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How Return Preparer Fraud Could Affect Taxpayers Making ERC Claims

by Hale E. Sheppard

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In this article, Sheppard examines two Tax Court cases involving return preparer fraud and their potential effects on well-intentioned taxpayers filing improper employee retention credit claims.

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I. Introduction

Everyone knows the IRS is struggling to timely process and audit employee retention credit claims, despite the various steps it has recently taken to get matters under control. What many people do not realize is that the Tax Court issued a decision in January that might help the IRS with its timing issues. This article, yet another in a growing list by the author, discusses ERC guidance, the three-year and five-year assessment periods under current law, the broad definition of tax return preparer, two key Tax Court cases addressing the effect of return preparer fraud, and the potential impact of that fraud on well-intentioned taxpayers filing improper ERC claims.

II. Summary of Relevant Guidance

Congress enacted the Coronavirus Aid, Relief, and Economic Security Act in 2020.[1] That law generally provided that an eligible employer could get an ERC against certain employment taxes equal to 50 percent of the qualified wages it paid to each employee.[2] Coverage of the ERC changed several times, but it originally applied to the second, third, and fourth quarters of 2020.[3]

Congress next passed the Taxpayer Certainty and Disaster Tax Relief Act.[4] It expanded the period during which eligible employers could benefit, adding the first and second quarters of 2021.[5] Moreover, eligible employers could get increased amounts of ERCs since two things changed under the relief act: The percentage of qualified wages for which the ERC could be claimed increased from 50 percent to 70 percent, and that amount was calculated per quarter, not per year.[6]

The following step by Congress was enacting the American Rescue Plan Act of 2021.[7] That legislation codified the ERC for the first time, making it section 3134. ARPA further expanded the ERC, allowing benefits for the third and fourth quarters of 2021.[8]

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[1] Joint Committee on Taxation, "Description of the Tax Provisions of P.L. 116-136, the Coronavirus Aid, Relief, and Economic Security Act," JCX-12R-20 (Apr. 23, 2020); *see also* Notice 2021-20, 2021-11 IRB 922.

[2] CARES Act, section 2301(a).

[3] CARES Act, section 2301(m).

[4] Consolidated Appropriations Act, 2021, division EE, section 207; JCT, "Description of the Budget Reconciliation Legislative Recommendations Relating to Promoting Economic Security," JCX-3-21, at 66-70 (Feb. 8, 2021); *see also* Notice 2021-23, 2021-16 IRB 1113.

[5] Notice 2021-23, Section III.A.

[6] *Id.* at Section III.D.

[7] ARPA section 9651; *see also* Notice 2021-49, 2021-34 IRB 316.

[8] Notice 2021-49, Section III.A.

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Things ended when Congress introduced the Infrastructure Investment and Jobs Act.[9] That law retroactively shortened the periods for which eligible employers could claim ERC benefits. With one narrow exception, eligible employers could no longer solicit ERCs for the fourth quarter of 2021.

III. Auditing ERC Claims

Many ERC showdowns begin when revenue agents audit eligible employers that requested credits or refunds, received the benefits, and still have open assessment periods. This sounds simple enough, but there is a lot more to it than many taxpayers think.

A. New IRS Procedures and Powers

The IRS issued a considerable amount of guidance to keep pace with Congress and address new ERC issues as they arose. This administrative direction has come in the form of notices, revenue procedures, chief counsel advisories, generic legal advice memoranda, frequently asked questions, alerts, checklists, regulations, and more.[10]

This article highlights some recent regulations on the ability of the IRS to reclaim excessive ERCs released to taxpayers.[11] The regulations begin by reminding taxpayers that ERCs were initially limited in several ways, one of which was that they could not exceed the amount of applicable employment taxes on the wages paid for all employees of the eligible employer for the relevant quarter. If the ERCs topped this threshold, the surplus would be treated as an overpayment and credited or refunded to the eligible employer, as appropriate. The regulations emphasize that a "refund, credit, or advance of any portion of [ERCs] to a taxpayer in excess of the amount to which the taxpayer is entitled is an erroneous refund for which the IRS must seek repayment."[12]

Citing two decisions by the Supreme Court, the regulations clarify that the IRS has the right to engage in recoupment of excess ERCs by litigation.[13] However, the CARES Act and ARPA specifically contemplate "administrative recapture" of these amounts. The IRS carried out its congressional mandate by issuing regulations confirming its authority concerning improper ERCs.[14] The regulations state that "these assessment and administrative collection procedures *do not replace* the existing recapture methods, but rather represent an *alternative method* available to the IRS" (emphasis added).[15] The regulations establish the following rule:

