PILLA TALKS TAXES

DAN PILLA'S MONTHLY TAX AND FINANCIAL BULLETIN

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IRS Intensifies Scrutiny of ERC Claims

Criminal Investigations Heat Up

As the IRS was flooded with claims for the Employee Retention Credit (ERC), it became increasingly concerned during 2023 that many claims were filed by businesses that might not qualify for the credit. And if the agency is correct, this is no small matter. As of early 2024, the IRS processed about 3.6 million claims granting refunds to businesses of about $230 million. The ERC is one of the largest COVID-era government giveaways to businesses.

To deal with the potential for large-scale ERC fraud, the IRS instituted a number of actions and programs designed to stem the tide. This started in July 2023, when the IRS announced a moratorium on processing new ERC claims. See: IR-2023-135 (July 2023). The IRS stopped processing new claims in September 2023, and throughout the remainder of the year it worked to put systems in place to guard against the issuance of refunds in questionable cases.

In October 2023, the IRS announced procedures allowing businesses to withdraw improper ERC claims. See: IR-2023-193 (Oct 19, 2023). The procedure allows businesses to withdraw ERC claims if they either were not issued a refund per the claim, or if they did receive a refund, did not deposit or otherwise negotiate the refund check. See the November 2023 issue of *PTT* for specific guidance on how the withdrawal program operates.

In early December the IRS announced that it mailed out more than 20,000 notices to businesses informing them that their ERC claims were disallowed. Since then, thousands more such notices

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have been issued. See: IR-2023-230 (Dec 6, 2023).

Then on December 21, the IRS announced the terms of its new Voluntary Disclosure Program for ERC claims. Under this program, a company that received an improper refund could elect to pay back 80% of the refund amount, retaining 20% in recognition of income tax deductions that had to be adjusted when the ERC application was made in the first place. See: IR-2023-247 and Announcement 2024-3.

Under the Voluntary Disclosure Program, participants would (among other terms): 1) not be subject to penalties and interest on the 80% if paid in full, 2) would not be required to amend payroll or income tax returns, and 3) would be required to disclose the name and contact information of any person or organization who assisted or advised the business in making the ERC claim. The deadline for submitting claims under this program was March 22, 2024.

As evidenced by this flurry of ERC enforcement activity, the IRS is very concerned about bogus ERC claims. In addition to the problems mentioned above, the IRS has stepped up both civil audits of ERC claims, and criminal investigations targeting both businesses and ERC promoters. The agency promises that more activity is planned for the coming year.

In the meantime, the IRS issued yet another release that, for the first time, specifically identifies the issues the agency looks at when flagging ERC claims as potentially invalid. See: IR-2024-75 (Mar 20, 2024). This release identifies seven suspicious signs of a potentially bad ERC claim. Let's review them.

1. CREDIT CLAIMED FOR TOO MANY QUARTERS

Eligibility for the ERC credit is determined on a quarter-by-quarter basis, beginning with the second quarter of 2020, and continuing through the third quarter 2021. Only in certain, very narrow, circumstances, is a business eligible for a credit in the fourth quarter 2021. Thus, a business that claims a credit for every available quarter will be looked at. You must determine your eligibility for each quarter standing alone.

2. NON-QUALIFYING GOVERNMENT SHUTDOWN ORDERS

In order to claim the credit based on the government shutdown order criterion, the business must have been subject to a governmental order fully or partially shutting down business activities in its area. Business operations had to be affected by this shutdown order. Some businesses may have claimed the credit if any government order was in place, even if operations

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weren't affected by it, or if they chose to voluntarily suspend business operations. ERC claims under these circumstances would be invalid. For an ERC claim to be valid under the government shutdown rules:

- The government order must have been in effect and the employer's operations must have been fully or partially suspended by the order during the period for which the credit is claimed,
- The government order must be due to the COVID-19 pandemic, and
- The order must have come from a federal, state or local government body. It cannot be suggested guidance, a recommendation, or any other kind of non-binding statement.

