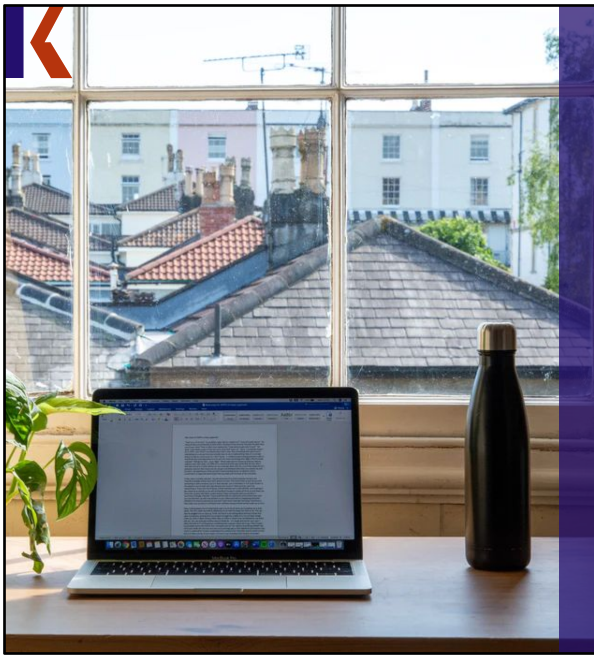

Current Federal Tax Developments

July 29, 2024

Kaplan Financial Education

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This Week We Look At:

FinCEN adds two more questions to BOI FAQ page

https://www.currentfederaltaxdevelopments.com

FinCEN Issues More Updates to BOI FAQ

Unsplash+ in collaboration with Shubham Dhage

- Beneficial Ownership Information Frequently Asked Questions, FinCEN Website, July 24, 2024
  - FinCEN again has updated its set of frequently asked questions related to the BOI reports required under the Corporate Transparency Act
  - The two new questions added deal with issues related to EIN:
    - What to do about tax disregarded entities and EINs
    - Updated on issues with obtaining EINs timely

https://www.fincen.gov/boi-faqs

FinCEN Issues More Updates to BOI FAQ

F. 13. What type of tax identification number should be reported by a reporting company that is disregarded for U.S. tax purposes?

An entity that is disregarded for U.S. tax purposes—a "disregarded entity"—is not treated as an entity separate from its owner for U.S. tax purposes. Instead of a disregarded entity being taxed separately, the entity's owner reports the entity's income and deductions as part of the owner's federal tax return.

A disregarded entity must report beneficial ownership information (BOI) to FinCEN if it is a reporting company (see Question C.1). Such a reporting company must provide one of the following types of taxpayer identification numbers (TINs) on its BOI report if it has been issued a TIN: an Employer Identification Number (EIN); a Social Security Number (SSN); or an Individual Taxpayer Identification Number (ITIN). If a foreign reporting company has not been issued a TIN, it must provide a tax identification number issued by a foreign jurisdiction and the name of that jurisdiction.

Consistent with rules of the Internal Revenue Service (IRS) regarding the use of TINs, different types of tax identification numbers may be reported for disregarded entities under different circumstances:

If the disregarded entity has its own EIN, it may report that EIN as its TIN. If the disregarded entity does not have an EIN, it is not required to obtain one to meet its BOI reporting requirements so long as it can instead provide another type of TIN or, if a foreign reporting company not issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of that jurisdiction.

If the disregarded entity is a single-member limited liability company (LLC) or otherwise has only one owner that is an individual with an SSN or ITIN, the disregarded entity may report that individual's SSN or ITIN as its TIN.

If the disregarded entity is owned by a U.S. entity that has an EIN, the disregarded entity may report that other entity's EIN as its TIN.

If the disregarded entity is owned by another disregarded entity or a chain of disregarded entities, the disregarded entity may report the TIN of the first owner up the chain of disregarded entities that has a TIN as its TIN.

