Navigating ERC Tax Audits and Investigations: Part One

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Introduction

Over the past three and a half years, countless businesses have availed themselves of the Employee Retention Credit ("ERC"), a tax credit intended to incentivize businesses to retain employees during the height of the COVID-19 pandemic.[1] The Internal Revenue Service ("IRS") estimates that approximately 3.6 million ERC claims have been filed and that more than $150 billion in ERC claims have been paid to businesses. As of September 14, 2023, it had a backlog of nearly 600,000 claims and recently doubled its processing rate to 40,000 claims per week in order to keep up with the influx of claims.[2] Moreover, the IRS is of the view that a substantial portion of the ERC claims paid to date are improper, because they are inflated, illegitimate, or outright fraudulent. And the IRS intends to get this money back.

The IRS has pledged to aggressively audit taxpayers who filed questionable ERC claims and ERC shops that have been promoting dubious ERC claims. The IRS is rapidly training its employment tax revenue agents on ERC claims and on areas of suspected abuse and is mobilizing those agents in the field. Audits have already begun.

The result of all of this activity is that tax practitioners can expect IRS audits of ERC claims to proliferate in the coming years. Taxpayers and tax professionals are well served to prepare themselves for the coming tsunami. This article is the first of a two-part series focusing on ERC audits. This first installment focuses on audits of ERC claims themselves, including what to expect in an ERC audit and strategies for navigating such audits. Part two will focus on the IRS' effort to investigate and penalize promoters of dubious ERC claims through promoter investigations and how to handle a promoter investigation.

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The Employee Retention Credit

The ERC is a refundable tax credit passed as part of the Coronavirus Aid Relief and Economic Security ("CARES") Act that was intended to incentivize employers to

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retain employees during the pandemic by allowing them to claim a dollar-for-dollar credit for "qualified wages" paid to employees. After receiving little attention in 2020, ERC claims mushroomed in 2021 after the Consolidated Appropriations Act 2021 removed the ban on taxpayers claiming both the paycheck protection program ("PPP") and the ERC and greatly expanded eligibility and the amount of the 2021 ERC. Congress again expanded the 2021 ERC with the passage of the American Rescue Plan Act of 2021 ("ARPA") and then pulled back slightly by removing Q4 2021 in the Infrastructure Investment and Jobs Act.

Putting aside recovery startup businesses, which are eligible for the ERC only in Q3 and Q4 of 2021, employers generally have two avenues to qualify for the ERC. The first, the gross receipts test, is an objective test that measures the decline in an employer's gross receipts during the pandemic. A business is eligible for the ERC if it experienced a greater-than-50% decline in gross receipts in any calendar quarter in 2020 or a greater-than-20% decline in any calendar quarter in 2021, in both cases as compared to the same calendar quarter in 2019.[3] There are special rules that often provide eligibility for a second calendar quarter based on eligibility for a single calendar quarter in 2020 or 2021, but these rules are beyond the scope of this article. The reason for the decline in gross receipts is irrelevant.

Businesses that cannot meet the gross receipts test can still qualify for the ERC if they meet what is known as the suspension of operations test. To be eligible under this test, a business generally must establish (i) that it experienced a full or partial suspension of business operations from a governmental order due to the pandemic; (ii) that its employees were not able to perform their jobs comparably through telework arrangements; and (iii) that the suspension of operations had more than a nominal effect on its business operations.[4] As may be apparent, this test is subjective and more open to interpretation than the gross receipts test.

Apart from these tests, there are other rules that affect both eligibility and the calculation of the credit. For instance, an employer who received a PPP loan that was forgiven generally may not claim an ERC credit for the same wages included on its PPP loan forgiveness application up to the amount of wages that were necessary for the requested amount of loan forgiveness.[5] In addition, a complex set of aggregation rules apply to ERC claims.[6] These rules impact an employer's eligibility in several ways, as discussed later.

