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by Tom Cullinan and Sam Kuzniewski

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In this article, Cullinan and Kuzniewski consider how courts might address employee retention credit restrictions under a plain-meaning analysis given the varying degrees of restrictions in IRS guidance and statutory language.

Congress enacted the employee retention credit in 2020 as part of the Coronavirus Aid, Relief, and Economic Security Act. As modified by subsequent enactments, the ERC was a refundable credit of up to $26,000 per employee, available to employers who kept employees on payroll and met certain requirements. The ERC was terminated for most employers as of September 30, 2021, but the law allows employers to file refund claims for 2020 credits until April 15, 2024, and to file refund claims for 2021 credits until April 15, 2025.[1]

The original law was enacted quickly, and there is no legislative history. The IRS has worked hard to provide guidance, most notably in Notice 2021-20, 2021-11 IRB 922 (applied to quarters in 2021 by Notice 2021-23, 2021-16 IRB 1113). While helpful, some of that guidance is arguably more restrictive than the statutory language. This article considers how the courts might address such restrictions under a plain-meaning analysis, using the "partially" suspended test as an example.

Partially Suspended

The Supreme Court has explained that "the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."[2] Thus, when statutory terms are not defined by statute or regulation, courts will give those statutory terms their "plain meaning," often using dictionaries. For example, the Supreme Court recently cited three different dictionaries to define "money" under the Railroad Retirement Tax Act.[3]

One way an employer can qualify for the ERC is if (in addition to satisfying other requirements) the operation of the employer's trade or business was "fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority . . . due to the coronavirus disease 2019 (COVID-19)."

None of the legislative enactments of the ERC define "partially." We, consequently, turn to dictionaries for help. *Merriam-Webster Dictionary* defines "partially" as "to some extent" or "in some degree." The *Oxford English Dictionary* similarly defines "partially" as "to some extent; incompletely, restrictedly; partly." Read plainly, the statute makes eligible any employer whose operations were suspended "to some extent" (that is, suspended at all), assuming it meets the other requirements.

This does not appear to be "the rare case" in which a literal interpretation of the statutory language would "produce a result demonstrably at odds with the intentions of its drafters." To the contrary, Congress appears to have intended the

[1] Infrastructure Investment and Jobs Act, P.L. 117-58.

[2] *Ron Pair Enterprises Inc. v. United States*, 489 U.S. 235 (1989).

[3] *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067 (2018).

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ERC to have an expansive application, as evidenced by post-CARES Act revisions that expanded employer eligibility. Moreover, if Congress had intended "partially" to require some minimal effect, it easily could have said so, as evidenced by its use of the objective gross receipts test as the other major path to eligibility.

Notice 2021-20

The IRS interpreted the "partially" suspended requirement in Notice 2021-20. The notice (at Q&A answer 17) states that "if an employer's workplace is closed due to a governmental order for certain purposes, but the employer's workplace may remain open for other limited purposes, the employer's operations would [only] be considered to be partially suspended if . . . the operations that are closed are *more than a nominal portion* of its business operations." (Emphasis added.) Or, if "all but a nominal portion, of an employer's business operations may continue, but the operations are subject to modification due to a governmental order (for example, to satisfy distancing requirements), such a modification of operations is considered to be a partial suspension of business operations due to a governmental order [only] if the modification required by the governmental order has *more than a nominal effect* on the business operations." (Emphasis added.) The notice (at Q&A answer 18) defines a nominal suspension of business operations as a less than 10 percent "reduction in an employer's ability to provide goods or services in the normal course of the employer's business."

"More than nominal" is more restrictive than "to some extent," especially if defined to require a more than 10 percent suspension. Many more businesses would be eligible for the ERC if "partially suspended" were defined as "suspended to some extent" rather than "suspended to the extent that it caused a more than 10 percent reduction in services." While the "more than nominal" standard might be acceptable as some sort of safe harbor, the IRS appears to be imposing it as a requirement, based on the FAQs available on IRS's website.[4]

Do employers have to follow Notice 2021-20 or the FAQs when considering their eligibility for the ERC? While that is, of course, the safest course of action and the one least likely to lead to a dispute, the answer is no. IRS notices and FAQs are "subregulatory guidance." Subregulatory guidance does not have the force and effect of law and cannot impose restrictions on taxpayers who are not already imposed by statute.[5] Consistent with this, the IRS has acknowledged that it will not take the position that its subregulatory guidance binds taxpayers, promising that it will not even seek so-called *Chevron* or *Auer* deference for such guidance when litigating against a taxpayer.[6] And, though the IRS might still argue for *Skidmore*[7] deference, that level of deference ultimately depends on the persuasiveness of the agency's position, making it a weak deferential standard that could and — we would argue — should be overcome by taxpayers who rely on a statute's plain meaning.

To summarize, the statutes that created the ERC were broadly worded, and many businesses would appear to be eligible under a plain reading of those statutes. The IRS does not have the legal authority to add restrictions that would reduce the number of eligible businesses — that was Congress's prerogative.

Protective Claims

We recognize, of course, that the IRS has placed a moratorium on processing new refund claims,[8] and that the recent press coverage may dissuade some businesses who should be eligible for the credit from claiming it. That would be unfortunate. Employers whose circumstances satisfy the FAQs and Notices can safely file for the ERC. The IRS has stated that it will not take positions contrary to such guidance, making it effectively a safe harbor.[9] On the other hand, employers whose business operations were

[4]IRS, "Frequently Asked Questions About the Employee Retention Credit" (last updated Oct. 19, 2023).

[5]IRS, "Policy Statement on the Tax Regulatory Process" (Mar. 5, 2019).

[6]*See* CC-2019-006 (Sept. 17, 2019). *See also Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984); and *Auer v. Robbins*, 519 U.S. 452 (1997).

[7]*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[8]IR-2023-169 (Sept. 14, 2023).

[9]IRS, *supra* note 5.

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suspended "to some extent" due to "orders from an appropriate governmental authority" related to COVID-19 but who suffered a less than 10 percent "reduction in . . . ability to provide goods or services" have a strong argument for eligibility, even though they do not meet the IRS's standard. To the extent that such taxpayers have resisted filing refund claims for fear of antagonizing the IRS, they might consider filing protective refund claims to protect their interests, should the more restrictive IRS position be struck down in the courts. ■

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