As explained above, a disregarded entity that is a reporting company must report one of these tax identification numbers when reporting beneficial ownership information to FinCEN

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- If the disregarded entity is a single-member limited liability company (LLC) or otherwise has only one owner that is an individual with an SSN or ITIN, the disregarded entity may report that individual's SSN or ITIN as its TIN.
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- If the disregarded entity is owned by another disregarded entity or a chain of disregarded entities, the disregarded entity may report the TIN of the first owner up the chain of disregarded entities that has a TIN as its TIN.

https://www.fincen.gov/boi-faqs

FinCEN Issues More Updates to BOI FAQ

As explained above, a disregarded entity that is a reporting company must report one of these tax identification numbers when reporting beneficial ownership information to FinCEN

https://www.fincen.gov/boi-faqs

FinCEN Issues More Updates to BOI FAQ

G. 3. How can I obtain a tax identification number for a new company quickly so that I can file an initial beneficial ownership information report on time?

A reporting company must provide one of the following types of taxpayer identification numbers (TINs) on its BOI report if it has been issued a TIN: an Employer Identification Number (EIN); a Social Security Number (SSN); or an Individual Taxpayer Identification Number (ITIN). If a foreign reporting company has not been issued a TIN, it must provide a tax identification number issued by a foreign jurisdiction and the name of that jurisdiction.

The Internal Revenue Service (IRS) offers a free online application for an EIN, which is provided immediately upon submission of the application. For more information, see "Taxpayer Identification Numbers (TIN)" at IRS.gov (https://www.irs.gov/individuals/international-taxpayers/taxpayer-identification-numbers-tin).

For more information on Employer Identification Numbers specifically, and to access the EIN online application, see "Apply for an Employer Identification Number (EIN) Online" at IRS.gov (https://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online).

https://www.fincen.gov/boi-faqs

FinCEN Issues More Updates to BOI FAQ

Most reporting companies should be able to use the EIN online application to apply for their EIN. However, there may be situations where a reporting company needs to file a Form SS-4, Application for Employer Identification Number (https://www.irs.gov/pub/irs-pdf/fss4.pdf), in order to obtain an EIN. In particular, if the responsible party for the applicant is a foreign person that does not have an SSN or ITIN, they will not be able to use the online application portal. For information about completing and submitting the Form SS-4 by mail for fax, see the Instructions to Form SS-4 (https://www.irs.gov/instructions/iss4).

For Forms SS-4 submitted by fax, applicants should generally receive their EIN in four business days. For Forms SS-4 submitted by mail, applicants should receive their EIN in four to five weeks. However, in some circumstances, it may take six to eight weeks to receive an EIN. Thus, in some limited circumstances, a reporting company with no other tax identification number may not be able to obtain its EIN by its BOI report filing deadline.

https://www.fincen.gov/boi-faqs

FinCEN Issues More Updates to BOI FAQ

A reporting company must report its tax identification number when reporting beneficial ownership information to FinCEN and, indeed, will be unable to submit its BOI report without including a tax identification number. In such circumstances, in addition to making all reasonable efforts to file its BOI report in a timely manner (including requesting all necessary information as early as practicable), the reporting company should file its report as soon as it receives its EIN. As a best practice, the reporting company may consider retaining documentation associated with its efforts to comply with the BOI reporting requirements in a timely manner

https://www.fincen.gov/boi-faqs

IRS News Release Adds 5 New Warning Signs of Problematic ERC Refund Claims

Unsplash+ in collaboration with Rodion Kutsaiev

- IRS shares more warning signs of incorrect claims for the Employee Retention Credit; urges businesses to proactively resolve erroneous claims to avoid penalties, interest, audit, IR-2024-198, July 26, 2024
  - IRS releases news release
  - Adds 5 new warning signs of problematic ERC refund claims based on experience from recent exams
  - Also added announcements regarding future ERC enforcement steps

https://www.irs.gov/newsroom/irs-shares-more-warning-signs-of-incorrect-claims-for-the-employee-retention-credit-urges-businesses-to-proactively-resolve-erroneous-claims-to-avoid-penalties-interest-audit

IRS News Release Adds 5 New Warning Signs of Problematic ERC Refund Claims

The IRS issued today's five new warning signs to give businesses and tax professionals additional time to prepare for an upcoming announcement involving new steps being taken to counter improper ERC claims. In coming days, the IRS plans to issue more information on new compliance work involving high-risk ERC claims as well as details about an anticipated short-term reopening of the Voluntary Disclosure Program and an important update about impending processing of low-risk payments to help small business with legitimate claims. This follows up on last month's announcement that the IRS was denying more of the highest-risk ERC claims.

