region” is not defined
 - Parking facilities in one city may not be combined with parking facilities in another city (Example 8)
 - Unclear whether different locations within the same city or metropolitan area can be aggregated

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Allowable costs include such items as:
 - Repairs
 - Maintenance
 - Utility costs
 - Insurance
 - Property taxes
 - Interest
 - Snow and ice removal
 - Leaf removal
 - Trash removal
 - Cleaning
 - Landscape costs
 - Parking lot attendant expenses
 - Security
 - Rent or lease payments or a portion of a rent or lease payment (if not broken out separately)

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - But note, **depreciation is not an includible expense**
 - The IRS cites to *Gordon v. Commissioner*, 37 T.C. 986,987 (1962) for the proposition that the allowance for depreciation is not an expense **paid** or an amount **paid**

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - The IRS specifies a 4-step process for computing the amount to disallow (or by which to increase UBTI)
 - **Step 1** – Compute the disallowance for reserved parking spots
 - **Step 2** – Determine the primary use of the remaining parking spots
 - **Step 3** – Calculate the allowance for reserved nonemployee spots
 - **Step 4** – Determine remaining use and allocable expenses

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 1 – Disallowance for reserved parking spots
 - Reserved parking spots include:
 - Spots reserved for the use of a specific employee (e.g., “Reserved for the CEO,” “Reserved for Employee of the Month”)
 - Spots reserved using signage such as “Employee Parking Only”
 - Spots segregated by a barrier to entry or limited by terms of access

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 1 – Disallowance for reserved parking spots (cont.)
 - Reserved parking spaces should not include:
 - Spaces reserved for parking company vehicles when not in use
 - Spaces reserved for use by company personnel when performing their company duties
 - e.g., spaces reserved for use by company maintenance personnel when parking their company maintenance vehicles

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 1 – Disallowance for reserved parking spots (cont.)
 - Determine the percentage of reserved parking spaces in relation to total parking spaces
 - Multiply this fraction times the total parking expenses for the parking facility

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 1 – Disallowance for reserved parking spots (cont.)
 - **Example**
 - ABC Manufacturing owns a surface parking lot adjacent to its manufacturing plant
 - ABC Manufacturing's parking lot has 500 spaces, 50 of which are reserved for management employees
 - Annual parking expenses are \$10,000

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 1 – Disallowance for reserved parking spots (cont.)
 - **Example (continued)**
 - Percentage of parking spots reserved for employees is 10% (50/500)
 - Parking expenses disallowed due to reserved parking, \$1,000 (10% x \$10,000)

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 1 – Disallowance for reserved parking spots (cont.)
 - **Important Note:**
 - **If signage, barriers to entry, or other markers reserving employee parking are removed by March 31, 2019, then no parking will be deemed reserved from January 1, 2018 on**

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 2 – Primary use of the remaining parking spots
 - Determine whether primary use of remaining parking is to provide parking to the general public
 - Primary use means greater than 50% of the actual or estimated usage of the nonreserved parking spaces
 - Primary usage is tested during normal business hours on a typical business day
 - For exempt organizations, this means during the normal hours of its exempt activities on a typical day

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 2 – Primary use of the remaining parking spots (cont.)
 - Nonreserved spaces that are available to the general public but are **empty** during normal business or exempt activity hours on a typical day are treated as provided to the general public
 - If there is significant variation in usage between days of week and seasons of the year, any reasonable method may be used to determine average or actual usage
 - This would apply to a church that operates a school

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 2 – Primary use of the remaining parking spots (cont.)
 - “General public” includes **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
 - “General public” **does not** include employees, partners, or independent contractors of a taxpayer (or exempt organization)

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 2 – Primary use of the remaining parking spots (cont.)
 - **Example**
 - ABC Manufacturing owns a surface parking lot adjacent to its manufacturing plant
 - ABC Manufacturing’s parking lot has 500 spaces, 50 of which are reserved for management employees
 - 400 employees park in the lot on a typical workday

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 2 – Primary use of the remaining parking spots (cont.)
 - **Example (continued)**
 - Percentage of parking spots reserved for employees is 10% (50/500)
 - The percentage of the remaining spots used by employees is 88.89% (400/450)
 - Therefore, the primary use of the remaining spots is **not** for the use of the general public

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 3 – Allowance for reserved nonemployee spaces
 - This includes spaces clearly marked as visitor parking, customer parking, student parking, etc.
 - Probably does not include handicap spaces unless they are limited to use by visitors, customers, students, etc.

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 3 – Allowance for reserved nonemployee spaces (cont.)
 - The notice states that the result of Step 3 is “the amount of the deduction for remaining total parking expenses that is not disallowed under § 274(a)(4).”
 - This seems too narrow since the statute does not disallow a deduction for parking provided the general public, whether reserved for the general public or not

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 3 – Allowance for reserved nonemployee spaces (cont.)
 - **Example**
 - ABC Manufacturing owns a surface parking lot adjacent to its manufacturing plant
 - ABC Manufacturing’s parking lot has 500 spaces, 50 of which are reserved for management employees
 - 400 employees park in the lot on a typical workday
 - There are 10 spots reserved for visitors
 - Annual parking expenses are \$10,000

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 3 – Allowance for reserved nonemployee spaces (cont.)
 - **Example (continued)**
 - Percentage of parking spots reserved for employees is 10% (50/500)
 - The percentage of the remaining spots used by employees is 88.89% (400/450)
 - The percentage of the remaining spots reserved for non-employees is 2.22% (10/450)
 - Parking expenses not disallowed = \$222 (2.22% x \$10,000)

