



May 4, 2018

The Honorable Steven Mnuchin
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

David Kautter
Acting Commissioner
Internal Revenue Service
111 Constitution Avenue, NW
Washington, DC 20224

Re: Request to Delay Implementation of New UBIT Provisions in IRC 512(a)(6) and 512(a)(7)

Dear Secretary Mnuchin and Commissioner Kautter:

On behalf of the North Carolina Center for Nonprofits, I am writing to request that the Department of Treasury and the Internal Revenue Service delay implementation of two provisions in Public Law No. 115-97 (hereinafter referred to as the Tax Cuts and Jobs Act) that add new subsections 512(a)(6) and 512(a)(7) to the Internal Revenue Code. Both of these new subsections relate to unrelated business income taxes (UBIT) for tax-exempt entities and both took effect on January 1, 2018.

The Center is a 501(c)(3) public charity with more than 1,400 nonprofit members serving all 100 counties of North Carolina. We have heard from dozens of these members with questions and concerns about the applicability of these new UBIT provisions to their organizations. Until the IRS issues formal guidance on these new provisions of the Internal Revenue Code, many tax-exempt nonprofits will remain unsure whether they are liable for UBIT for certain parking and transit arrangements they provide for their employees and how to determine the amount of qualified transportation expenses that are subject to UBIT. Further, until the IRS undertakes an outreach campaign, a significant number of tax-exempt organizations – particularly houses of worship and other nonprofits that have never previously filed IRS Form 990-T – will be unaware that some of their parking and transportation expenses are considered unrelated business income and that they are required to file IRS Form 990-T and pay UBIT on these expenses..

Background

From our conversations with staff, board members, and volunteers of North Carolina nonprofits, two changes to UBIT in the Tax Cuts and Jobs Act are particular sources of confusion and concern:

1. One provision in the Tax Cuts and Jobs Act adds subsection 512(a)(7) to the Internal Revenue Code. This subsection imposes a new tax on nonprofits that provide transportation and parking benefits to their employees. Nonprofits that provide these benefits are now required to pay unrelated business **income** tax (UBIT) on these **expenses** and must file Form 990-T with the IRS. This income tax on nonprofits' expenses is counterintuitive and imposes unrelated business income tax on many tax-exempt organizations that have no activities that would generate unrelated business income (*i.e.* income from trade or business that the organizations regularly carry on that is unrelated to their missions).
2. Another provision in the Tax Cuts and Jobs Act adds subsection 512(a)(6) to the Internal Revenue Code. This subsection requires tax-exempt nonprofits with more than one unrelated trade or business to calculate their unrelated business income – and the related expenses – “separately with

respect to each trade or business.” Because the new statute does not define what constitutes a “separate” trade or business, it is impossible for tax-exempt organizations to understand with certainty whether this subsection applies to their UBIT, and, if so, how they should calculate their unrelated business income from each “separate” trade or business.

Because these changes to UBIT took effect on January 1, 2018, just 10 days after being signed into law by President Trump, most nonprofits were unaware of these new laws until well after they had begun incurring expenses (in the case of IRC Section 512(a)(7)) or undertaking unrelated business activities (in the case of IRC Section 512(a)(6)) that would be affected by these new provisions.

Concerns we have heard from nonprofits

Most of the questions and concerns we have heard about these new UBIT provisions have been about the applicability of the new tax in IRC Section 512(a)(7) to employer-provided parking. In particular, the Center has heard that many nonprofits in urban parts of North Carolina, including in the cities of Charlotte, Raleigh, Durham, Wilmington, and Asheville, may be subject to UBIT on their parking expenses but have found it unclear from the language of IRC Section 512(a)(7) exactly how this will apply to their organizations. Further, some other North Carolina nonprofits may be subject to UBIT on the amounts they pay for employees’ bus or light rail passes, and some nonprofits with multiple lines of trade or business that are subject to UBIT may need to develop new accounting practices to adjust to the change in IRS Section 512(a)(6).

