Insights

Treasury and IRS Provide Gross Receipts Safe Harbor for Employers Claiming the CARES Act Employee Retention Credit

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On Tuesday, August 10, 2021, the U.S. Department of the Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) issued Revenue Procedure 2021-33 (“RP 21-33”), which provides helpful guidance regarding the calculation of gross receipts for purposes of determining an employer’s eligibility for the Employee Retention Credit ("ERC") provided under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”). Under the CARES Act, an employer may be eligible for the ERC if its gross receipts for a calendar quarter decline by a certain percentage, as compared to a prior calendar quarter. RP 21-33 provides a safe harbor that permits employers, including tax-exempt employers, to exclude certain stimulus proceeds from gross receipts solely for determining eligibility for the ERC.

Background

The Coronavirus Disease 2019 (“COVID-19”) pandemic gave rise to unprecedented pressures on the U.S. economy. In an effort to provide relief, and minimize job loss and business closures, the federal government implemented numerous stimulus programs including forgivable SBA Paycheck Protection Program (PPP) loans under the CARES Act. In addition to the PPP loans, the SBA was authorized to issue grants to eligible live venue and arts facilities under the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (“Shuttered Venue Operator Grants”), and qualifying restaurants and food vendors under the American Rescue Plan of 2021 (“Restaurant Revitalization Grants”). These programs provided much needed funding to businesses struggling to remain open in the face of various stay at home orders and restrictions on public gatherings. In addition to these grant and loan programs, which came with logistical hurdles, the federal government utilized creative approaches to allow businesses to retain revenue that would otherwise be payable to the Treasury in the form of employee withholding taxes - enter the ERC.

ERC

The ERC is a refundable payroll tax credit provided under the CARES Act to encourage employers, including tax-exempt organizations, to keep employees on their payroll during the COVID-19 pandemic. The ERC is available to eligible employers whose operations were fully or partially suspended due to a COVID-19 shutdown. An employer may be eligible for the credit if its gross receipts for a calendar quarter decline by a certain percentage as compared to a prior calendar quarter. The ERC is available for qualifying wages paid after March 12, 2020 and before January 1, 2022. For more information, see our prior alerts **Paycheck Protection Program: Aggregated Guidance for Loans and Forgiveness** and **The CARES Act: Issues for Employers**. IRS Guidance made clear that employers that received PPP loan forgiveness, shuttered venue operator grants, or restaurant revitalization grants may also claim the ERC, provided the same wages were not counted for both the ERC and the other programs. However, prior to the issuance of RP 21-33, employers were left wondering whether the various incentive payments received during the pandemic would need to be included as gross receipts for purposes of determining their eligibility for the ERC in a given quarter.

RP 21-33 Safe Harbor

RP 21-33 provides a “safe harbor” permitting employers to exclude the following (“Relief Programs”) from gross receipts for purposes of determining eligibility for the ERC:

- The amount of the employer’s PPP loan[s] that is forgiven;
- The amount of any Shuttered Venue Operators Grants received by the employer; and
- The amount of any Restaurant Revitalization Grants received by the employer.

The revenue procedure provides that, absent the operation of the safe harbor, the applicable definitions of “gross receipts” for purposes of determining eligibility to claim the ERC would require the inclusion of any amounts received from the Relief Programs. As a result, an employer that participated in one or more of the Relief Programs, but otherwise experienced the required percentage of decline in gross receipts, might not be able to utilize the ERC solely because its participation in one or more the Relief Programs caused a temporary increase in gross receipts as defined under the tax law. In support of its decision to establish the safe harbor, the IRS and Treasury pointed to existing guidance permitting the participation in both the ERC and the Relief Programs as evidence that Congress intended for employers to be able to avail themselves of both types of relief.

Employers claim the ERC on their employment tax return (generally Form 941 or Form 941-X).
While an employer is not required to apply this safe harbor, if it is elected, it must be applied consistently for determining eligibility for the ERC. That is, the employer must exclude the amounts from their gross receipts for each calendar quarter in which gross receipts are relevant to determine their eligibility to claim the ERC. In addition, an employer claiming the credit must also apply the safe harbor to all employers treated as a single employer under the ERC aggregation rules.

RP 21-33 applies for purposes of determining eligibility to claim the ERC for wages paid after March 12, 2020, and before January 1, 2022 and does not permit the exclusion of these amounts from gross receipts for any other federal tax purpose.

If you have any further questions, comments or concerns, please feel free to contact **Kendall A. Schnurpel**, **Robert A. Greising**, or a member of our **Business, Acquisitions & Securities team**.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have. In addition, marijuana remains a federally illegal Class I drug. All activities related to marijuana are currently illegal under the federal laws of the United States and nothing contained in this alert is intended to assist in any way with violation of applicable law.

[1] The method used to determine eligibility for the ERC varies depending on the calendar quarter being tested. Employers should consult IRS Notices 2021-20, 2021-23, and 2021-49 for the applicable rules.
[2] See Section 2301(g) of the CARES Act, Notice 2021-20.