In some cases, government agencies issued guidance and "helpful hints" on keeping workers and the public safe during the pandemic. For example, the Occupational Safety and Health Administration (OSHA) issued such guidance on occasions, as did various state agencies. Such guidance generally does not rise to the level of a government order requiring businesses to fully or partially cease operations under threats of fines and penalties.

You must make sure to have documentation establishing: 1) the issuance of a government order directly related to COVID-19, 2) the extent to which it suspended operations, and 3) the duration of the suspension. Keep in mind, as stated above, qualification for the ERC is determined on a quarter-by-quarter basis. Thus, a government order in place for the second and third quarters of 2020 does not constitute a qualified order for the fourth quarter of 2020.

3. TOO MANY EMPLOYEES AND WRONG CALCULATIONS

Many businesses claim a credit based on *total* wages paid to *every* employee on the payroll. But this might not be accurate. The law changed several times throughout 2020 and 2021 as to who qualified and the dollar amounts subject to the credit. Moreover, certain employees, such as family members, do not qualify for the credit in any event. Remember, the quarter-by-quarter analysis rules are applicable for all elements of the credit, including qualifying employees and the dollar amounts of wages paid. Care must be taken in the evaluation process to ensure that the claimed ERC is not excessive.

4. SUPPLY CHAIN ISSUES

Many ERC promoters suggested that even if a business was not directly affected by a government shutdown order, it may nevertheless claim the ERC if its critical suppliers of materials, equipment, etc., were shut down. While it is true that supply chain problems directly attributable to government shutdown orders affecting critical trading partners can be the basis of an ERC claim, the rules are very strict and they apply quite narrowly. In order to sustain an ERC claim based on supply chain issues, you must carefully review the rules. In particular, see IRS Chief Counsel Memo AM 2023-005 (July 2023). This memo provides five different potential fact scenarios under which supply chain issues might give arise to an ERC claim. Just one such scenario qualifies as a "governmental shutdown" that prevents the operation of a downstream business.

5. ERC CLAIMED FOR TOO MUCH OF A GIVEN TAX PERIOD

Generally, a business can qualify for the ERC for an entire calendar quarter if operations were fully or partially suspended due to a government order during the entire calendar quarter. But not all government orders were in effect for the entirety of a given quarter. A business can claim the ERC only for wages paid during the suspension period. If the suspension period did not cover an entire quarter, the ERC cannot be claimed for wages paid during the entire quarter under the shutdown order criterion. Note, however, that an ERC can also be based on a percentage drop in gross revenue during a calendar quarter as compared to the same quarter in 2019. But this test too is based on a quarter-by-quarter analysis.

6. BUSINESS DIDN'T PAY WAGES OR DIDN'T EXIST

A business may claim the ERC only for tax periods in which it paid wages to qualifying employees. IRS reports that some businesses claimed the ERC for periods in which they did not have any eligible employees. The ERC is based on wages paid to eligible employees during the periods covered by the law. If no wages were paid, no credit is available. Moreover, IRS analysis shows that some businesses are claiming credits during periods they didn't even exist. To qualify, the business must have been in operation, and must have paid wages to qualifying employees, during the period for which the credit is sought. The IRS is disallowing the claims made by such businesses.

7. PROMOTER CLAIMS, "THERE'S NOTHING TO LOSE"

Business owners need to beware of any promoter hustling ERC clients by claiming they have "nothing to lose" by filing the claim. Bogus ERC claims, if paid by the IRS, are subject to audit and repayment of the credit, along with penalties and interest, not to mention the legal fees and costs associated with the audit or other enforcement action. And in the worst case, even if a refund is not granted, if a business knowingly and intentionally files a claim the business's owners know to be false, believing they had "nothing to those," such an action could form the basis of a criminal charge.

According to the IRS, the Criminal Investigation unit has initiated more than 386 criminal cases, worth almost $3 billion. These cases have resulted in twenty-five investigations leading to federal charges, twelve convictions, and six sentencings. And while this may not seem like a lot of cases in the context of the 3.6 million ERC claims paid by the IRS to date, the agency is running ongoing investigations and is actively seeking to prosecute the most egregious cases of fraud.

