

## Part III

### Administrative, Procedural, and Miscellaneous

26 CFR 601.105 Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.  
Also Part I, § 3134; § 2301 of Public Law 116-136

Rev. Proc. 2021-33

#### **SECTION 1. PURPOSE**

This revenue procedure provides a safe harbor that permits a taxpayer to exclude certain items from “gross receipts” under §§ 448(c) and 6033 of the Internal Revenue Code (Code), as applicable, solely for purposes of determining eligibility to claim the employee retention credit under section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116-136, 134 Stat. 281 (March 27, 2020), as amended by sections 206 and 207 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), enacted as Division EE of the Consolidated Appropriations Act, 2021 (CAA), Public Law 116-260, 134 Stat. 1182 (December 27, 2020), and extended by section 9651 of the American Rescue Plan Act of 2021 (ARP),

Public Law 117-2, 135 Stat. 4 (March 11, 2021). The items covered by the safe harbor are: (1) the amount of the forgiveness of a Paycheck Protection Program (PPP) loan under section 7(a)(37) or 7A of the Small Business Act, (2) a grant under section 324 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Economic Aid Act), enacted as Title III of Division N of the CAA, and (3) a restaurant revitalization grant under section 5003 of the ARP.

## **SECTION 2. BACKGROUND**

### .01 Employee Retention Credit.

(1) As originally enacted, section 2301 of the CARES Act permits eligible employers, including tax-exempt organizations, that pay qualified wages after March 12, 2020, and before January 1, 2021, to claim an employee retention credit against applicable employment taxes. Section 206 of the Relief Act adopted amendments and technical changes to section 2301 of the CARES Act for qualified wages paid after March 12, 2020, and before January 1, 2021. Section 207 of the Relief Act amended section 2301 of the CARES Act to extend the application of the employee retention credit to qualified wages paid after December 31, 2020, and before July 1, 2021, and to modify the calculation of the credit amount for qualified wages paid during that time, in addition to making other changes. Section 9651 of the ARP added § 3134 to the Code, providing an employee retention credit for wages paid after June 30, 2021, and before January 1, 2022.<sup>1</sup>

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<sup>1</sup> The modifications made by the Relief Act or the ARP to the employee retention credit are not relevant to this revenue procedure, except to the extent specifically discussed herein. Nonetheless, references to the employee retention credit and other related terms in this revenue procedure should be read to incorporate the changes to the applicable rules made by the Relief Act and the ARP for the relevant calendar quarters in 2020 and 2021.

(2) Notice 2021-20, 2021-11 I.R.B. 922 (March 15, 2021), and Notice 2021-23, 2021-16 I.R.B. 1113 (April 19, 2021), provide additional guidance on eligibility for, and the claiming of, the employee retention credit for qualified wages paid after March 12, 2020, and before January 1, 2021, and for qualified wages paid after December 31, 2020, and before July 1, 2021, respectively. Notice 2021-49, 2021-34 I.R.B. \_\_\_\_ (August 23, 2021) provides separate guidance on the employee retention credit under § 3134 of the Code for qualified wages paid after June 30, 2021, and before January 1, 2022.

.02 Eligible Employer. The employee retention credit is available only to employers that are eligible employers, as defined in section 2301(c)(2) of the CARES Act, as amended by section 207 of the Relief Act, or § 3134(c)(2) of the Code, for the applicable calendar quarters in 2020 and 2021. An employer may be eligible for the employee retention credit if its gross receipts for a calendar quarter decline by a certain percentage as compared to a prior calendar quarter. The method used to determine if an employer is an eligible employer based on experiencing the requisite percentage decline in gross receipts varies depending on the calendar quarter for which the employer is determining its eligibility for the employee retention credit. Taxpayers should refer to section III.E. of Notice 2021-20, section III.C. of Notice 2021-23, and section III.D of Notice 2021-49 for these rules, as applicable. All persons treated as a single employer under § 52(a) or (b) of the Code, or § 414(m) or (o) of the Code, are treated as a single employer for purposes of the employee retention credit. See Notice 2021-20, section III.E. and § 3134(d) of the Code.

.03 PPP Loans and interaction with the employee retention credit.