> Any amount of [ERCs] for qualified wages . . . that is treated as an overpayment and refunded or credited to an employer [by the IRS] . . . and to which the employer is not entitled, resulting in an erroneous refund to the employer, shall be treated as an *underpayment* . . . and may be assessed and collected by the [IRS] in the same manner as the taxes. [Emphasis added.][16]

IRS officials explained that, under the new regulations, the IRS can "treat what is normally an erroneous refund as an underpayment of tax subject to regular assessment and administrative collection practices."[17]

B. Normal Deadlines

Eligible employers could have solicited ERCs on timely Forms 941, "Employer's Quarterly Federal Tax Return," for various quarters in 2020 and 2021. Alternatively, they could — and in some instances still can — seek ERCs by later filing Forms 941-X, "Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund."

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[9] *See also* Notice 2021-65, 2021-51 IRB 880.

[10] *See, e.g.*, Notice 2021-20; Notice 2021-23; Notice 2021-24, 2021-18 IRB 1122; Notice 2021-49; Notice 2021-65; T.D. 9904; T.D. 9953; T.D. 9978; AM 2023-005; Rev. Proc. 2021-33, 2021-34 IRB 327; IRS Office of Professional Responsibility, "Professional Responsibility and the Employee Retention Credit," Issue No. 2023-02 (Mar. 7, 2023); ILM 202333001; AM 2023-007; IR-2020-62 (referencing FAQs no longer accessible online); IRS, "Frequently Asked Questions About Employee Retention Credit" (July 27, 2023).

[11] REG-111879-20; T.D. 9904; REG-109077-21; T.D. 9953, Background, Section V.

[12] T.D. 9904, Background, Section III.

[13] T.D. 9904, Background, Section IV.

[14] T.D. 9904, Explanation of Provisions.

[15] T.D. 9953, Explanation of Provisions; T.D. 9978, Summary of Comments and Explanation of Revisions.

[16] T.D. 9978; reg. section 31.3111-6(b) and (c); reg. section 31.3134-1(a) and (b); reg. section 31.3221-5(b) and (c).

[17] Lauren Loricchio, "New ERC Withdrawal Process Coming From IRS," *Tax Notes Federal*, Oct. 23, 2023, p. 745.

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Forms 941 for all four quarters of a particular year are deemed filed on April 15 of the next year.[18] For example, Forms 941 for the second quarter of 2020 had to be filed by July 31, 2020, but were deemed to have been filed nearly nine months later, on April 15, 2021.[19] Likewise, Forms 941 for all quarters of 2021 were deemed filed on April 15, 2022.

A taxpayer normally must file a refund claim, including a Form 941-X, within three years after filing the relevant Form 941, or within two years after paying the relevant taxes, whichever period expires later.[20] Importantly, filing a refund claim does not create a new assessment period, and it generally does not extend the existing assessment period for the original Form 941.[21] The IRS has clarified this point in the employment tax context, explaining that "filing an amended Form 940 or [Form 941-X] does not affect the period of limitations for assessment."[22]

The IRS generally has three years from the date on which a tax return is filed (or deemed to have been filed) to identify it as problematic, conduct an audit, and propose changes.[23] Thus, the normal assessment period for Forms 941 for any quarter of 2020 will expire on April 15, 2024, while the standard assessment period for Forms 941 for 2021 will not end until April 15, 2025.[24]

C. Special Deadlines for Certain Quarters

The rules further favor the IRS when it comes to ERC claims for the third and fourth quarters of 2021.[25] ARPA granted the IRS more time to audit taxpayers that might be misbehaving: It gave the IRS five years from the date on which the relevant Form 941 is actually or deemed filed to challenge an eligible employer.[26] For instance, if an eligible employer filed a timely Form 941 for the third quarter of 2021 claiming ERCs, that Form 941 is deemed to have been filed on April 15, 2022, and the assessment period will stay open until April 15, 2027.

D. Summary of Assessment Periods

Condensing this information, the IRS might audit ERC claims and propose additional taxes and penalties during the following periods:

- For ERC claims for the second, third, and fourth quarters of 2020, the normal assessment period expires April 15, 2024.
- For ERC claims for the first and second quarters of 2021, the normal assessment period expires April 15, 2025.
- For ERC claims for the third and fourth quarters of 2021, the extended assessment period expires April 15, 2027.

