

IRS CLARIFIES INTERACTION BETWEEN PAYCHECK PROTECTION PROGRAM AND EMPLOYEE RETENTION TAX CREDIT IN M&A DEALS

Hodgson Russ Federal-International Tax Alert
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Under the CARES Act, an employer otherwise eligible for employee retention credits (“ERC”) is denied such credits if it participates in a Paycheck Protection Program (“PPP”) loan.

The previously existing rules coordinating the interplay between the two programs suggested the seemingly harsh result that businesses otherwise eligible for the ERC that acquire a target entity that took a PPP loan would disqualify the acquiring entity from ERC benefits as a result of the program’s post-acquisition employer aggregation rules.

Clarification had been requested, and taxpayers and M&A participants have been anxiously awaiting further guidance or clarification of this important aspect of the competing programs. That guidance has now been issued -- in a generally taxpayer-friendly fashion.

On November 16, 2020, the IRS updated its FAQs on the ERC program to provide clarity regarding whether employers would still be eligible to claim the ERC when acquiring a target that has participated in the PPP loan program. Under the new guidance:

- In a stock/equity deal, assuming that the PPP borrower target has “fully satisfied” their PPP loan (meaning that they have (a) repaid the PPP note in full, (b) received forgiveness confirmation with funds remitted to the PPP lender by the SBA, or (c) satisfied the change of control requirements under the SBA’s October 2nd procedural notice, including the establishment of an interest-bearing escrow account, and submitted a forgiveness application to the PPP lender), acquisition of a PPP borrower target will not jeopardize the ERC eligibility of any members of the buyer’s aggregated group and there will be no recapture of any ERC taken by the buyer before the transaction. If the target’s PPP loan is not “fully satisfied” at the time of closing, the same result as above generally occurs *except* that the target will remain ineligible to claim the ERC after the transaction.

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- In an asset deal, acquisition of a PPP borrower target's assets will not jeopardize the ERC eligibility of any members of the buyer's aggregated group, but if the buyer assumes the target's PPP loan then wages paid by the buyer after the transaction closing date to any individual who was employed by the target on the closing date will not be "qualified wages" eligible for the ERC.

For more general information on the ERC or the PPP program, please see our prior alerts located at our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

Please contact Brad Birmingham (716.848.1511) or Joe Rekrut (716.848.1715) with any questions you may have regarding the ERC or the above IRS guidance.

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