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 4 – Determine remaining use and allocable expenses
 - **Example**
 - ABC Manufacturing owns a surface parking lot adjacent to its manufacturing plant
 - ABC Manufacturing's parking lot has 500 spaces, 50 of which are reserved for management employees
 - 400 employees park in the lot on a typical workday
 - Annual parking expenses are \$10,000

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - Step 4 – Determine remaining use and allocable expenses
 - **Example (continued)**
 - Percentage of parking spots reserved for employees is 10% (50/500)
 - Cost associated with this parking is \$1,000 (10% x \$10,000)
 - The percentage of the remaining spots used by employees is 88.89% (400/450)
 - Cost associated with this parking is \$8,000 (88.89% x (\$10,000-\$1,000))

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - **Exempt organization example**
 - Seascap Church (SC) operates a church and school
 - The church and school together have 500 spaces used variously by congregants, church employees, school teachers, and students
 - 10 parking spaces are reserved for various employees
 - SC incurs annual parking lot expenses of \$10,000

Notice 2018-99 Parking Lot Tax Guidance (continued)

- Owned or Leased Parking (continued)
 - **Exempt organization example** (continued)
 - On the weekends, approximately 20 employees park in the lot, 400 nonreserved spots are occupied by congregants, and the remainder are empty
 - Step 1: $10/500 = 2\%$; $2\% \times \$10,000 = \200
 - Step 2: Weekdays: $440/490 = 89.80\%$
Weekends: $470/490 = 95.92\%$
>50% provided for general public

Other Scenarios

- Leased office space
 - It is not uncommon for an office lease to specify that the tenant has access to a set number of parking spaces for employees and guests
 - In this case, the employer must allocate a portion of the monthly rent to the parking spaces and figure out the employee use percentage
 - If spaces are only used by employees, then the cost of all the spaces is taxable
 - In determining the amount of the rent to allocate, consider the monthly lease rate for parking if the landlord leases parking spaces

Other Scenarios

- Leased office space (continued)
 - If the lease does not specify a number of parking spaces, but makes parking available to employees, then the employer must still determine an allocation of rent to cover parking for employees and guests
 - If guests account for more than 50% of the parking used, then no loss of deduction or addition to UBTI

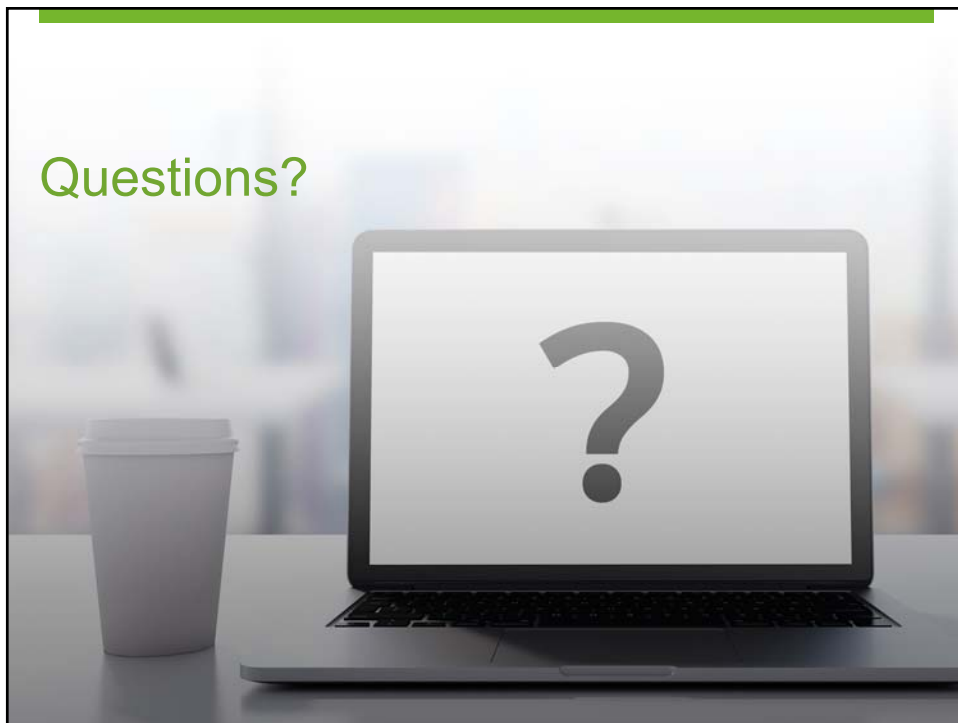
Notice 2018-100 Parking Lot Tax Relief

- This notice provides estimated tax penalty relief to tax exempt organizations:
 - To the extent their underpayment of estimated tax is related to the addition to UBTI imposed by IRC § 512(a)(7)
 - Must not have had to file a Form 990-T for the taxable year immediately preceding the organization's first taxable year ending after December 31, 2017

Notice 2018-100 Parking Lot Tax Relief (continued)

- Must timely file Form 990-T and timely pay the amount reported for the taxable year for which relief is granted
 - But what about organizations that did not file an extension for the 990-T and cannot file a timely return?
- Relief is claimed by writing “Notice 2018-100” on the top of Form 990-T

Questions?



Upcoming Webcast

Please join us! Learn more at capincrouse.com.

Marginal Revenue Analysis – Evaluating Academic Efficiency

May 23
1 p.m. Eastern

Co-presented by:

Tyler VanderVen, Partner, CapinCrouse
Jan Haas, Senior Consultant, CFO Colleague



Thank you.

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