IV. Analyzing Two Critical Fraud Cases

As noted, the IRS generally has three years from the date on which a return is deemed filed to assess tax related to that return.[27] This three-year period may be extended in certain situations. For instance, section 6501(c)(1) provides that the IRS may assess additional taxes and penalties at any time if a return is found to be intentionally false or fraudulent.[28] We now consider two pivotal cases discussing the effect of fraud by someone other than the taxpayer.

A. Actions of Others Affecting Taxpayer: Key Case

The filing of a false or fraudulent tax return can trigger serious consequences both for taxpayers and for their return preparer. The seminal case in this area is *Allen*.[29]

The taxpayer was a delivery driver who retained Gregory Goosby to prepare his Forms 1040 for 1999 and 2000. The taxpayer provided Goosby with certain tax-related information: his Form W-2, data about his section 401(k) retirement plan, a mortgage interest statement, and proof of property tax payment. Goosby

[18] Section 6501(b)(2); reg. section 301.6501(b)-1(b); section 6513(c); reg. section 301.6513-1(c).

[19] Reg. section 301.6501(b)-1(b).

[20] Section 6511(a); reg. section 301.6511(a)-1(a); section 6511(b)(1); reg. section 301.6511(b)-1(a).

[21] *Badaracco v. Commissioner*, 464 U.S. 386, 393 (1984); IRS, "Employment Tax Returns — Examination and Appeals Rights," Publication 5146, at 6 (revised Mar. 2017).

[22] IRS, *supra* note 21.

[23] Section 6501(a).

[24] Reg. section 301.6501(b)-1(b).

[25] Notice 2021-49, Section III.G.

[26] ARPA section 9651(a); Notice 2021-49, Section III.G.

[27] Section 6501(a).

[28] *Payne v. Commissioner*, 224 F.3d 415 (5th Cir. 2000), *supplemented by* T.C. Memo. 2001-231; *Neely v. Commissioner*, 116 T.C. 79 (2001).

[29] *Allen v. Commissioner*, 128 T.C. 37 (2007).

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prepared the Forms 1040, claiming "false and fraudulent" itemized deductions.[30]

Later, the IRS began a criminal investigation of Goosby (not the taxpayer), which ultimately resulted in his indictment, trial, and conviction on 30 counts of willfully aiding and assisting in the preparation of false and fraudulent tax returns. The taxpayer's Forms 1040 for 1999 and 2000 were not used by the IRS as the basis for any counts against Goosby.

In March 2005, the IRS issued the taxpayer a notice of deficiency regarding his Forms 1040 for 1999 and 2000. Notably, the notice of deficiency did not assert civil fraud penalties — or any other penalties, for that matter — against the taxpayer.

The parties stipulated that (1) the itemized deductions on Schedule A to the Forms 1040 were false and fraudulent, (2) the taxpayer did not have any intent to evade taxes, and (3) Goosby claimed the deductions with the intent to evade taxes.[31]

The taxpayer argued that the normal three-year assessment period for 1999 expired on April 15, 2003, and for 2000 expired on April 15, 2004. The IRS did not issue its notice of deficiency until March 2005, so it was technically too late. For its part, the IRS maintained that the fraudulent intent of Goosby was sufficient to keep the assessment periods open indefinitely, making the notice of deficiency timely. The taxpayer countered that only his intent, and not the intent of Goosby, was relevant to the analysis.

The Tax Court began by reviewing the applicable tax provisions. As noted earlier, section 6501(a) generally provides that the IRS has three years from the date on which a Form 1040 is deemed filed to conduct its audit and assess any additional taxes, penalties, and interest. However, under section 6501(c)(1), this period may be extended indefinitely "in the case of a false or fraudulent return with the intent to evade tax."

Based on the preceding tax provisions, the Tax Court held in *Allen* that (1) nothing in the plain language of the statutes suggests that the assessment period is only extended for fraud committed by the taxpayer; (2) section 6501(c)(1) links the extension of the assessment period to the fraudulent nature of the Form 1040, not to the identity of the person engaged in fraud; and (3) assessment periods are strictly construed in favor of the IRS.[32] The Tax Court went on to say:

> We do not find it unduly burdensome for taxpayers to review their returns for items that are obviously false or incorrect. It is every taxpayer's obligation. [The taxpayer] cannot hide behind an agent's fraudulent preparation of his returns and escape paying tax if the [IRS] is unable to investigate fully the fraud within the limitations period. The [IRS] has just as much need for an extended limitations period to investigate and examine taxpayers who sign and allow to be filed returns that greatly overstate expenses or include fictitious expenses whether the fraud was committed by the taxpayer or the taxpayer's preparer. To find otherwise would allow a taxpayer to receive the benefit of a fraudulent return by hiding behind the preparer.[33]

Several other cases have followed the reasoning in *Allen* since that case was decided in 2007.[34]

B. Actions of Others Affecting Taxpayer: Latest Case

A recent case, *Murrin*, involved the same issue the Tax Court addressed in *Allen*.[35] Many taxpayers, including those that made ERC claims, were hoping for a judicial change of heart.