On the civil side of enforcement, the IRS sent out approximately 12,000 letters to businesses in late December disallowing approximately 22,000 ERC claims. The result is more than $572 million in proposed assessments. While these proposed assessments are subject to appeal, the entity claiming the credit bears the burden to prove the claim is correct.

In addition, the IRS collected $224 million from the Voluntary Disclosure Program (now closed), and saved $251 million in payouts from the claims withdrawal program, which is still available.

CONGRESS ADDRESSES ERC FRAUD

While it is still possible to file an ERC claim by amending employment tax returns, the IRS is pushing Congress to grant more time to audit those claims. Normally, the IRS has just three years from the date a return is filed in which to audit the return. IRS is now asking Congress to extend the statute of limitations from three years to six years for ERC claims. The House passed a bill in mid-March containing a provision that would do just that, but it stalled in the Senate for unrelated reasons. I believe it will likely pass this year.

If the statute of limitations is extended to six years, it's possible the IRS may re-open the ERC Voluntary Disclosure Program, which ended on March 22, 2024.

IRS LETTER 6577

The notice the IRS is currently mailing to businesses regarding disallowed ERC claims is Letter 6577. It states that the business erroneously or incorrectly claimed the ERC, provides a breakdown of why the IRS believes it is incorrect, and gives the business the opportunity to appeal.

This is different than the letters that went out late last year and into January of 2024. Those letters informed businesses that ERC claims were under audit and required additional documentation to support the claim.

If your business receives a Letter 6577 you must consult counsel immediately. The burden of proof is on the taxpayer to prove the ERC claim is correct. The IRS does not have to prove the claim is incorrect.

CONCLUSION

If you filed an ERC claim as a result of responding to marketing by promoters, you should give careful consid-

Continued on page 7.

THE 2024 TAXPAYERS DEFENSE CONFERENCE

Mark Your Calendars Now!

The date is now set for the 2024 Taxpayers Defense Conference. This is our 30th year of providing the best, most cutting-edge and up-to-date information available in the nation to tax professionals practicing in the areas of IRS problems resolution and taxpayers' rights. If you are a tax pro representing businesses or individuals before the IRS, you simply must attend this seminar. There is simply no substitute for attending this conference.

CONFERENCE DATES:

Thursday & Friday, Nov 7 & 8, 2024 – 9AM to 5PM
Wednesday, Nov 6, 2024 – 6:30PM – TDI members only networking and business meeting (spouses welcome)

LOCATION:

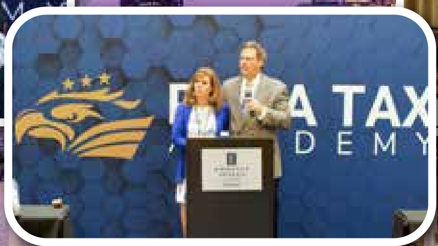
DoubleTree by Hilton Hotel & Suites Houston Galleria
5353 Westheimer Road, Houston, TX 77056-5474

Reservations:

1-800-245-6120
SRP Code is TD2.

We will have a room block set up by the end of March 2024. For room reservations, contact the hotel directly. To make reservations to attend the conference, call Jean at **1-800-346-6829 or email: Jean@taxhelponline.com.**

DON'T WAIT. Do it now!



Call Jean at **1-800-346-6829**
or email: Jean@taxhelponline.com

2023 Taxpayers Defense Conference

The 2023 Taxpayers Defense Conference is now in the books. It was our 29th consecutive annual conference and it was a great success. We had about forty people in the room with us in Tampa, FL, and another fifteen streaming live online. Online attendees were able to participate by asking questions through the chat function on our platform.