The ARPA, codified in Code Sec. 3134,[7] also permits a limited credit in Q3 and Q4 of 2021 for what is known as a "recovery startup business," or RSUB. A RSUB is a business that began carrying on operations after February 15, 2020, has average annual gross receipts of less than $1,000,000 over a defined period of time, and does not meet the gross receipt test or partial suspension test.[8] A RSUB is only eligible for the ERC in Q3 and Q4 of 2021, subject to a maximum credit amount of $50,000 per calendar quarter.[9]

Employers who satisfy either the gross receipts test or the suspension of operations test may receive a credit for 50% of "qualified wages" paid to employees in 2020, subject to a maximum of $10,000 of qualified wages, and 70% of qualified wages paid to employees in each of the first three calendar quarters in 2021, subject to a maximum of $10,000 of qualified wages in each calendar quarter.[10] What constitutes "qualified wages" depends largely on the size of the employer. Large employers, defined as employers with more than 100 average monthly full-time employees in 2019 (for the 2020 ERC) and more than 500 such employees in 2019 (for the 2021 ERC), may only claim as qualified wages those wages paid to employees while they were not providing services (colloquially referred to as Netflix employees because they presumably stayed at home and watched Netflix).[11] Because very few employers paid their employees not to work outside of the PPP, characterization as a large eligible employer effectively limits an employer's ability to claim the ERC. Small employers, *i.e.*, employers with 100 or fewer average monthly full-time employees in 2019 (for the 2020 ERC) and 500 or fewer such employees in 2019 (for the 2021 ERC), may claim as "qualified wages" any wages paid to employees regardless of whether they were providing services.[12]

Putting it all together, for 2020, an employer may recover a maximum ERC of $5,000 per employee, and for 2021, an employer may recover a maximum ERC of $7,000 per employee for each of the first three calendar quarters, for a maximum ERC of $26,000 per employee. Unlike other pandemic programs that have expired, the ERC may be claimed by filing amended payroll tax returns (*e.g.*, Forms 941-X) for the relevant calendar quarters. In light of the three-year statute of limitations for refund claims,[13] this means that 2020 ERC claims may be filed up until April 15, 2024, and 2021 ERC claims may be filed up until April 15, 2025.[14]

The ERC itself is not subject to tax, but §2301(e) of the CARES Act provides that the expense disallowance rules in Code Sec. 280C apply. The IRS has interpreted this to mean that taxpayers who claim the ERC need to amend their 2020 and 2021 federal income tax returns to reduce any wage and health plan expenses that were used to claim

the ERC by the amount of the ERC.[15] Reducing expenses increases taxable income, thus making the full amount of the ERC taxable. Many states follow the federal tax rules on this point too.

The Proliferation of ERC Claims and Government Response

As stated earlier, the ERC exploded in 2021 after the ban on claiming the PPP and the ERC was removed. Then Congress expanded the program greatly, and the IRS began actively publicizing it, encouraging employers to avail themselves of it.[16]

These changes had unintended consequences. Virtually overnight, companies began to sprout up claiming to have special expertise in processing ERC claims and promising easy money. Many of these businesses charged their clients large fees based on a percentage of the ERC claimed. According to the IRS, many of these so-called "ERC mills" disregarded the rules and restrictions on ERC eligibility to process as many claims as possible. By some estimates, this has resulted in billions of dollars of erroneous ERC claims.

As time went on, the IRS changed course and began to focus on deterring the filing of illegitimate ERC claims. It has since issued several warnings to taxpayers and professionals alike to beware of ERC promoters pushing dubious claims.[17] In March 2023, the IRS placed ERC abuse first on its "Dirty Dozen" list of abusive tax schemes.[18] Congress got in on the act as well. As part of the ARPA, Congress extended the statute of limitations for assessing erroneous ERC claims from the normal three-year assessment period to five years for ERC claims relating to Q3 and Q4 of 2021, giving the IRS additional time to audit these claims.[19] And on July 24, 2023, the Treasury and the IRS issued final regulations authorizing the IRS to use its assessment procedures to recapture erroneously paid ERC claims.[20]

Punctuating the gravity of the situation, on September 14, 2023, the IRS took the unusual step of announcing a moratorium on processing new ERC claims until at least 2024.[21] The purpose of the moratorium was "to protect against fraud" and "to protect the businesses from facing penalties or interest payments stemming from bad claims pushed by promoters." Unless it is extended, it is not clear that this moratorium will have much, if any, practical effect on ERC claims given that, with a backlog of 600,000 claims and the ability to process about 40,000 claims per week, the IRS has little if any ability to process new claims in 2023. The IRS has vowed to use the moratorium to devise new protections and safeguards to deter illegitimate ERC claims.[22]

The September 14th press release also announced two forthcoming initiatives: (i) a settlement program for the repayment of ERC claims that would allow "businesses to avoid penalties and future compliance action" and (ii) a program that would allow taxpayers to withdraw ERC claims that have been filed but not yet processed.[23]

