



Disallowance Questions Answered: New Final Rule on Aircraft Operating Expenses Attributable to Commuting

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New Final Rule on Commuting Disclaimer

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New Final Rule on Commuting Historical Background

- Historically, commuting was defined as travel from the employee's residence to the employee's principal place of business
- Tax treatment prior to tax reform
- Impact to employee
 - Use of the employer-provided aircraft to travel between the employee's residence and place of employment was considered personal in nature
 - SIFL income would be imputed to the employee on his/her Form W-2

New Final Rule on Commuting Historical Background

- Impact to Employer
 - Commuting use of the employer-provided aircraft by the employee was considered a personal non-entertainment use of the aircraft
 - Consequently, even if the employee was a specified individual, the employer was entitled to deduct all expenses allocable to such use since such use was not subject to the disallowance of expenses related to personal entertainment use of the aircraft by specified individuals
 - However, travel to and from an employee's vacation home would likely be viewed as entertainment travel

New Final Rule on Commuting Recent Changes – TCJA

- The Tax Cuts and Jobs Act of 2017 (TCJA) added a new Section 274(l) to the Internal Revenue Code, which provides in part that:

No deduction shall be allowed under this chapter for any expense incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer in connection with travel between the employee's residence and place of employment, except as necessary for ensuring the safety of the employee.

- Section 274(l) applies to tax years beginning after December 31, 2017

New Final Rule on Commuting Recent Changes – TCJA

- Section 274(l) does not define:
 - employee's residence
 - place of employment
 - necessary for ensuring the safety of the employee

- Lack of definitions left aircraft owners and operators confused as to which aircraft-related expenses were subject to the disallowance

New Final Rule on Commuting Recent Changes – Final 1.274-14 Reg

- IRS promulgating Treasury Regulation Section 1.274-14 to provide guidance on Section 274(l)(1)
 - NPRM – published June 23, 2020
 - Final Rule – published Dec. 16, 2020,
- Reg. 1.274-14 applies to tax years beginning on or after Dec. 16, 2020

New Final Rule on Commuting Definition of Residence

- Per Reg. sec. 1.274-14(c)(2), the term “residence” means a residence as defined in Reg. sec. 1.121-1(b)(1).
- Consequently, a residence may include a house, apartment, houseboat, etc.
- Furthermore, the final regulations state that the employee’s residence is not limited to the employee’s principal residence. It may include vacation homes or other residences where the employee may live temporarily.

New Final Rule on Commuting Definition of Employee

- Per Reg. sec. 1.274-14(c)(1), the term “employee” means an employee of the taxpayer as defined in section 3121(d)(1) and (2)
- This includes only corporate officers and common law employees
- The final regulations appear to exclude directors, partners, and shareholders from the commuting disallowance rules Expenses related to the commute of these individuals remain deductible as under prior law.

New Final Rule on Commuting Definition of Place of Employment

- Place of Employment is an employee's regular or principal (if more than one regular) place of business
 - an employee must have at least one regular or principal place of business
 - does not include temporary or occasional places of employment

New Final Rule on Commuting Definition of Place of Employment

- What about employees who works full-time from home but occasionally travels to their employer's corporate office or other corporate facility?
 - Remains unclear whether the home office or the corporate office or other corporate facility would be their "principal place of business"
- Expenses incurred for travel between a residence and a temporary or secondary place of business would be deductible as business related travel expenses

New Final Rule on Commuting Employee Safety Exception

- Treas. Reg. 1.274-14 provides that transportation is necessary for ensuring the safety of an employee “if unsafe conditions, as described in §1.61-21(k)(5) exist for the employee”
 - §1.61-21(k)(5) provides that unsafe conditions exist “if a reasonable person would, under the facts and circumstances, consider it unsafe for the employee to walk to or from home, or to walk to or use public transportation at the time of day the employee must commute”
 - History of crime in the geographic area at the time of day of the commute is a factor
 - How does this relate to air transportation?
 - What about COVID-19?

New Final Rule on Commuting Employee Safety Exception

- “Reasonable person” standard appears lower than the “bona fide business oriented security concern” standard for Standard Industry Fare Level (SIFL) rules
- May not be necessary for an independent security study or to implement an overall security program for purposes of IRC 274(l)(1)

New Final Rule on Commuting

Section 274(e) exceptions

- The final regulations confirm that the section 274(e) exceptions do not apply to the section 274(l)(1) commuting expense disallowance.
- Accordingly, all expenses associated with an employee's use of a company aircraft for commuting are disallowed.
 - Does not matter whether the employee is a "Specified Individual"
 - Does not matter whether the employee reimbursed the company for any portion of the value of the transportation
 - Does not matter whether the employee recognized fringe benefit income for the transportation under SIFL rule

New Final Rule on Commuting Disallowance Calculations

- Unclear whether “all expenses” includes depreciation
 - IRC 274(a): *“No deduction otherwise allowable under this chapter shall be allowed for any item”*
 - interpreted to include depreciation
 - IRC 274(l): *“No deduction shall be allowed under this chapter for any expense”*

New Final Rule on Commuting Disallowance Calculations

- No specific method for calculating the proportion of an aircraft operator's total aircraft operating expenses that should be attributed to commuting has been provided.
 - IRS declined to adopt a “marginal cost” approach
 - Presumably, a similar methodology for calculating disallowance under Reg. 1.274-10 may be appropriate
 - Other methods may also be acceptable



Q&A

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