

Employee Retention Credit and Professional Responsibility

As has been said many times, when a taxpayer claims the Employee Retention Credit (ERC), the taxpayer must reduce the wage and health expenses claimed on the income tax return by the amount of the credit. The reduction applies in the year the wages and health expenses were paid which permitted the ERC to be claimed.

Example: During 2022 taxpayer claims the ERC for one or more quarters of 2020. In this case the taxpayer needs to reduce the wage/health expenses claimed on their income tax return for 2020, the year the expenses were paid/incurred. If the 2020 return has already been filed, the taxpayer will need to file an amended income tax return for 2020.

ISSUE:

You have looked at your client's business activities and determined your client did NOT qualify for the ERC. IRS has issued several warnings to employers to beware of third parties promoting improper ERC claims. Yet, even after your telling the client they didn't qualify AND IRS warnings being issued, your client went somewhere else, possibly to a company that "specializes" in the ERC, and claimed the credit for tax years 2020 and 2021. Is it acceptable under Circular 230 for you to amend the client's income tax returns for 2020 and 2021 to reduce the wage and health expenses?

IRS ANSWER:

Circular 230 requires tax professionals to prepare returns accurately. Tax professionals are permitted to rely on work performed by other professionals, BUT this reliance cannot be blind reliance. If the tax professional finds incomplete, incorrect, or inconsistent information, the tax professional is not permitted to accept the work performed by others.

The Office of Professionals Responsibility (OPR), in Issue Number 2023-02, says, in part: "IF THE PRACTITIONER CANNOT REASONABLY CONCLUDE (CONSISTENT WITH THE STANDARDS DISCUSSED IN THIS GUIDANCE) THAT THE CLIENT IS OR WAS ELIGIBLE TO CLAIM THE ERC, THEN THE PRACTITIONER SHOULD **NOT** PREPARE AN ORIGINAL OR AMENDED RETURN THAT CLEIMS OR PERPETUATES A POTENTIALLY IMPROPER CREDIT."

Editor's note: We feel OPR's opinion is exactly correct - the preparing of an amended income tax return is telling IRS the underlying item, ERC in this case, is valid. Therefore, tax professionals should NOT amend an income tax return for a taxpayer who has claimed an improper ERC.

Example: David, the tax professional, has determined Brenda does NOT qualify for the ERC. Brenda "heard" about this fantastic opportunity and paid an ERC specialty company to get her the ERC. The ERC company told Brenda she needed to amend her income returns by the credit amount. Brenda asks David to prepare the amended income tax return. If David prepares this amended income tax return, David, is in violation of Circular 230 because he is preparing a return that he feels is incorrect. In addition to NOT filing amended returns for Brenda, David should, under section 10.21 of Circular 230, promptly inform Brenda of the "noncompliance, error, or omission" and any penalty or penalties that may apply.

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