(1) Section 1102 and 1106 of the CARES Act, as amended by the Paycheck Protection Program Flexibility Act of 2020 (Public Law 116–142) and the Economic Aid Act, established the PPP, which allows “eligible recipients” to obtain loans guaranteed by the Administrator of the Small Business Administration under section 7(a)(36) of the Small Business Act (15 U.S.C. § 636(a)(36)) (PPP First Draw Loans). Section 1109 of the CARES Act provides additional authority to permit certain lenders to participate in the PPP by making loans (Section 1109 Loans) that must be consistent, to the maximum extent practicable, with the terms and conditions for loans under the PPP. Section 311 of the Economic Aid Act authorized additional loans to be made to “eligible entities” (PPP Second Draw Loans) under section 7(a)(37) of the Small Business Act (15 U.S.C. § 636(a)(37)).

(2) Section 1106 of the CARES Act, originally codified at 15 U.S.C. § 9005, provides that an eligible recipient of a PPP First Draw Loan is eligible for forgiveness of all or a portion of the principal amount of the PPP First Draw Loan if certain conditions are met. Section 304 of the Economic Aid Act redesignated, transferred, and amended section 1106 of the CARES Act as section 7A of the Small Business Act, to be inserted after section 7 of the Small Business Act (15 U.S.C. § 636). Section 311 of the Economic Aid Act provides that an eligible entity is eligible for forgiveness of a PPP Second Draw Loan in the same manner as an eligible recipient with respect to a PPP First Draw Loan made under section 7(a)(36) of the Small Business Act. Section 1109(d)(2)(D) of the CARES Act provides that the terms and conditions for forgiveness of Section 1109 Loans must be consistent, to the maximum extent practicable, with the terms and conditions under section 1106 of the CARES Act regarding PPP First Draw

Loans. Collectively, this revenue procedure refers to PPP First Draw Loans, Section 1109 Loans, and PPP Second Draw Loans as “PPP Loans,” all of which are covered loans under either section 7(a)(37) or 7A of the Small Business Act.

(3) An employer that receives a PPP Loan may claim the employee retention credit available to it for the calendar quarter, subject to the restriction that the qualified wages may not be counted both for the employee retention credit and as payroll costs that are paid during the covered period (payroll costs) to the extent the payroll costs qualify the eligible employer for forgiveness under the PPP. See section 2301(g) of the CARES Act, section 7A(a)(12) of the Small Business Act, as amended by section 206(c)(1) of the Relief Act, and § 3134(h)(1)(A) and (h)(2) of the Code. See also Section III.I of Notice 2021-20.

.04 Certain grants and interaction with the employee retention credit.

(1) Section 324 of the Economic Aid Act authorizes the Small Business Administration to make grants to eligible live venue, performing arts, and museum operators and promoters (shuttered venue operator grants). Shuttered venue operator grant funds may be used for certain qualifying expenses, including payroll costs, which has the same meaning as under section 7(a)(36)(A) of the Small Business Act. See section 324(d)(2)(A) of the Economic Aid Act. Section 5003 of the ARP provides grants to qualifying restaurants and food vendors (restaurant revitalization grants). Restaurant revitalization grants may be used for certain qualifying expenses, including payroll costs, which has the same meaning as under section 7(a)(36)(A) of the Small Business Act, except that the term does not include qualified wages taken into account in determining the employee retention credit under section 2301 of the CARES Act. See

section 5003(a)(8)(A) of the ARP. Collectively, these two grants are referred to as “ERC-Coordinated Grants” in this revenue procedure.

(2) Under § 3134(h)(1)(B) and (C) of the Code, an employer that receives an ERC-Coordinated Grant may claim the employee retention credit available to it for the calendar quarter, subject to the restriction that the qualified wages may not be counted both for the employee retention credit and as payroll costs in connection with an ERC-Coordinated Grant.

.05 Exclusion from gross income.

(1) Sections 276(a)(1), 276(b), and 278(a) of the COVID-related Tax Relief Act each provide that no amount is included in the gross income of an eligible recipient or eligible entity, as applicable, by reason of the forgiveness of a PPP First Draw Loan, Section 1109 Loan, or PPP Second Draw Loan, respectively, and that no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of such exclusion from gross income.

(2) Section 278(d) of the COVID-related Tax Relief Act provides guidance regarding the Federal income tax consequences of shuttered venue operator grants. Specifically, section 278(d) of the COVID-related Tax Relief Act provides that no amount of a shuttered venue operator grant is included in the gross income of an eligible recipient, and that no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of such exclusion from gross income.