The relevant facts in the dispute are straightforward — so much so that the parties presented the case to the Tax Court fully stipulated and without the need for a trial. The taxpayers filed timely joint Forms 1040 with the IRS for 1993 through 1999, relying on their professional return preparer, Duane Howell. The taxpayers did not report any improper information on their returns, and they had no

[30] *Id.* at 37, 38.

[31] *Id.*

[32] *Id.* at 39-40.

[33] *Id.* at 41-42.

[34] *See Eriksen v. Commissioner*, T.C. Memo. 2012-194; *Finnegan v. Commissioner*, 926 F.3d 1261 (11th Cir. 2019); *Ames-Mechelke v. Commissioner*, T.C. Memo. 2013-176.

[35] *Murrin v. Commissioner*, T.C. Memo. 2024-10.

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intention of dodging federal income taxes. However, "unbeknownst to [them], Howell placed false or fraudulent entries on those [Forms 1040] with intent to evade tax." The IRS did not discover the improprieties committed by Howell until many years after the normal three-year period for auditing the Forms 1040 had expired. Still, in 2019 the IRS issued a notice of deficiency to the taxpayers based on the fraud exception found in section 6501(c)(1).

The Tax Court began its review as expected, summarizing the general three-year rule under section 6501(a), as well as the exception under section 6501(c)(1) providing that the assessment period remains open forever "in the case of a false or fraudulent return with the intent to evade tax."[36] Next, citing *Allen*, the Tax Court underscored that it has "previously held in a precedential opinion that the [fraud] exception to the statute of limitations encompasses the case where a tax return preparer prepares" the relevant return.

The Tax Court then recapped the main position raised by the taxpayers, which was that the Tax Court incorrectly decided *Allen* because the fraud exception covers "solely taxpayer fraud." On a related note, the taxpayers suggested that the Tax Court follow *BASR Partnership*, a contrary holding about the applicability of the fraud exception by the Federal Circuit.[37] The Tax Court discarded these arguments, emphasizing that the doctrine of *stare decisis* is paramount, the position by the Federal Circuit on this precise issue "is not clear," and, in all events, any judicial appeal in *Murrin* would not go to the Federal Circuit.

The Tax Court then explained that, even if it were to reconsider its earlier decision in *Allen*, the taxpayers would still lose based on the following analysis.

First, assessment periods are strictly construed in favor of the IRS.

Second, section 6501(c)(1), by its own terms, "does not restrict its application to cases where taxpayers personally had the intent to evade tax." After exploring a Supreme Court case from last year addressing a similar issue in the bankruptcy context, the Tax Court concluded that section 6501(c)(1) "contains no requirement that the intent to evade belong to the taxpayer . . . and we will not import a restriction that Congress saw fit not to impose."

Third, several other provisions in the code expressly apply only when a taxpayer commits fraud, demonstrating that Congress knows how to limit the intent requirement to certain actors like the taxpayers when it wants to do so. The Tax Court compared section 6501(c)(1) (creating endless assessment periods in cases of fraud) with section 6663 (imposing penalties against taxpayers in cases of fraud) as part of its analysis. It explained that the purpose of the former is to grant the IRS more time to audit returns when it is at a "special disadvantage" in discovering irregularities, whereas the latter is linked to the culpability of a particular taxpayer and designed to protect tax revenue and reimburse the IRS for increased investigatory expenses. The Tax Court concluded that the fraud exception to the normal assessment period "is tied to a false or fraudulent return with the intent to evade, not a particular person," while the fraud penalty is taxpayer specific.

Fourth, any legislative history supporting a different result is informative, but not binding. The Tax Court declared, consistent with long-standing concepts of statutory interpretation, that it did not need to resort to legislative history and other secondary sources given the "unambiguous nature of the text" of section 6501(c)(1).

