The Legal Services Department of the General Council on Finance and Administration offers the opinion below regarding recent guidance offered by the Internal Revenue Service related to calculating unrelated business income.

December, 2018

On December 10, 2018, the Internal Revenue Service ("IRS") announced "interim guidance regarding the treatment of qualified transportation fringe benefit expenses paid or incurred after December 31, 2017."[1] As part of this guidance, the IRS has addressed how nonprofit organizations should calculate the amount of unrelated business income they must report because of changes made by the Tax Cuts and Jobs Act to the tax treatment of certain employer-provided fringe benefits, including "qualified parking."[2]

Does the interim guidance apply to churches?

Yes, the guidance applies to churches (and other tax-exempt organizations).

Will churches incur unrelated business taxable income ("UBTI") in relation to parking provided to their employees?

The short answer is "maybe," and is in large part dependent upon how the church provides parking for its employees – i.e., whether it (1) pays a third party for parking spots for its employees or (2) owns or leases its own parking facility.

What happens if a church pays a third party for its employees to have access to parking?

According to the IRS's guidance, the amount by which UBTI would be increased would be "calculated as the taxpayer's total annual cost of employee parking paid to the third party." However, if that amount exceeds the monthly cap on what can be excluded from an employee's taxable income, any such excess would not increase UBTI.[3]

What if the church owns or leases a parking facility?

[1] A PDF of Notice 2018-99 is available here.
[2] "The term 'qualified parking' 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 by transportation described in subparagraph (A), 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." (§ 132(f)(5)(C))
[3] See Examples 1 and 2 on pages 11-12 of the notice for an illustration of this scenario.

Under the interim guidance, a church (or any other tax-exempt organization) must analyze both the parking it makes available to its employees and to the "general public."[4] The IRS has laid out four steps for determining the potential impact on UBTI:

1. Reserved spaces for employees. If the church has reserved spaces for its employees, it must calculate the percentage of total spaces those reserved spots represent, then apply that percentage to the "total parking expenses" incurred.[5] The result is the amount by which UBTI would be increased in relation to such reserved spots.
2. Primary use of remaining spots. If the church's "primary use" – defined as "greater than 50 percent of actual or estimated usage of the parking spots in the parking facility" as tested "during the normal hours of the [church's] activities on a typical day" – of the remaining spots is providing parking for the general public, the remaining total parking expenses would not increase UBTI.
3. Reserved spaces for nonemployees. If the primary use of remaining parking spaces is not providing parking to the general public, the church calculates the percentage of the total spaces reserved for nonemployees, then applies that percentage to the total parking expenses incurred. The result is the amount by which UBTI is not increased in relation to such reserved spaces.
4. Spots not already categorized. If a church, after having gone through the first three steps, has any parking expenses/spaces which have not been identified as either increasing UBTI or not, further analysis is needed. This step appears to be most relevant when the second step reveals that the primary use is for employees, rather than the general public.[6]

The Notice includes a number of helpful examples, which serve to illustrate how these steps are to be applied.

So, if a church has reserved spots for its employees, or even just for its pastor, the guidance says the cost associated with those spots would increase the church's UBTI?

Yes, and this could be the only potential problem area for the vast majority of churches, as step two would usually result in a conclusion that the primary use of the remaining spaces would be for the general public. Fortunately, the IRS has given employers (including churches) until March 31, 2019 to reduce or eliminate reserved spaces for employees and will allow such reduction or elimination to be treated as if it happened prior to January 1, 2018. A church that would have a tax obligation solely because of the spaces it reserves for employees would be able to avoid that liability by making changes by the March 31, 2019 deadline.

[4] For the purposes of this interim guidance, the IRS's definition of "general public" includes "congregants of a religious organization."

[5] In the guidance, the IRS defines total parking expenses to "include, 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)."

[6] See Examples 7 and 8 on pages 15-17 of the Notice.

If the church determines some portion of its total parking expense results in an increase to UBTI, does it have to file Form 990-T?

In its Notice, the IRS points out two important rules regarding UBTI and the requirement to file Form 990-T. First, the $1,000 specific deduction available to decrease UBTI applies to any UBTI which results from the new tax treatment of certain fringe benefits. Second, the requirement to file Form 990-T applies only to organizations that have UBTI of at least $1,000. Thus, in applying the interim guidance in the Notice, if a church determines that it must "increase" its UBTI by an amount less than $1,000, it will not have any tax liability and would not have to file Form 990-T if either of the following is true:

- The church has no unrelated business activities which generate additional UBTI; or
- The church has unrelated business activities which generate UBTI, but the sum of that UBTI and the increase required by applying the interim guidance is less than $1,000.

Churches which must increase UBTI by at least $1,000, or which have UBTI from other sources that, when combined with any increase required by the interim guidance, amounts to $1,000 or more, will be subject to the Form 990-T filing requirement and may have to pay some amount of tax.

Why is the IRS calling this "interim guidance"?

The IRS states in the Notice that it will be publishing regulations which will cover the issues addressed by the guidance provided in the Notice. The Notice makes it clear that the interim guidance may be relied on until those regulations are finalized.

What does a church do if, in applying the interim guidance, it determines it must file a Form 990-T for 2018?

The IRS simultaneously issued Notice 2018-100, in which it states it will provide relief, under certain circumstances. In this Notice, the IRS acknowledges the changes to the taxation of certain fringe benefits could result in many nonprofit organizations having to file Form 990-T for the first time. The IRS is therefore providing relief from underpayment penalties if:

1. The underpayment results from the changes made to the tax treatment of the fringe benefits;
2. The nonprofit was not required to file Form 990-T for its prior tax year;
3. The nonprofit both timely files Form 990-T and pays any taxes due; and
4. The nonprofit writes "Notice 2018-100" on the top of its Form 990-T.