https://www.irs.gov/newsroom/irs-shares-more-warning-signs-of-incorrect-claims-for-the-employee-retention-credit-urges-businesses-to-proactively-resolve-erroneous-claims-to-avoid-penalties-interest-audit

IRS News Release Adds 5 New Warning Signs of Problematic ERC Refund Claims

Essential businesses during the pandemic that could fully operate and didn't have a decline in gross receipts. Promoters convinced many essential businesses to claim the ERC when, in many instances, essential businesses weren't eligible because their operations weren't fully or partially suspended by a qualifying government order. Modifications that didn't affect an employer's ability to operate, like requiring employees to wash hands or wear masks, doesn't mean the business operations were suspended. The IRS urges essential businesses to review eligibility rules and examples related to government orders.

https://www.irs.gov/newsroom/irs-shares-more-warning-signs-of-incorrect-claims-for-the-employee-retention-credit-urges-businesses-to-proactively-resolve-erroneous-claims-to-avoid-penalties-interest-audit

IRS News Release Adds 5 New Warning Signs of Problematic ERC Refund Claims

Business unable to support how a government order fully or partially suspended business operations. Whether a business was fully or partially suspended depends on its specific situation. When asked for proof on how the government order suspended more than a nominal portion of their business operations, many businesses haven't provided enough information to confirm eligibility.

https://www.irs.gov/newsroom/irs-shares-more-warning-signs-of-incorrect-claims-for-the-employee-retention-credit-urges-businesses-to-proactively-resolve-erroneous-claims-to-avoid-penalties-interest-audit

IRS News Release Adds 5 New Warning Signs of Problematic ERC Refund Claims

Business reporting family members' wages as qualified wages. If business owners claimed the ERC using wages paid to related individuals, those claims are likely for the wrong amount or ineligible. Wages paid to related individuals aren't qualified wages for the ERC. Generally, related individuals are the majority owner and their:

- Spouse.
- Child or a descendant of a child.
- Brother, sister, stepbrother or stepsister.
- Father, mother or an ancestor of either.
- Stepfather or stepmother.
- Niece or nephew.
- Aunt or uncle.
- Son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law or sister-in-law.
- Household member, meaning an individual who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household.

https://www.irs.gov/newsroom/irs-shares-more-warning-signs-of-incorrect-claims-for-the-employee-retention-credit-urges-businesses-to-proactively-resolve-erroneous-claims-to-avoid-penalties-interest-audit

IRS News Release Adds 5 New Warning Signs of Problematic ERC Refund Claims

Business using wages already used for Paycheck Protection Program loan forgiveness. The U.S. Small Business Administration offered the Paycheck Protection Program, which provided SBA-backed loans that helped businesses keep their workforce employed during the pandemic. The PPP ended May 31, 2021, but borrowers could still apply for PPP loan forgiveness.

If SBA forgave the loan, businesses can't claim the ERC on wages that they reported as payroll costs to get PPP loan forgiveness. Participating in the PPP affects the amount of qualified wages used to calculate the ERC. Payroll costs up to the amount SBA forgave aren't eligible for ERC. Taxpayers can use the rest of their qualified wages to figure their credit.

https://www.irs.gov/newsroom/irs-shares-more-warning-signs-of-incorrect-claims-for-the-employee-retention-credit-urges-businesses-to-proactively-resolve-erroneous-claims-to-avoid-penalties-interest-audit

IRS News Release Adds 5 New Warning Signs of Problematic ERC Refund Claims

Large employers claiming wages for employees who provided services. Special rules applied to large eligible employers, which are those that averaged:

- more than 100 full-time employees in 2019 and claimed ERC for 2020 tax periods, and/or
- more than 500 full-time employees in 2019 and claimed ERC for 2021 tax periods.