Audits of ERC Claims

The IRS has been aggressively auditing ERC claims for over a year now. These audits are conducted by employment tax specialists within the IRS who have become well versed in the ERC rules. Most audits occur after the ERC has been paid, but increasingly audits are taking place before the ERC payment goes out the door. This is consistent with the IRS Commissioner's view that recent ERC claims are noticeably weaker than claims that were filed closer in time to the period of economic hardship.[24]

Preparing for the Audit

One of the first things for a taxpayer to consider when notified of an ERC audit, or even in anticipation of one, is who will represent the taxpayer during the audit. Some ERC shops include provisions in their contracts promising to represent their clients during an IRS audit. Others merely promise to provide "support." These clauses were intended to incentivize taxpayers to use the ERC shops and to provide assurance that they would stand behind their advice. Taxpayers need to give careful consideration as to whether to avail themselves of this service. On one hand, these provisions potentially provide an economic benefit to taxpayers as the cost of handling an IRS audit can be significant. On the other hand, some of these ERC shops are likely to come under IRS scrutiny themselves, giving rise to different incentives and potential conflicts of interest.

Once representation is squared away, the representative should focus on the areas an IRS auditor is likely to explore, which will, of course, depend in large part on the taxpayer's basis for eligibility. Knowledge is power, and the guidance issued by the IRS in this area is complex and often ambiguous. The more a representative understands about the taxpayer's situation and the rules governing the ERC, the more effective he will be in achieving a good result for the client. Though ERC compliance will be the focus, IRS audits can be wide-ranging and can even be expanded beyond the ERC, in keeping with the IRS' policy of 100% compliance, such that it is important

in preparing for the audit to inquire about all areas of potential non-compliance on the taxpayer's returns. This is especially true if the taxpayer failed to file amended income tax returns to reduce its deductions for wages that supported its claim for the ERC, which will bring the taxpayer's income tax return(s) into the mix.

Below are the areas we think practitioners should focus on when preparing for an ERC audit.

1. Did the taxpayer accurately determine whether it is a small eligible employer or a large eligible employer? Remember that this involves determining the average monthly number of full-time employees ("FTEs") in 2019. An FTE for this purpose, as opposed to the full-time equivalency determination for the PPP, is an employee who worked 30 hours/week or 130 hours/month.[25] The follow-up question is whether the taxpayer included the correct amount of qualified wages for small eligible employers (all wages paid during the relevant period) and for large eligible employers (only wages paid not to provide services during the relevant period).
2. Did the taxpayer calculate gross receipts correctly, as such term is defined in Code Sec. 448(c) (or Code Sec. 6033 for tax-exempt entities)? Are there subtracting entries in the taxpayer's general ledger? Did the taxpayer use the same method of tax accounting—cash or accrual, that it used on its income tax returns for the relevant tax year? Some taxpayers mistakenly thought, or were told, they could cherry-pick the approach to maximize the amount of their ERC.
3. Did the taxpayer accurately rely on the safe harbors for business combinations in 2020 and 2021?[26]
4. If the taxpayer is relying on the suspension of operations test, did it take the necessary first step of identifying a governmental order that limited its commerce, travel, or group meetings due to COVID-19?[27] Note that governmental orders do not include OSHA guidelines or CDC recommendations, unless an executive order specifically requires adherence to them.
5. Were the taxpayer's employees able to work comparably through telework, which includes telephone and video conference capabilities?[28] The ability to work comparably through telework is what excludes from the ERC many office-based businesses like law firms and accounting firms.
6. Did the suspension of business operations have a more than nominal effect on the taxpayer's business? Recall there is a 10% safe harbor in Notice 2021-20, Q&A #11 for essential businesses, and a separate 10% test in Notice 2021-20, Q&A #18, relating to reductions in an employer's ability to provide goods or services in the normal course of its business by not less than 10%.
7. Did the suspension of operations result from a reduction in demand, in which case the IRS takes the position it does not give rise to a partial suspension?[29]
8. Did the taxpayer base its ERC claim upon a disruption in its supply chain caused by a governmental order impacting its supplier? In addition to the statement of this rule in Notice 2021-20, Q&A #12, practitioners should consult IRS Chief Counsel Memorandum AM 2023-005 (June 30, 2023), which greatly limits the circumstances in which disruptions in the taxpayer's supply chain may satisfy the suspension of operations test.[30]
9. Did the taxpayer apply the aggregation rules correctly?[31] These rules are extraordinarily complex and should be navigated carefully. There are parent–subsidiary groups, brother–sister groups, combined groups, and affiliated service groups. Remember that the aggregation rules apply for purposes of (i) the gross receipts test, (ii) the suspension of operations test, (iii) the calculation of the number of FTEs, and (iv) the determination of the maximum credit amount per employee?[32]
10. Did the taxpayer properly calculate the amount of the ERC? Our experience is that the vast majority of taxpayers and advisors get this wrong, and we recommend a recalculation at the beginning of every ERC audit, even if it means hiring an experienced firm to assist. The math seems simple (*e.g.*, 50% or 70% of qualified wages up to a cap of $10,000), but it is surprisingly complex, particularly the rules that prevent double dipping with the PPP, FFCRA paid family/sick leave credits, and other tax credits, and the rules that require the determination of related parties that must be excluded from the ERC calculation.[33] These rules can be headache-inducing for those who do not work with them regularly. You also need to make sure the taxpayer excluded from qualified wages severance and other post-termination payments made to former employees.[34]