Our presenters (besides myself) included Scott MacPherson, who did a two-hour ethics session; Steve Klitzner, who did a session on how to challenge underlying assessments in CDP appeals; and for the first time, my daughter MacKenzie Hesselroth (Pilla), who presented a session on how to meet the burden of proof in CDP cases. That session is an outstanding supplement to the above Special Report on releasing levies. All agree that she did a great job with her first-ever presentation of this kind. We will see more of her in the future.

MacKenzie discusses the burden of Proof

If you missed the Conference, we are working to have the self-study materials available soon.

Check out PillaTaxAcademy.com for the latest coursers and webinarts available.

2023 Defense Conference Speakers
left to right: Dan Pilla, Steve Klitzner, MacKenzieHesselroth, Scott MacPherson

Dan Answers Questions

Jean takes questions from online attendees eration to having experienced counsel review the claim. And while the Voluntary Disclosure Program is closed as of March 22nd, the claim withdrawal process is still available. This program applies to ERC claims that have not been paid by the IRS, or if a check was issued, the business did not yet negotiate the check. See the lead article in the November 2023 issue of this newsletter for all the details on withdrawing an ERC claim.

The Tax Court Petition Filing Deadline

Is it Carved in Stone?

BY SCOTT MACPHERSON

IRS deadlines are hard and fast, correct? We have said a thousand times, if you don't respond to IRS notices within the stated deadlines, you lose your rights – end of story. This is especially true with statutory notices that carry judicial appeal rights. Two such notices that we see routinely are (1) the statutory notice of deficiency ("SNOD") that relates to an IRS determination of additional taxes owed, and (2) the Notice of Determination issued in connection with a Collection Due Process (CDP) appeal.

Both notices constitute a final administrative determination regarding the merits of one's case. The SNOD says the citizen owes more taxes, and the Notice of Determination is the Appeals Office's ruling on a citizen's challenge to the IRS's intended collection action (either lien or levy). Both notices carry Tax Court appeal rights to judicial review, and in both cases, the petition for review must be filed within a stated period of time. In the case of a SNOD, Code § 6213 mandates that the petition generally must be filed within 90 days of mailing the SNOD. In the case of a Notice of Determination, the petition must be filed within 30 days of the Notice, per Code § 6330.

We've always believed these deadlines are carved in stone. They could not be extended, certainly not by the IRS, so failure to file a petition within the prescribed deadline was fatal to one's right of judicial review of the IRS's decision.

That no longer seems to be the case.

In *Boechler, P.C. v. Commissioner,* 142 S.Ct. 1493 (2022), the Supreme Court unanimously held that the deadline for petitioning the Tax Court is subject to "equitable tolling" with respect to CDP appeals. The Third Circuit, in *Culp v. Commissioner,* 75 F.4th 196 (3rd Cir. 2023), became the first appellate court to address the idea of "equitable tolling" in the context of a SNOD. *Culp* applied the Supreme Court's holding in Boechler and reached the same unanimous conclusion.

The pertinent facts of the two cases are the same: the taxpayers filed a petition with the Tax Court after the respective statutory deadline, an act which not too long ago, I would have told you would simply have killed the taxpayer's appeal rights. And in fact, in both cases, the Tax Court dismissed the petitions for lack of jurisdiction. Both petitioners appealed.

For clarity, these two cases represent two different paths of jurisdictional review of proposed IRS actions. The first, CDPH, concerns proposed levies or the filing of a notice of tax lien. Before initiating a levy or filing a notice of lien, the IRS is required to give a taxpayer a written notice of the proposed action. The taxpayer then has a right to an administrative hearing wherein he can argue why the proposed action should not be taken. If the hearing officer sustains the proposed action, the taxpayer has thirty days to appeal that decision to the Tax Court. See: IRC § 6330.

Similarly, if the IRS believes that a taxpayer owes more taxes than was reflected on his return (or if he failed to file a return), the IRS must mail a notice of the proposed deficiency, with an explanation, to the taxpayer before it assesses the proposed debt. The taxpayer has a right to challenge the proposed deficiency in the Tax Court. Generally the deadline is ninety days. If he does not file a petition in the Tax Court in a timely manner, the proposed deficiency will be assessed against the taxpayer and the IRS may begin collection. See: IRC § 6213.

