

# Some Employers Can't Abandon Newly Taxable Commuting Benefits

Posted on Feb. 22, 2018

By Stephanie Cumings

Tax-exempt employers have to pay tax on the commuting benefits they provide under the new tax law, and in some cities there may be no way to avoid it.

A few major cities have laws that require employers to offer commuting benefits to their employees, so tax-exempts may be on the hook for those taxes absent changes in local laws.

John E. Schembari of Kutak Rock LLP said that while many tax-exempt employers are considering whether they will continue offering benefits like parking subsidies or transit reimbursements to their employees, some employers don't have that luxury.

"The San Francisco Bay Area, New York City, and Washington, D.C. require certain employers to offer qualified transportation benefits to their employees," Schembari said. "This means that many tax-exempt employers will have [unrelated business taxable income] as a result of complying with these local laws." New York and D.C. passed the Affordable Transit Act and the Transit Benefits Requirement Act, respectively, in 2015, following in the footsteps of San Francisco's Bay Area Commuter Benefits program. Schembari said taxable employers in these areas face a similar dilemma in the lack of an income tax deduction for qualified transportation benefits.

Under the Tax Cuts and Jobs Act ([P.L. 115-97](#)), [taxable employers can no longer deduct](#) amounts used to provide qualified transportation and other fringe benefits. Similarly, amounts used by tax-exempt employers to provide transportation fringe benefits will now be subject to unrelated business income tax. Brian M. Pinheiro of Ballard Spahr LLP said the UBIT for tax-exempts is meant to create parity with taxable employers that lost their deduction.

Carol V. Calhoun of Venable LLP said the local laws requiring employers to provide transportation benefits were passed when there was no downside for the employers because the benefits were either deductible or not taxable. "Exempt organizations aren't used to the idea that if you give a benefit, you suddenly have to pay tax because you gave that benefit," she said recently at a District of Columbia Bar Taxation Community luncheon. "These organizations are suddenly going to be subject to a tax that they didn't anticipate," she added.

Calhoun said some media reports have mischaracterized the changes as only applying to situations in which employers provide money for commuting benefits. However, for tax-exempts, UBIT could arise even when employees put aside their own money in a tax-free account provided by the employer. Pinheiro said that when employees make pretax contributions to transportation benefits or other benefits like [section 401\(k\)](#) plans, that's deemed to be an employer contribution under the tax code, which is why those pretax contributions could give

rise to UBIT.

Kathryn Bjornstad Amin of Groom Law Group said there are still questions about how UBIT will be triggered. She said it would helpful to have more guidance on whether allowing employees to set aside tax-free money to pay for commuting will give rise to the tax. Amin also said there are questions about how the provision will apply to parking facilities. There's a specific reference in the section on UBIT and fringe benefits to qualified parking as defined in [section 132\(f\)\(5\)\(C\)](#), and Amin said it's unclear what Congress's intent was in highlighting this code section given that parking is already included in the general reference to [section 132\(f\)](#).

## New Reporting an 'Enormous Burden'

Jennifer G. Krengel of Steptoe & Johnson LLP said UBIT will also affect small employers that aren't familiar with the reporting requirements and have never filed a Form 990-T, "Exempt Organization Business Income Tax Return."

"It's an enormous burden that's being put on tax-exempt employers," Krengel said at the Employee Benefits session of the American Bar Association Section of Taxation meeting in San Diego. Krengel said the IRS should consider guidance to help small employers understand the reporting requirements because they could face penalties if they fail to meet them. Amin agreed that guidance for small employers would be helpful to make them aware of their new reporting obligations. She said a special, simplified form might be warranted.

Many tax-exempt organizations have gone to great lengths to avoid having any unrelated business taxable income largely to avoid the reporting requirements, Amin said.

"This is something they've been trying to avoid for years, and now all of a sudden they're going to be subject to UBIT, and they'll have to file this form they've never filed before just to report benefits being provided to employees," she said. Amin noted that UBIT generally arises when an employer is engaging in activity unrelated to its tax-exempt purpose. She said providing benefits to employees wouldn't usually strike employers as something unrelated to their business. Pinheiro noted that even for tax-exempts familiar with paying UBIT there would be an added administrative burden of calculating UBIT for transportation benefits.

While one might assume that employers would abandon transportation benefits now that the tax treatment has changed, practitioners said that doesn't appear to be the case. "From what we've been hearing so far, no employers have changed their benefits at all," Amin said. "I think it's because so many employees use these benefits and employers don't want to take that away from them."

Pinheiro noted that employees can still exclude the value of any employer-provided transportation benefits. He said it is strange that Congress took away employers' tax-favorable treatment but not employees', because this creates odd incentives.

"If the employer scraps their program altogether and decides to just pay employees extra salary, the employer can deduct the extra salary because it's just regular salary," he said. "But now the employee doesn't have the pretax benefit."

Even so, Pinheiro agreed that employers might be reluctant to revoke these popular benefits. He said it would likely depend on the cost to the employer. "I think you might see some employers pull back, but I don't expect a full-scale reversal," he said.