The authors have experienced both increasing and decreasing the amount of the ERC on audit when the ERC was calculated by another preparer. Our experience is that IRS agents do not challenge the calculation of the credit if the math was done correctly as much as they challenge the determination of eligibility, particularly if it is based on the subjective suspension of operations test. We have increased multiple ERC claims on audit, and the agents approved the

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increases because the calculations were unassailable. In one case, the increase was more than $1 million.

11. If the taxpayer qualified for the ERC as a recovery startup business, did it meet the definition of such term in Code Sec. 3134(c)(5)? If so, confirm that the taxpayer claimed the ERC only for Q3 and Q4 of 2021 and that it capped the amount of the ERC at $50,000 per calendar quarter.
12. Last but not least, did the taxpayer maintain adequate records to substantiate eligibility and the amount of the ERC? Notice 2021-20 contains recordkeeping requirements.[35] IRS agents expect taxpayers to have this information ready and frequently cite that when refusing to grant extensions from information document request ("IDR") due dates.

The Audit Itself

IDRs

The issuance of an IDR (and request for an extension of time to assess on Form SS-10) is typically the opening salvo of an IRS audit. The taxpayer should expect to receive an IDR seeking records substantiating the basis for which the ERC was claimed, especially all records required to be kept under Notice 2021-20, Q&As #70-71. Under Circular 230, in the absence of a good faith claim of privilege, a practitioner must submit records or information in response to a proper request from a duly authorized officer of the IRS.[36] In addition, the failure to provide responsive records may result in the issuance of an administrative summons, which is enforceable in contempt proceedings and may serve as the basis for denying an ERC claim.

In certain circumstances where an attorney was involved in advising the client with respect to ERC eligibility, the client may have a valid claim of privilege with respect to information raised in an IDR. The tax practitioner privilege under Code Sec. 7525, which extends the attorney–client privilege to accountants when providing certain tax advice, also may be available. It is important to note, however, that documents prepared in connection with the preparation of a tax return, *e.g.*, an amended payroll tax return asserting the ERC, are not privileged.[37] Neither are communications made in connection with traditional tax preparation.[38]

Taxpayer Interviews and Site Visits

The IRS's practice to date has been to request a taxpayer interview in almost every ERC audit. Typically, the interview takes place after the production of the first IDR, but it can occur earlier in the audit. The interviews are conducted over the telephone and typically last 45–90 minutes.

As a general practice, it is always best to request that the interview take place with the representative after speaking with the taxpayer as opposed to with the taxpayer itself. In most cases, agents will oblige this request, provided that the practitioner is able to provide the relevant information, which speaks once again to the importance of preparation.

Occasionally, an IRS agent will object to a practitioner interview and, in some cases, even threaten to issue an administrative summons to compel the taxpayer's attendance. These threats should be resisted because they are contrary to Code Sec. 7521(c), which authorizes a power of attorney and other authorized representatives "to represent the taxpayer in an interview …" It further states that "[a]n officer or employee of the Internal Revenue Service may not require a taxpayer to accompany the representative in the absence of an administrative summons issued to the taxpayer under subchapter A of chapter 78."

As stated by the Honorable Fred T. Goldberg, Jr. in 1990 when he testified before the Senate Subcommittee on Private Retirement Plans and Oversight of the Internal Revenue Service:

> One of the areas in the examination process concerned the mandatory attendance of taxpayers at examinations even when they were represented by qualified and authorized representatives. The Taxpayer Bill of Rights allows authorized representatives to attend examinations in place of the taxpayer, other than examinations related to summons proceedings. Our field employees have been notified to honor all such requests from properly authorized individuals.