But now both the Supreme Court and the Third Circuit said that these filing deadlines are not hard and fast. Rather, they are subject to "equitable tolling." We must define this phrase to understand why the courts ruled the way they did. In the words of the Third Circuit,

> The equitable tolling doctrine pauses the running of, or tolls, a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action. It is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods. *Culp* at 203 (3rd Cir. 2023) (internal quotations and citations omitted).

Examples of an "extraordinary circumstance" include fire, hurricane, flood, death of a child or spouse, being hospitalized, and most surely, the "car on head" defense presented by Dan Pilla at the 2023 Defense Conference.

On the other hand, "jurisdictional" deadlines cannot be waived, forfeited, or tolled. Therefore, the decisive legal issue before both courts was whether the deadline for filing the Tax Court petition was jurisdictional or not. At the start of its opinion the Supreme Court explained:

> Jurisdictional requirements mark the bounds of a "court's adjudicatory authority." Yet not all procedural requirements fit that bill. Many simply instruct "parties [to] take certain procedural steps at certain specified times" without conditioning a court's authority to hear the case on compliance with those steps. … The distinction matters. Jurisdictional requirements cannot be waived or forfeited, must be raised by courts *sua sponte*, and, as relevant to this case, do not allow for equitable exceptions. *Boechler* at 1497 (internal citations omitted).

The Court continued, saying, "To that end, we treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is." *Id*. This is determined by the "traditional tools of statutory construction." *Id*. No particular word or words are required, but the language of the statute "must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Id*.

The Court then went back and forth with the IRS analyzing the grammar of § 6330, concluding at the end that the deadline is not clearly jurisdictional.

The Third Circuit in *Culp* had the benefit of referring to the Supreme Court's *Boechler* decision. The *Culp* court noted, "If the § 6330(d*)(1)* deadline in *Boechler* fell short of being jurisdictional, § 6213(a)'s limit must as well." *Culp* at 201.

When applying the aforementioned test of statutory construction, the Third Circuit noted a difference in language between the beginning of the statute and the end of the statute:

> The most pertinent part of § 6213(a) provides that "[w]ithin 90 days . . . after the notice of deficiency . . . is mailed . . . the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency." Nothing in that language links the deadline to the Court's jurisdiction. Yet, elsewhere in §6213(a), Congress specified that "[t]he Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition." *26 U.S.C.* § 6213(a). So Congress knew how to limit

> the scope of the Tax Court's jurisdiction. It expressly constrained the Tax Court from issuing injunctions or ordering refunds when a petition is untimely. But it did not similarly limit the Tax Court's power to review untimely redetermination petitions. *Culp* at 203.

That difference — that some court actions are forbidden, and some are not — is the difference between a deadline that is jurisdictional and one that is subject to equitable tolling.

But those intermediary holdings did not answer the question of what to do with a late petition. "[T]he nonjurisdictional nature of the filing deadline does not help Boechler," the Supreme Court said, "unless the deadline can be equitably tolled." *Id*. at 1500. By default, though, it can be tolled, because "nonjurisdictional limitations periods are presumptively subject to equitable tolling." *Id*. at 1500.

The IRS challenged that presumption by comparing § 6330 to a refund deadline under § 6511, which the Supreme Court previously held is not subject to equitable tolling; *see United States v. Brockamp*, 519 U.S. 347 (1997). The Court dissected that old case and found too many dissimilarities between the two statutes. Thus, the answer is that the thirty-day window in which a taxpayer can appeal an unfavorable CDP decision is subject to equitable tolling, but the filing of a suit for refund is not.

Similarly, the Third Circuit in *Culp* had to determine whether the particular non-jurisdictional limitation period regarding the filing of a petition challenging a SNOD is subject to equitable tolling. The court there too noted the default position: "It is hornbook law that limitations periods are customarily subject to equitable tolling." *Culp* at 203 (quoting *Young v. United States*, 535 U.S. 43, 49 (2002)).