Fifth, the Tax Court countered the accusation by the taxpayers that its earlier ruling in *Allen* was inconsistent with subsequent court decisions, holding that the fraud exception in section 6501(c)(1) does not apply to parties that were not involved in preparing and filing the relevant returns. The Tax Court first pointed out that the cases cited by the taxpayers were misplaced because, in *Murrin*, the individual committing the fraud was indeed the return preparer. Seemingly miffed with the questioning of its seminal case, the Tax Court then clarified that its ruling had even broader applicability: It stated that the fraud exception in section 6501(c)(1) "is triggered by (1) a false or fraudulent return (2) with the intent to evade tax [and] the combination of the return with

[36] Section 6501(a); section 6501(c)(1).

[37] *BASR Partnership v. United States*, 795 F.3d 1338 (Fed. Cir. 2015).

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the intent requirement circumscribes the pool of actors whose intent might matter to those who had a hand in the preparation or filing of a tax return."

The Tax Court concluded with the following main holding:

> The sole question before the Court is the same as the one we decided in *Allen* . . . whether Section 6501(c) applies only where a taxpayer herself has filed a false or fraudulent return with the intent to evade tax. The [Internal Revenue] Code contains no such limitation, and we will adhere to our precedent.
>
> We have concluded that no special justification exists warranting our reversal of *Allen*. Mr. Howell's preparation of false or fraudulent returns with the intent to evade tax is sufficient to trigger the indefinite period of limitation to assess tax.

V. Definition of Return Preparer

When dealing with how to penalize certain return preparers, the IRS broadly defines this category. "Return preparer" generally means any person who prepares for compensation, or who employs other persons to prepare for compensation, any tax return or claim for refund, or a "substantial portion" thereof.[38] The term encompasses both "signing preparers" (that is, individuals who are primarily responsible for the overall substantive accuracy of a return or claim) and "non-signing preparers" (that is, individuals, other than signing preparers, who prepare all or a substantial portion of a return or claim).[39] The concept of non-signing preparers is expansive, reaching individuals who provide written or oral advice to a taxpayer (or to another tax return preparer) when that advice leads to a position or entry that constitutes a substantial portion of a return.[40] The examples in the regulations build on this notion, as follows:

> Attorney A, an attorney in a law firm, provides legal advice to a large corporate taxpayer regarding a completed corporate transaction. The advice provided by A is directly relevant to the determination of an entry on the taxpayer's return, and this advice leads to a position(s) or entry that constitutes a substantial portion of the return. A, however, does not prepare any other portion of the taxpayer's return and is not the signing tax return preparer of this return. A is considered a nonsigning tax return preparer.[41]

A person must complete a substantial portion of a return to be deemed a preparer of any type. The regulations contain four relevant points in this regard — namely, (1) a person who renders tax advice on a position that is directly relevant to the determination of the existence, characterization, or amount of an entry on a return will be regarded as having prepared that entry; (2) whether a schedule, entry, or other portion of a return is a substantial portion is based on whether the person knows or reasonably should know that the tax attributable to the schedule, entry, or other portion of a return is a substantial portion of the tax required to be shown on the return; (3) a single tax entry may constitute a substantial portion of the tax required to be shown on a return; and (4) factors to consider in determining whether a schedule, entry, or other portion of a return is a substantial portion include, but are not limited to, the size and complexity of the item relative to the taxpayer's gross income and the size of the tax understatement attributable to the item compared with the taxpayer's reported tax liability.[42]

The regulations indicate that a person can be labeled a tax return preparer regardless of educational qualifications and professional status requirements.[43]

VI. Various Sources Decry ERC Fraud

The Treasury Inspector General for Tax Administration published several reports

[38] Section 7701(a)(36)(A).

[39] Reg. section 301.7701-15(b)(1) and (2); reg. section 1.6694-1(b)(1); section 7701(a)(36); and reg. section 301.7701-15(a).

[40] Reg. section 301.7701-15(b)(2)(i).

[41] Reg. section 301.7701-15(b)(2)(ii), Example 1.

[42] Reg. section 301.7701-15(b)(3)(i).

[43] Reg. section 301.7701-15(d).

