Employee Retention Credit Adviser Urges Court to Lift Moratorium

Posted on May 16, 2024

By Lauren Loricchio

An employee retention credit adviser has asked a federal court to end the IRS's moratorium on processing new claims for the ERC.

Stenson Tamaddon LLC is seeking an injunction requiring the IRS to resume its processing of claims for the ERC, according to a complaint filed May 14 with the U.S. District Court for the District of Arizona.

"Ultimately this is about our clients, not us," Stenson Tamaddon CEO Eric Stenson told *Tax Notes*. "The IRS has done a wrestling maneuver and has pinned tens of thousands of small businesses to the ground. We are asking the court to order the IRS to do its job and process claims."

Along with the IRS, *Stenson Tamaddon v. IRS* names the United States, IRS Commissioner Daniel Werfel, Treasury, and Treasury Secretary Janet Yellen as defendants.

The ERC was created by the Coronavirus Aid, Relief, and Economic Security Act to help struggling businesses pay their employees during the COVID-19 pandemic by establishing a refundable credit against employer taxes. But to address the influx of fraudulent and erroneous claims, the IRS announced in September 2023 that it was suspending the processing of new ERC claims. An IRS official said May 14 that a resumption date for processing new claims hasn't been determined.

Stenson Tamaddon argues that the IRS "has failed Congress and American businesses in its role as steward of the ERC program." It argues that the IRS "improperly suspended the ERC program in violation of its statutory mandate to refund American businesses under the Congressionally enacted program."

Stenson Tamaddon has lobbied Congress on legislative and regulatory issues related to the ERC, disclosures show.

In addition to a preliminary and permanent injunction requiring the IRS to resume processing new ERC refund claims, Stenson Tamaddon seeks to enjoin the IRS and Treasury from enforcing Notice 2021-20, 2021-11 IRB 922, which provides ERC guidance to employers and includes a lengthy FAQ.

The suit says the IRS "routinely cites Notice 2021-20 when denying ERC claims," and it argues that "the IRS's reliance on that notice has prevented thousands of taxpayers from collecting financial relief Congress guaranteed to them under the statute."

One of the firm's clients filed a lawsuit earlier this year in a U.S. district court in California seeking to bar the IRS and Treasury from enforcing guidance on the ERC, arguing that it runs afoul of the Administrative Procedure Act's notice and comment procedures.

Stenson said his firm has a handful of appeals and audits in the works with the IRS.

"It's important to us as a firm — across the board and for all our clients — to ensure IRS Notice 2021-20 . . . is set aside," Stenson said. "We would like to permanently resolve that matter."

Neither the IRS nor Treasury replied to a request for comment.

"The floodgates could reopen, depending on how this case plays out," said Christopher M. Ferguson of Kostelanetz LLP.

Some ERC advisers had stopped their activities because of the moratorium on processing claims and the narrow eligibility criteria being applied by the IRS under Notice 2020-21, according to Ferguson.

"The prospect that that may be jettisoned will provide a lot of temptation for companies to get back in the game," Ferguson said.

Ferguson added that the complaint raises valid arguments.

However, one element that potentially distinguishes the case from *Green Valley Investors LLC v. Commissioner*, Nos. 17379-19, 17380-19, 17381-19, 17382-19 (T.C. 2022), which invalidated an IRS notice regarding conservation easements, is the exigencies of the pandemic, which might be cited as a basis for bypassing the normal notice and comment procedures, Ferguson noted.

Ferguson said the lawsuits may place pressure on Congress to act regarding pending, or other, ERC legislation to ease the strain on the IRS from the deluge of claims.

The plaintiff in *Stenson Tamaddon LLC v. IRS* was represented by Peter A. Arhangelsky and Ashley M. Repka of Greenberg Traurig LLP.