Large eligible employers can only claim wages paid to employees who were not providing services. Many large employers' claims incorrectly included wages for employees who were providing services during these periods. The ERC comparison chart provides more details.

https://www.irs.gov/newsroom/irs-shares-more-warning-signs-of-incorrect-claims-for-the-employee-retention-credit-urges-businesses-to-proactively-resolve-erroneous-claims-to-avoid-penalties-interest-audit

CCA Outlines How to Apply Controlled Group Rules for ERC Claims for Tax Exempt Organizations

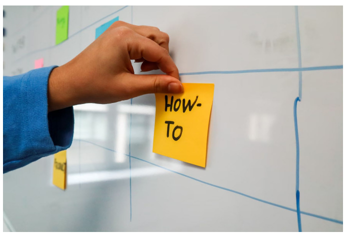

Photo by Walls.io on Unsplash

- CCA 202430007, July 26, 2024
  - ERC law text says that rules "like" Section 52(a) and (b) rules apply to tax-exempt organizations to determine related employers
  - However there are no Treasury regulations applying §52 to tax-exempt organizations as the underlying credit normally doesn't apply to tax-exempt organizations
  - Decide that tax-exempt organizations must apply a reasonable, good faith interpretation of the law when determining how these rules apply to an exempt organization

https://www.taxnotes.com/research/federal/irs-private-rulings/legal-memorandums/good-faith-standard-applies-controlled-exempt-orgs-seeking-erc/7khx8

CCA Outlines How to Apply Controlled Group Rules for ERC Claims for Tax Exempt Organizations

Because Treasury Regulations have not been issued regarding the application of section 52 to tax-exempt organizations, a tax-exempt organization must apply a reasonable, good faith interpretation of the controlled group rules in determining its eligibility for and the amount of the ERC. The application of Treasury Regulation §1.414(c)-5(b) (modified by substituting "more than 50 percent" in place of "at least 80 percent" each place it appears in §1.414(c)-5(b)) by a tax-exempt organization would be treated as a reasonable, good faith interpretation of the controlled group rules in determining eligibility for and the amount of the ERC, provided that the tax-exempt organization applies the controlled group rules on a consistent basis for all purposes under the Code.

https://www.taxnotes.com/research/federal/irs-private-rulings/legal-memorandums /good-faith-standard-applies-controlled-exempt-orgs-seeking-erc/7khx8

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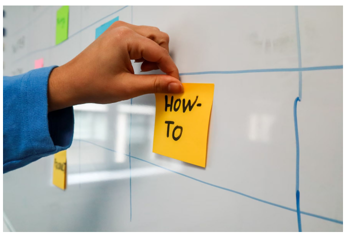

Photo by Walls.io on Unsplash

- CCA 202430007, July 26, 2024
  - The pension regulations noted earlier also don't apply to churches
  - However, CCA advises that looking to those rules would also be a reasonable, good-faith interpretation of those rules

https://www.taxnotes.com/research/federal/irs-private-rulings/legal-memorandums/good-faith-standard-applies-controlled-exempt-orgs-seeking-erc/7khx8

CCA Outlines How to Apply Controlled Group Rules for ERC Claims for Tax Exempt Organizations

Guidance also has not been issued regarding the application of section 52 to churches or qualified church-controlled organizations. Therefore, a church, or qualified church-controlled organization must apply a reasonable, good faith interpretation of the controlled group rules under section 52 in determining eligibility for and the amount of the ERC for churches or qualified church-controlled organizations (taking into account the reason the controlled group rules were included in the ERC).

Although Treasury Regulation §1.414(c)-5 generally does not apply to churches (as defined in section 3121(w)(3)(A)) and qualified church-controlled organizations (as defined in section 3121(w)(3)(B)),14 the application of the controlled group rules provided in §1.414(c)-5(b) (but substituting "more than 50 percent" in place of "at least 80 percent" each place it appears in §1.414(c)-5(b)) by a church or qualified church-controlled organization would be treated as a reasonable, good faith interpretation of the controlled group rules in determining eligibility for and the amount of the ERC.

https://www.taxnotes.com/research/federal/irs-private-rulings/legal-memorandums/good-faith-standard-applies-controlled-exempt-orgs-seeking-erc/7khx8

CCA Outlines How to Apply Controlled Group Rules for ERC Claims for Tax Exempt Organizations