(3) Section 9673 of the ARP provides guidance regarding the Federal income tax consequences of a restaurant revitalization grant. Specifically, section 9673 of the ARP provides that no amount of the restaurant revitalization grant is included in the gross

income of an eligible recipient, and that no deduction is denied, no tax attribute is reduced, and no basis increase is denied, by reason of such exclusion from gross income.

.06 Gross receipts.

(1) For purposes of determining eligibility to claim the employee retention credit, other than in the case of a tax-exempt entity, “gross receipts” are defined by reference to § 448(c) of the Code. See section 2301(c)(2)(B)(i) of the CARES Act; section 2301(c)(2)(A)(ii)(II) of the CARES Act as amended by section 207(d) of the Relief Act; § 3134(c)(2)(A) of the Code. Section 1.448-1T(f)(2)(iv) of the Income Tax Regulations provides, in relevant part, that “gross receipts” are the gross receipts of the taxable year in which such receipts are properly recognized under the taxpayer's accounting method used in that taxable year for Federal income tax purposes, determined without regard to § 1.448-1T. For this purpose, gross receipts include total sales, net of returns and allowances, and all amounts received for services. In addition, gross receipts include any income from investments, and from incidental or outside sources, regardless of whether that income is included in the taxpayer's gross income under § 61 of the Code. For example, gross receipts include tax-exempt interest within the meaning of § 103 of the Code even though that interest is not included in the taxpayer's gross income under § 61 of the Code. In addition, gross receipts are reduced by the taxpayer's adjusted basis in the property sold for sales of capital assets as defined in § 1221 of the Code, or sales of property described in § 1221(2), relating to property used in a trade or business.

(2) In the case of a tax-exempt organization determining eligibility to claim the employee retention credit, “gross receipts” are defined by reference to § 6033 of the Code. See section 2301(c)(2)(C) of the CARES Act as amended by section 206(a) of the Relief Act; § 3134(c)(2)(C) of the Code. Section 1.6033-2(g)(4) of the Income Tax Regulations provides, in relevant part, that “gross receipts” are the gross amount received by the organization during its annual accounting period from all sources without reduction for any costs or expenses including, for example, cost of goods or assets sold, cost of operations, or expenses of earning, raising, or collecting those amounts. Thus, for a tax-exempt organization, “gross receipts” includes, but is not limited to (i) the gross amount received as contributions, gifts, grants, and similar amounts without reduction for the expenses of raising and collecting those amounts, (ii) the gross amount received as dues or assessments from members or affiliated organizations without reduction for expenses attributable to the receipt of those amounts, (iii) gross sales or receipts from business activities (including business activities unrelated to the purpose for which the organization qualifies for exemption, the net income or loss from which may be required to be reported on Form 990-T, *Exempt Organization Business Income Tax Return (and Proxy Tax Under Section 6033(e))*, (iv) the gross amount received from the sale of assets without reduction for cost or other basis and expenses of sale, and (v) the gross amount received as investment income, such as interest, dividends, rents, and royalties. In determining its gross receipts, a tax-exempt organization should generally use the same accounting method that it regularly uses to keep its books and records. For example, if a donor makes an unconditional pledge to a tax-exempt organization and the pledge will be paid over three years, a tax-



exempt organization using an accrual method of accounting discounts the pledge to its present value and treats that amount as gross receipts in the first year, whereas a tax-exempt organization using the cash method of accounting treats only the amount of the pledge it actually receives each year as gross receipts for that year.

### **SECTION 3. EMPLOYEE RETENTION CREDIT GROSS RECEIPTS SAFE HARBOR**

.01 In general. Although the amount of forgiveness of a PPP Loan is not included in gross income, that forgiveness amount would be included in gross receipts under § 448(c) of the Code and § 1.448-1T(f)(2)(iv), or § 6033 of the Code and § 1.6033-2(g)(4), as applicable. Similarly, the amount of an ERC-Coordinated Grant received by a taxpayer is not included in gross income, but the amount would be included in gross receipts. Therefore, unless an employer uses the safe harbor as provided in this section 3, the employer must include the amount of the forgiveness of a PPP Loan and the amount of any ERC-Coordinated Grants in gross receipts for determining eligibility to claim the employee retention credit with respect to applicable calendar quarters in 2020 and 2021.

