AICPA

January 15, 2021

The Honorable David J. Kautter
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Michael W. Faulkender
Assistant Secretary for Economic Policy
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Employee Retention Credit – Sections 206 of the Taxpayer Certainty and Disaster Relief Act of 2020 (Division EE of the Consolidated Appropriations Act, 2021)

Dear Messrs. Kautter, Faulkender and Rettig:

The American Institute of CPAs (AICPA) appreciates the efforts by the Department of the Treasury ("Treasury") and the Internal Revenue Service (IRS) to provide guidance to taxpayers affected by the Coronavirus Disease 2019 pandemic (commonly known as "Coronavirus" or "COVID-19").

In response to the pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act.[1] In addition, on December 27, 2020, the Consolidated Appropriations Act, 2021[2] (CAA 2021), which included the Taxpayer Certainty and Disaster Relief Act of 2020 (TCDRA) (Division EE of the CAA 2021), was signed into law. This letter relates to Section 206 of the TCDRA.

Background

The CARES Act provided employers with the option to benefit from one of two mutually exclusive incentives, a Paycheck Protection Program (PPP) loan or an employee retention credit (ERC), designed to allow employers to retain employees during the pandemic. Section 206 of the TCDRA allows employers who received a PPP loan to retroactively claim the ERC for wages paid after March 12, 2020, but not for the wages used to obtain PPP loan forgiveness.

[1] P.L. 116-136.
[2] P.L. 116-260.

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It is unclear how the reporting of wages as payroll costs on a previously filed PPP loan forgiveness application affects an employer's ability to claim the ERC for wages that were included on a loan forgiveness application but did not affect the amount of loan forgiveness.

Recommendation

The AICPA recommends that the IRS and Treasury provide guidance stating that the filing of a PPP loan forgiveness application does not constitute an election to forgo the ERC with respect to the amount of wages reported on the application exceeding the amount of wages necessary for loan forgiveness.

Analysis

Qualified wages for ERC purposes are amounts paid by an eligible employer up to $10,000 per employee, unless the employer elects out of the provision. IRS frequently asked question (FAQ) #93 states that an eligible employer can elect not to apply the ERC for any calendar quarter by not claiming the credit on the employer's employment tax return. IRS FAQ # 94 states that the election can be changed by amending a quarterly payroll tax filing and that the employer can claim a credit for a subsequent quarter even though no credit was claimed in the previous quarter. The FAQs do not address the election process when payroll costs have been reported on a PPP loan forgiveness application.

To be eligible for PPP loan forgiveness, an employer must incur or pay payroll, rent, utilities and interest amounts during the covered period or alternative covered period. On loan forgiveness applications, many employers reported only payroll costs (and not rent, utilities, and interest), because the payroll costs[3] generally exceeded the loan amounts. Because employers did not have the option to claim the ERC at the time many loan forgiveness applications were filed, they were not concerned about reporting wages in excess of those needed for loan forgiveness.

The following examples illustrate our recommendation:

> *Example 1*
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> Employer X received a $1,000,000 PPP loan. On its PPP loan forgiveness application Employer X reported $1,500,000 of payroll costs for the covered period April 15, 2020 to September 29, 2020. The entire loan was forgiven.
>
> Employer X should be permitted to claim the ERC for qualified wages paid from March 13, 2020 through December 31, 2020, including qualified wages related to the $500,000 of wages reported on the loan forgiveness application in excess of the

[3] Adjusted for the salary or hourly wage reduction and full-time equivalents during the covered period and a reference period.

> $1,000,000 of wages necessary for forgiveness, without jeopardizing the validity of the PPP loan forgiveness application.
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> *Example 2*
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> Employer X received a $1,000,000 PPP loan. On its PPP loan forgiveness application, Employer X reported $1,500,000 of payroll costs for the covered period April 15, 2020 to September 29, 2020. In addition, Employer X incurred $100,000 of rent expenses during the covered period that were not reported on the loan forgiveness application as they were not necessary for loan forgiveness. The entire loan was forgiven.
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> Employer X should be permitted to claim the ERC for qualified wages paid March 13, 2020 through December 31, 2020, including up to $600,000 ($1,500,000 of wages included on the loan forgiveness application + $100,000 of rent expenses not reported on the application - $1,000,000 loan) of payroll costs reported on the loan forgiveness application, without jeopardizing the validity of the PPP loan forgiveness application.

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We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please feel free to contact Deborah Walker, Chair, AICPA Employee Benefits Taxation Technical Resource Panel at (202) 257-5609, or dwalker@cbh.com; Kristin Esposito, AICPA Director – Tax Policy & Advocacy, at (202) 434-9241 or kristin.esposito@aicpa-cima.com; or me at (612) 397-3071 or chris.hesse@CLAconnect.com.

Sincerely,

Christopher W. Hesse

Christopher W. Hesse, CPA
Chair, AICPA Tax Executive Committee

cc: The Honorable Michael J. Desmond, Chief Counsel, Internal Revenue Service
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