The circuit court looked for "good reason to believe that Congress did not want the equitable tolling doctrine to apply," and found none. "The filing period is neither emphasized nor set out in a technical way. And though Congress provided for three equitable exceptions to the deadline, there is good reason to believe these exceptions are not exhaustive." *Id*.

Having held that these filing deadlines are subject to equitable tolling, both the Third Circuit and the Supreme Court remanded for a determination whether equitable tolling applies. On remand, the Tax Court in both cases simply ordered the IRS to file an Answer. As of this writing both cases are still pending in the Tax Court.

These holdings should not be interpreted as an invitation to be late, or even a statement that being late is "okay." For one, recall the definition above: equitable tolling applies when a litigant *has pursued his rights diligently but some extraordinary circumstance* prevents him from bringing a timely action. Thus, a petitioner who is late will have to successfully argue that tolling applies to him before he can argue his case in chief. Filing late therefore substantially increases uncertainty as to the success of, as well as the costs to, the petitioner's case.

And two, the *Culp* decision is authoritative only in the Third Circuit. It is noteworthy that a Tax Court case subject to review by the Ninth Circuit held differently. In the case of *Hallmark Research Collective v. Commissioner*, 159 T.C. No. 6 (2022), the Tax Court dismissed a SNOD petition for lack of jurisdiction because the petitioner filed *one day late*. This was two months after the *Culp* Tax Court dismissed for lack of jurisdiction, and thus, prior to the Third Circuit court's decision being issued. Instead of appealing that order of dismissal to its own circuit court, Hallmark moved to vacate in light of the Supreme Court's decision in *Boechler*.

The Tax Court considered the motion to vacate and still dismissed the petition for lack of jurisdiction. This occurred before the Third Circuit's decision, so the *Hallmark* court had before it only the *Boechler* decision. The Tax Court said that "the Supreme Court's reasoning in *Boechler* does not apply to the ninety-day deadline of § 6213(a)." *Hallmark* at 6. The court explained that Congress must "clearly state" that a filing deadline is jurisdictional, "and absent such a clear statement, courts should treat the restriction as nonjurisdictional in character." *Hallmark* at 8 (internal citation omitted).

The court then spent almost 19 pages analyzing and discussing whether the deadline of § 6213(a) is jurisdictional. Its conclusion:

> *Section 6213(a)* clearly states that its 90-day deadline is jurisdictional, as indicated by its text, context, and uniform treatment during its long history. … Late-filed deficiency petitions must therefore be dismissed for lack of jurisdiction. *Hallmark* at 42.

One wonders how the Third Circuit reached the opposite conclusion in only four pages of analysis. Hallmark did not appeal that decision, so as of yet there are no other circuit court decisions (or a Supreme Court decision) on the question of equitable tolling in the context of a SNOD under § 6213.

In footnote 5 of the *Culp* decision, the court cites an amicus brief for the statistic that the Tax Court dismisses approximately 600 SNOD cases per year for being untimely. Thus, many hundreds of taxpayers per year could obtain relief from their tax burdens if more courts follow *Culp*.

But the easy answer in all of this is, DON'T MISS YOUR FILING DEADLINE!

Scott MacPherson *is an attorney licensed in Arizona, California, and Washington D.C. He is a member of* The MacPherson Group *of tax resolution attorneys, together with his father Mac MacPherson and brother Nathan MacPherson, all of whom are TDI members and past speakers at our* Taxpayers Defense Conference*. Scott can be reached at* maclawpllc@protonmail.com.

EDITOR'S NOTE: For more information on how to file a Tax Court petition, see chapter 4 of ***Taxpayers' Defense Manual.***

How You Can Ask Dan Pilla a Question

If you have questions or problems you'd like Dan Pilla to address, please write to Dan at:

215 W. Myrtle Street
Stillwater, MN 55082

or e-mail to:

support@taxhelponline.com

Write the word "newsletter" in the subject line.

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