FACTS

Employer X is an organization exempt from tax under section 501(c)(3) of the Code. National Organization is managed by a Board of Directors. (Members of a Board of Directors are referred to as “Directors” herein.) Employer X is an affiliate of National Organization and is a subordinate organization in a group exemption letter held by National Organization. However, Employer X asserts that it operates as an independent tax-exempt organization, has its own EIN, and is managed by a Board of Directors., None of the Directors of National Organization is a Director of Employer X. National Organization does not have the power to appoint any Directors of Employer X. National Organization also does not have the general power to remove any Director of Employer X or to designate a new Director of Employer X. In addition, no Director of Employer X is an agent or employee of National Organization. Further, Employer X does not have a general power to appoint or remove any Director of National Organization or to designate a new Director of National Organization and no Director of National Organization is an agent or employee of Employer X.

https://www.taxnotes.com/research/federal/irs-private-rulings/legal-memorandums/good-faith-standard-applies-controlled-exempt-orgs-seeking-erc/7khx8

CCA Outlines How to Apply Controlled Group Rules for ERC Claims for Tax Exempt Organizations

FACTS

Employer X functions under the direction of a chief executive officer (CEO) who is selected by and reports to Employer X's Board of Directors. The Directors have the ability under Employer X's bylaws to appoint or remove any Director of Employer X and to designate a new Director.

Employer X asserts that it is not aggregated with National Organization under section 52 in determining its eligibility for and the amount of the ERC. Employer X has claimed the ERC for the third calendar quarter of 2020.

Alternatively, assume that all facts remain the same as above except that National Organization has the general power to appoint and to remove or designate three of the five Directors (60 percent) of Employer X.

https://www.taxnotes.com/research/federal/irs-private-rulings/legal-memorandums/good-faith-standard-applies-controlled-exempt-orgs-seeking-erc/7khx8

CCA Outlines How to Apply Controlled Group Rules for ERC Claims for Tax Exempt Organizations

DISCUSSION

No Director of either Employer X or National Organization is a representative (that is, a director, agent, or employee) of the other organization. In addition, neither organization is controlled by the other because neither organization has the general power to appoint a Director of the other organization or the general power to remove a Director and designate a new Director. Because Employer X and National Organization are not members of a controlled group under section 52, Employer X is not required to be aggregated with National Organization to determine the amount of the ERC for which Employer X is eligible. Employer X's application of the controlled group rules under section 52 in determining its eligibility for and the amount of the ERC is a reasonable, good faith interpretation provided that Employer X applies the controlled group rules on a consistent basis for all purposes under the Code.

https://www.taxnotes.com/research/federal/irs-private-rulings/legal-memorandums /good-faith-standard-applies-controlled-exempt-orgs-seeking-erc/7khx8

CCA Outlines How to Apply Controlled Group Rules for ERC Claims for Tax Exempt Organizations

DISCUSSION

In applying the alternative facts, Employer X's assertion that Employer X and National Organization are not members of a controlled group under section 52 is not a reasonable, good faith interpretation because National Organization has the general power to appoint and to remove or designate more than 50 percent (that is, 60 percent) of the Board of Directors of Employer X. Employer X and National Organization are members of a controlled group under section 52, and Employer X is required to be aggregated with National Organization to determine its eligibility for and the amount of the ERC.

https://www.taxnotes.com/research/federal/irs-private-rulings/legal-memorandums/good-faith-standard-applies-controlled-exempt-orgs-seeking-erc/7khx8

CCA Outlines How to Apply Controlled Group Rules for ERC Claims for Tax Exempt Organizations

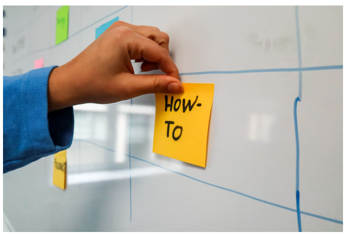

Photo by Walls.io on Unsplash

- CCA 202430007, July 26, 2024
  - Caveats: First, this is only a CCA and is not binding on taxpayers - rather it's simply a legal analysis a court may or may not accept
  - However
    - Fairly safe if a taxpayer's position is consistent with the CCA
    - A taxpayer still needs a reasonable interpretation of what those provisions mean regardless of how a court might feel about the analysis in the CCA

https://www.taxnotes.com/research/federal/irs-private-rulings/legal-memorandums/good-faith-standard-applies-controlled-exempt-orgs-seeking-erc/7khx8

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