.02 Safe Harbor. Section 2301(g) of the CARES Act and § 3134(h) of the Code set forth a coordination rule providing that the employee retention credit does not apply to so much of the qualified wages paid by an eligible employer as are taken into account as payroll costs in connection with forgiveness of a PPP Loan or, in the case of § 3134(h), an ERC-Coordinated Grant (relief programs). This rule demonstrates a congressional intent that an employer be able to participate in the relief programs and also claim the employee retention credit, provided that the same dollar of wages that are paid for or reimbursed with relief program funds may not be treated as qualified

wages for purposes of the employee retention credit. Including the amount of the forgiveness of a PPP Loan or the amount of an ERC-Coordinated Grant in gross receipts for determining eligibility to claim the employee retention credit could frustrate this congressional intent. Specifically, an employer that participated in one or more of the relief programs and that otherwise has the requisite percentage decline in gross receipts might be precluded from claiming an employee retention credit with respect to a calendar quarter in which there is the decline in gross receipts solely because its participation in the relief program resulted in a temporary increase in gross receipts within the meaning of the tax law. Accordingly, this revenue procedure provides a safe harbor that permits an employer to exclude the amount of the forgiveness of a PPP Loan and the amount of ERC-Coordinated Grants from the definition of gross receipts solely for the purpose of determining eligibility to claim the employee retention credit (safe harbor). An employer is not required to apply this safe harbor. This safe harbor does not permit the exclusion of the amount of forgiveness of a PPP Loan or the amount of ERC-Coordinated Grants from the definition of gross receipts under § 448(c) or § 6033 of the Code for any other Federal tax purpose.

.03 Application of safe harbor. An employer may exclude the amount of the forgiveness of a PPP Loan and the amount of any ERC-Coordinated Grants from its gross receipts in determining eligibility to claim the employee retention credit for a calendar quarter if the employer consistently applies this safe harbor in determining eligibility to claim the employee retention credit. An employer consistently applies this safe harbor by (i) excluding the amount of the forgiveness of any PPP Loan and the amount of any ERC-Coordinated Grant from its gross receipts for each calendar quarter

in which gross receipts for that calendar quarter are relevant to determining eligibility to claim the employee retention credit, and (ii) applying the safe harbor to all employers treated as a single employer under the employee retention credit aggregation rules.

.04 Manner of electing to use the safe harbor. An employer elects to use the safe harbor by excluding the amount of the forgiveness of a PPP Loan and the amount of ERC-Coordinated Grants from its gross receipts when determining eligibility to claim the employee retention credit on its employment tax return or adjusted employment tax return for that calendar quarter or, for employers that file employment tax returns on an annual basis, for the year including the calendar quarter.

.05 Revocation of safe harbor election. Subject to the rule in section 3.03 of this revenue procedure, an employer may revoke its safe harbor election by including the amount of the forgiveness of the PPP Loan or the amount of ERC-Coordinated Grants in its gross receipts when determining eligibility to claim the employee retention credit for a calendar quarter on its adjusted employment tax return for that calendar quarter or, for employers that file employment tax returns on an annual basis, for the year including the calendar quarter. Due to the consistency rule in section 3.03 of this revenue procedure, the employer must adjust all employment tax returns that are affected by the revocation of the safe harbor election.

#### **SECTION 4. SUBSTANTIATION REQUIREMENTS**

An employer must retain in the employer's records support for the credit claimed, including the use of the safe harbor set forth in this revenue procedure. See also Notices 2021-20, 2021-23, and 2021-49.

## **SECTION 5. EFFECT ON OTHER DOCUMENTS**

.01 Notice 2021-20, 2021-11 I.R.B. 922 (March 15, 2021), is amplified.

.02 Notice 2021-23, 2021-16 I.R.B. 1113 (April 19, 2021), is amplified.

.03 Notice 2021-49, 2021-34 I.R.B. \_\_\_\_ (August 23, 2021), is amplified.

## **SECTION 6. EFFECTIVE DATE**

This revenue procedure applies for purposes of determining eligibility to claim the employee retention credit for wages paid after March 12, 2020, and before January 1, 2022.

## **SECTION 7. PAPERWORK REDUCTION ACT**

Any collection of information associated with this notice has been submitted to the Office of Management and Budget for review under OMB control number 1545-0029 in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid OMB control number.

## **SECTION 8. DRAFTING INFORMATION**

The principal author of this revenue procedure is Anna Gleysteen of the Office of the Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the Department of the Treasury and the Internal Revenue Service participated in its development. For further information on this revenue procedure regarding taxable entities, contact Ms. Gleysteen at (202) 317-7007 (not a toll-free call). For further information on this revenue procedure regarding exempt organizations, contact Amber MacKenzie at (202) 317-4809 (not a toll-free call).