In addition, §4.11.55.3.1(1) of the Internal Revenue Manual confirms that if the representative is resolute in not having the taxpayer present at the interview, then, in keeping with Code Sec. 7521(c), "the examiner must attempt to conduct the initial interview with the taxpayer's representative." Most agents, when confronted with these provisions, will relent and agree to an interview with the representative.

In cases where the agent insists upon interviewing the taxpayer, it is often because the agent is considering imposing accuracy-related, or fraud, penalties, to which the taxpayer's state of mind or due diligence may be relevant, or is preparing to counter an anticipated assertion of reasonable cause. If a taxpayer decides to sit for an interview with an agent, it is imperative that the taxpayer be thoroughly prepared. In some cases, the taxpayer may have legitimate concerns about criminal exposure, either due to

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his conduct with respect to the ERC claim or with respect to some other aspect of his tax returns. In such cases, an interview with the taxpayer should be avoided at all costs. If the interview cannot be put off through other means, the taxpayer may have no choice but to assert his rights under the Fifth Amendment of the U.S. Constitution. This serves as a bar to the IRS obtaining the taxpayer's testimony, though obviously it may raise the agent's suspicions as to the potential for fraud. These are extremely delicate situations that are best handled with the assistance of competent counsel familiar with criminal tax matters.

Some IRS agents are requesting site visits as part of ERC audits, especially in cases when claims of social distancing or group gathering limitations are asserted as part of a suspension-of-operations claim. In these cases, the safest course of action is to have the practitioner conduct the site visit without the taxpayer's presence. This allows the practitioner to control the flow of information and to ensure the agent does not unintentionally violate the taxpayer's right to representation.

Penalties

Penalties may become a hotly contested area in many ERC audits. Accuracy-related penalties amounting to 20% of any underpayment may be assessed in instances where a taxpayer disregarded IRS rules and regulations, which includes notices issued by the IRS.[39] Given the IRS' issuance of multiple warnings of ERC abuse, agents may not hesitate to assess penalties against taxpayers who disregarded published guidance in submitting ERC claims. Many of these taxpayers understandably may assert reliance on professionals based on advice they received from ERC shops or accountants working with them. However, recent notices from the IRS suggest that it may challenge such assertions, especially where the advisors and the advice given possess some of the "red flags" previously identified by the IRS. For instance, a recent notice issued by the IRS warns taxpayers to be "cautious of advertised [ERC] schemes and direct solicitations promising tax savings that are too good to be true," and notes that taxpayers who nevertheless follow such solicitations may be "required to repay the credit along with penalties and interest."[40]

Audit Conclusion and Beyond

At the conclusion of the audit, the revenue agent will discuss the proposed adjustments with the representative. If the representative is prepared with her own position and ERC computations, she will be in a good position to negotiate a favorable, or at least palatable, outcome for the taxpayer at the conclusion of the audit.

If the taxpayer does not agree with the agent's adjustments, or the agent has asserted penalties with which the taxpayer does not agree, the taxpayer may have to pursue its arguments with the IRS Independent Office of Appeals by filing a protest. The IRS' position is that the U.S. Tax Court lacks jurisdiction to review ERC refund suits because they constitute employment tax cases that do not involve a worker classification or Section 530 determination. Taxpayers can obtain judicial review of an ERC assessment by filing suit in the appropriate U.S. District Court or the Court of Federal Claims, but they must first pay part of the assessment before gaining access to the court.

Conclusion

The number of IRS audits involving the ERC is growing rapidly, and is likely to get worse before it gets better. Thousands of taxpayers will be impacted, and representatives can prepare themselves now by educating themselves on the ERC and learning what to expect when they receive the inevitable phone call alerting them that a client is under an ERC audit.

