KPMG report: Preliminary analysis and observations regarding certain exempt organization provisions in JCT Bluebook

The staff of the Joint Committee on Taxation (JCT) on December 20, 2018, issued the General Explanation of Public Law 115–97—the “Bluebook.” This report provides initial impressions regarding certain exempt organization provisions in the Bluebook (JCS-1-18).

The Bluebook—prepared in consultation with the staffs of the House Committee on Ways and Means, the Senate Committee on Finance, and the Treasury Department’s Office of Tax Policy—provides an explanation of the federal tax provisions enacted in December 2017 as Pub. L. No. 115–97, the law that is often referred to as the “Tax Cuts and Jobs Act” or the “Act.”

The Bluebook contains an explanation of each provision in the Act—including the reason for change to existing law—and thus may provide insight regarding congressional intent underlying those provisions. Note that the Bluebook is technically not considered “legislative history” with regard to the Act. See FPC v. Memphis Light, Gas & Water Div., 411 U.S. 458, 472 (1973). The courts have applied varying degrees of deference to prior versions of Bluebooks issued with regard to prior legislation.

Certain exempt organization provisions

The Act contained several provisions directly applicable to exempt organizations, each of which is addressed by the Bluebook. Guidance released by Treasury and the IRS since the enactment of the Act has answered many questions, and in most respects, the Bluebook’s explanations are consistent with such guidance. However, the Bluebook’s explanations are not consistent with Treasury and IRS guidance in at least two instances.

The first instance relates to section 512(a)(6)—that requires exempt organizations with more than one unrelated trade or business to compute unrelated business taxable income (UBTI) separately for each such trade or business—and its intersection with sections 512(b)(10) and (11)—that generally permit an exempt organization to deduct its charitable contributions in computing UBTI. The Bluebook states:
It is not intended that an exempt organization that has more than one unrelated trade or business be required to allocate its deductible charitable contributions among its various unrelated trades or businesses.

This is contrary to the draft Form 990-T, Exempt Organization Business Income Tax Return, and accompanying instructions (released in October 2018) that suggest that an organization with more than one unrelated trade or business should allocate the charitable contribution deduction among its separate trades or businesses “using any reasonable method” and take the deduction against the income from each such separate trade or business rather than aggregate UBTI. Read TaxNewsFlash-Exempt Organizations announcing the release of the draft Form 990-T instructions.

The second instance relates to section 512(a)(7) which increases UBTI by any amount for which section 274 would disallow a deduction that is paid or incurred by an exempt organization for any qualified transportation fringe (as defined in section 132(f)) and any parking facility used in connection with qualified parking (as defined in section 132(f)(5)(C)).

The Bluebook suggests that “appropriate allocations of depreciation . . . with respect to facilities used for parking” should be taken into account in determining the deductions associated with qualified parking that are disallowed under section 274(a)(4) (and presumably the expenses that must be included in UBTI under section 512(a)(7)). However, the Bluebook also appears to indicate that a technical correction may be necessary to reflect Congress’s intent that such depreciation be taken into account.

By contrast, Notice 2018-99 states that a deduction for an allowance for depreciation on a parking structure is not a parking expense for which a deduction is disallowed under section 274(a)(4) (or that must be included in UBTI under section 512(a)(7)). Read TaxNewsFlash-Exempt Organizations. Until proposed regulations are issued, exempt organizations may rely on the guidance in Notice 2018-99 to determine the expenses associated with parking facilities that must be included in UBTI under section 512(a)(7).

In addition to sections 512(a)(6) and (7), the Bluebook also contains explanations relating to:

- Section 4960 that imposes an excise tax on remuneration in excess of $1 million and “excess parachute payments” paid to certain employees of exempt organizations
- Section 4968 that imposes a 1.4% excise tax on the net investment income of certain private colleges and universities
- Section 170(l) that eliminates the charitable contribution deduction for payments made for the benefit of a higher education institution that grant the donor the right to purchase seating at an athletic event in the institution’s athletic stadium.

For more information, contact a tax professional with KPMG’s Washington National Tax practice:

Alexandra Mitchell | +1 202 533 6078 | aomitchell@kpmg.com
Preston Quesenberry | +1 202 533 3985 | pquesenberry@kpmg.com
Randall Thomas | +1 202 533 3786 | randallthomas@kpmg.com

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