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describing what many had predicted — that is, trouble with the ERC from the outset. TIGTA identified many claims of dubious veracity. For instance, one report explained that within just two months of enacting the CARES Act, the IRS had already flagged over 1 million Forms 941 as erroneous or possibly fraudulent.[44] A second report discovered that the IRS did not catch several hundred Forms 941 for 2020 claiming ERCs of more than $92 million despite their strong indicators of fraud.[45] A third TIGTA report explained that many erroneous or fraudulent ERC claims went undetected by the IRS.[46]

The Government Accountability Office also released several reports regarding the IRS's implementation of various COVID-19-related tax benefits, including the ERC.[47] Like TIGTA, the GAO identified many problems. These included granting ERC claims submitted by fabricated or ineligible entities, conceding ERCs to taxpayers that never claimed them on their Forms 941 in the first place, failing to catch mismatches between the ERC claims actually received and those reported on Forms 941, miscalculations of amounts, and more.[48]

The IRS's national taxpayer advocate has also been critical of the ERC program, pointing out several problems, including fraud. In her report to Congress, the national taxpayer advocate explained that the mix of "confusing rules," absence of a duty for taxpayers to attach supporting documentation to their ERC claims, and inefficient IRS processes "created fertile ground for ERC mills to lure business owners into filing fraudulent claims."[49]

The IRS has been open about problems with fraud, too. Here are but a few examples. Early on, high-ranking agency officials threatened that the IRS "would not cease until every fraudulently obtained dollar is accounted for and the individuals behind the schemes are prosecuted to the fullest extent of the law."[50] IRS enforcement officials later acknowledged that the ERC constitutes a "substantial compliance issue" because of the huge number of claims and incidence of noncompliance, with "much of it bordering on fraud."[51] Finally, the IRS repeatedly warned that many companies are urging taxpayers to take ERC positions that range from extremely aggressive to downright fraudulent.[52]

VII. Conclusion

Civil fraud is an unpleasant topic that many taxpayers shy away from. This aversion is understandable but unwise in the context of the ERC, when the IRS is on the warpath and launching allegations of fraudulent actions, both by taxpayers and their return preparers. One must take a candid look at where things stand now.

The IRS generally has three years from the filing of an employer's tax return to audit and make proposed adjustments related to ERCs, and this period extends to five years for the third and fourth quarters of 2021. The Tax Court affirmed in January that fraud committed by a return preparer, even without the knowledge or consent of the taxpayer, suffices to keep the assessment period open indefinitely. The IRS has broadly defined the concept of "return preparer" to encompass both signing and non-signing preparers, and various authorities (including the GAO, the national taxpayer advocate, the IRS, and TIGTA) have reported significant amounts of fraud in the ERC context.

[44] TIGTA, "Interim Results of the 2020 Filing Season: Effect of COVID-19 Shutdown on Tax Processing and Customer Service Operations and Assessment of Efforts to Implement Legislative Provisions," Report No. 2020-46-041, at 18-19 (June 30, 2020).

[45] TIGTA, "Implementation of Tax Year 2020 Employer Tax Credits Enacted in Response to the COVID-19 Pandemic," Report No. 2021-46-043, at 18-19 (July 9, 2021).

[46] TIGTA, "Delays Continue to Result in Businesses Not Receiving Pandemic Relief Benefits," Report No. 2022-46-059, at 4 (Aug. 31, 2022).

[47] *See, e.g.*, GAO, "COVID-19: Continued Attention Needed to Enhance Federal Preparedness, Response, Service Delivery, and Program Integrity," GAO-21-551 (July 10, 2021); GAO, "COVID-19: Sustained Federal Action Is Crucial as Pandemic Enters Its Second Year," GAO-21-387 (Mar. 31, 2021).

[48] GAO, "COVID-19: IRS Implemented Tax Relief for Employers Quickly, but Could Strengthen Compliance Efforts," GAO-22-104280, at 33-35 (May 17, 2022).

[49] National Taxpayer Advocate, "2023 Annual Report to Congress," at 41-42 (2024).

[50] IR-2021-65.

[51] Nathan J. Richman, "Employee Retention Credit Claimants May See Help From IRS," *Tax Notes Federal*, June 12, 2023, p. 1862.

[52] *See, e.g.*, IR-2021-65; IR-2022-183; IRS Tax Tip 2023-44; IR-2023-105.

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Given the billions of dollars at stake and the IRS's ongoing struggle to timely process and audit massive numbers of ERC claims, the questions are as follows: Will the IRS adopt an aggressive strategy of alleging that taxpayers and/or their return preparers engaged in fraudulent behavior? Are return preparers those who give any type of oral or written advice? Do ERC claims constitute a "substantial portion" of the relevant returns? And does the IRS have forever to scrutinize ERC claims thanks to *Allen*, as recently upheld in *Murrin*? The IRS faces serious problems in imposing even negligence-type penalties when it comes to ERCs, so proving civil fraud — particularly the intent element — should be a serious challenge in most situations. Still, in the current environment, taxpayers making ERC claims should be aware of various IRS tactics for expanding audit periods. ■

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