ENDNOTES

1. The IRS estimates that more than 2.5 million ERC claims have been filed. IR-2023-135 (July 26, 2023).
2. IR-2023-135 (July 26, 2023); Richard Rubin, *IRS Shuts Door on New Pandemic Tax Credit Claims Until At Least 2024*, WALL STREET J., Sep. 14, 2023; Alan Rappeport, "This Little-Known Pandemic-Era Tax Credit Has Become a Magnet for Fraud" New York Times, May 26, 2023; Testimony of IRS Commissioner Danny Werfel (Apr. 19, 2023) available at *www.warner.senate.gov/public/index.cfm/2023/4/under-questioning-from-warner-irs-commissioner-commits-to-doubling-processing-for-business-tax-credits*.
3. Code Sec. 3134(c)(2)(A).
4. *Id.*; Notice 2021-20, Q&A #15, 17, & 18, IRB 2021-11, 922.
5. Code Sec. 3134(h)(2).
6. Code Sec. 3134(d).
7. Unless otherwise indicated, all section or "§" references are to the Internal Revenue Code and to the Treasury regulations promulgated thereunder.
8. Code Sec. 3134(c)(5); Notice 2021-49, §III.D.
9. Code Sec. 3134(b)(1)(B).
10. Code Sec. 3134(a).
11. Code Sec. 3134(c)(3)(A).
12. *Id.*
13. Code Sec. 6511.
14. This is because employment tax returns filed before April 15th of the following tax year are deemed filed on April 15th of such tax year. Code Sec. 6513(c)(1).
15. Notice 2021-40, §IV.C, IRB 2021-28, 15.
16. IR-2021-21 (Jan. 26, 2021), available at *bit.ly/412Fkds*.
17. *See, e.g.*, COVID Tax Tip 2022-170, Nov. 7, 2022, available at *bit.ly/411yzsI*; IR-2023-40 (Mar. 7, 2023) available at *www.irs.gov/newsroom/irs-issues-renewed-warning-on-employee-retention-credit-claims-false-claims-generate-compliance-risk-for-people-and-businesses-claiming-credit-improperly*; Office of Professional Responsibility Issue No. 2023-2 (Mar. 7, 2023), available at *www.irs.gov/pub/irs-utl/2023-02-professional-responsibility-and-*

the-employee-retention-credit-R2-508-compliant.pdf.

[18] IR 2023-49 (Mar. 20, 2023) available at *www.irs.gov/newsroom/irs-opens-2023-dirty-dozen-with-warning-about-employee-retention-credit-claims-increased-scrutiny-follows-aggressive-promoters-making-offers-too-good-to-be-true*.

[19] Code Sec. 3134(l).

[20] T.D. 9978.

[21] IR-2023-169 (Sep. 14, 2023). On the same day, the IRS also issued additional FAQs, an ERC eligibility checklist, and a list of warning signs of aggressive ERC marketing. These releases reinforce prior ERC guidance and provide no new insight into the rules governing the ERC.

[22] *Id.*

[23] *Id.*

[24] *See* IR-2023-135 (Jul. 26, 2023) ("The further we get from the pandemic, we believe the percentage of legitimate claims coming in is declining.").

[25] *See* Notice 2021-20, Q7A #31, IRB 2021-11, 922; Notice 2021-49, §IV.B, IRB 2021-34, 316.

[26] *See* Notice 2021-20, Q&A #28 (relating to 2020), IRB 2021-11, 922; Notice 2021-49, §IV.F. (relating to 2021), IRB 2021-34, 316.

[27] *See* Notice 2020-21, Q&A #10, IRB 2021-15, 986.

[28] Notice 2021-20, Q&A #15, IRB 2021-11, 922.

[29] *See* Notice 2021-20, Q&A #13, IRB 2021-11, 922.

[30] IRS Chief Counsel Memorandum AM 2023-005 (Jun. 30, 2023).

[31] Code Sec. 52(a) & (b); Reg. §1.52-1, Code Sec. 414(m) & (o).

[32] Notice 2021-20, Q&A #7, IRB 2021-11, 922.

[33] CARES Act §2301(e); Code Sec. 51(i).

[34] Notice 2021-20, Q&A #39, IRB 2021-11, 922.

[35] Notice 2021-20, Q&As #70 & 71, IRB 2021-11, 922.

[36] Reg. §10.20.

[37] *KPMG, LLP*, DC-DC, 2003-1 USTC ¶50,174, 237 FSupp2d 35 (2002).

[38] *R.A. Frederick*, CA-7, 99-1 USTC ¶50,465, 182 F3d 496 (1999).

[39] *See* Code Sec. 6662.

[40] IR-2023-40 (Mar. 7, 2023), IRB 2023-22, 879 available at *www.irs.gov/newsroom/irs-issues-renewed-warning-on-employee-retention-credit-claims-false-claims-generate-compliance-risk-for-people-and-businesses-claiming-credit-improperly*.

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