The following is a summary of the most significant questions and concerns that our members have thus far communicated to the Center:

1. **Nonprofits are (rightly) confused about how (and whether) this tax applies to parking benefits they provide for their employees.** For example, some nonprofits have seen the recent update to IRS Publication 15-B. While this publication makes no references to UBIT of tax-exempt entities, it appears to imply that nonprofits are liable for paying UBIT on their expenses for employees’ parking regardless of whether they pay for their employees’ parking directly or whether they reimburse their employees for regular parking expenses.
2. **Nonprofits are receiving conflicting advice from tax professionals about the applicability of these changes to their organizations.** We have heard from several organizations that they have received different guidance when they talked with more than one CPA and/or attorney about these new provisions in the Internal Revenue Code. For example, there appears to be varying opinions among tax professionals about how UBIT applies to the portion of nonprofits’ leases that cover employee parking expenses. Some nonprofits have been advised that they may be better situated renegotiating their leases to change the terms related to payment for parking expenses. Without clear guidance from the IRS, however, these nonprofits may lack the certainty to assess whether they should make such changes.
3. **This may create divergent tax burdens for similarly situated nonprofits.** In many parts of North Carolina, a tax-exempt nonprofit owns its building and parking lot and leases portions of the building – and several parking spaces – to other tax-exempt nonprofits. It would appear that the nonprofit that owns the building and parking lot would not be subject to UBIT, since does not pay for employee parking. However, its tenant nonprofits may be liable for UBIT to the extent they are leasing parking spaces from the landlord nonprofit, even though these may be the same parking spaces that are untaxed when used by employees of the nonprofit building owner.
4. **The IRS has not issued guidance on the applicability of Section 512(a)(7) to certain types of transportation.** Most analysis of the applicability of qualified transportation benefits to payment for transit passes relates parking or urban mass transit. However, employees of nonprofits in certain parts of North Carolina must commute to work by ferry. The organizations that employ

these workers are uncertain whether they are required to pay UBIT on the amount they spend on their employees' ferry passes.

5. **This creates a new (and unexpected) filing burden for many nonprofits, since tax-exempt organizations that provide these parking and transportation benefits will now need to file Form 990-T.** Many of these nonprofits may be unaware of this new tax and may have never had to file Form 990-T nor pay UBIT if they do not have income-producing business activities that would otherwise be subject to UBIT. Some houses of worship – particularly those in urban areas – pay for clergy and staff parking but have never previously had to file any version of the Form 990 with the IRS. Without a targeted outreach initiative from the IRS, it is unlikely that these organizations will be aware of the need to File Form 990-T or pay UBIT. As a result, some organizations could become liable for failure to file Form 990-T and pay UBIT on expenses that they should not reasonably have been expected to realize were taxable. Second,
6. **This establishes a bad policy of applying an income tax to nonprofits' expenses.** We recognize that setting tax policy and revising the Internal Revenue Code is the role of Congress rather than Treasury or the RIS. However, we would note that the policy of imposing unrelated business income tax on certain expenses of tax-exempt organizations is counterintuitive, confusing, and unprecedented (as far as we are aware). Because Section 512(a)(7) was approved with very little deliberation in Congress and with little or no opportunity for input by tax professionals or the affected taxpayers (i.e. tax-exempt organizations), we would hope that Treasury and the IRS would provide an opportunity for nonprofits to receive clear guidance on its applicability to their activities, to have a transition period to implement the necessary record-keeping practices to comply with the new law, and to make the case to members of Congress to make corrective changes to this new provision in tax legislation.

Request for delay

For the reasons described above, the North Carolina Center for Nonprofits requests that Treasury and the IRS immediately delay implementation of IRC Sections 512(a)(6) and 512(a)(7) until one year after: (1) final rules are promulgated; and (2) the IRS has undertaken a targeted outreach campaign to the tax-exempt community. This delay would help provide the necessary official guidance for compliance, adequate notice to affected tax-exempt organizations, and a reasonable transition period for tax-exempt organizations to develop the necessary record-keeping systems. We further request that this delayed implementation be retroactive to January 1, 2018.

Thank you for your consideration of these concerns. Please do not hesitate to contact me with any questions you may have.

Sincerely,



David R. Heinen
Vice President for Public Policy and Advocacy

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