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[Third Party Communication:

Date of Communication: Month DD, YYYY]

From: [redacted]
Sent: Thursday, March 16, 2023 9:20:07 AM
To: [redacted]
Cc: [redacted]
Bcc:
Subject: FW: ERC offsets/PEOs - duplicate copy of advice from

Good morning. I am reissuing this advice that   gave you earlier this week solely so that it can be processed for public release under IRC section 6110;   does not have the requisite software on his computer to submit this for public release. Let me know if you have any questions.

[redacted] – please post this in the Employment Tax Issues bucket, POSTS-105274-23. Thanks.

[redacted]

From: **Sent:** Tuesday, March 14, 2023 2:22 PM
To
Cc:
Subject: ERC offsets/PEOs

Good afternoon,

You asked whether the IRS is authorized to offset certain COVID-19 employment tax credits (*e.g.*, employee retention credit (ERC)) to any existing tax liabilities of a Professional Employer Organization (PEO) that pays wages to individuals as part of the services provided to a client employer pursuant to a service agreement, although the credits being claimed on the Form 941 Schedule R are attributable to wages paid to a client employer's employees.

IRC § 6402(a) grants the IRS discretion to credit any overpayment against "any liability in respect of an internal revenue tax on the part of the person who made the overpayment." With respect to the COVID-19 employment tax credits, the IRS made the business decision to offset excess refundable COVID-19 employment tax credits to any existing tax liabilities on the employer's account (see COVID-19-Related Employee Retention Credits: General Information FAQs, FAQ #12 and COVID-19-Related Tax Credits: Basic FAQs, FAQ #14). This decision applies to all types of refundable COVID-19 employment tax credits including the ERC, the credit for paid sick and family leave wages, and the COBRA credit.

For taxpayers who use third-party payors (TPPs), the process for claiming credits against employment tax liabilities and liability for erroneously claimed credits differs depending on the type of TPP used. For taxpayers who use a section 3504 agent, Certified Professional Employer Organization (CPEO) or PEO that pays wages to individuals as part of the services provided to a client pursuant to a service agreement, although the credits being claimed on the Form 941 Schedule R are attributable to wages paid to a client's employees, the 3504 agent, the CPEO or **PEO is the taxpayer** who is actually claiming the employment tax in an aggregate amount on a single line on a Form 941 filed under its own EIN. If a refund is ultimately issued to the TPP aggregate filer, it is then between the TPP aggregate filer and the client to ensure the TPP remits any portion of the refund it received to the client in the appropriate amount.

The IRS is not a party to those agreements and has no legal obligation to refund any portion of the TPP filer's refund to a client identified on Schedule R. In addition, when the IRS conducts an audit of a Form 941 filed by these types of TPPs, the IRS is examining the aggregate total amount of the line item credit claimed by the TPP on the Form 941, using the client by client allocation information provided on Schedule R as part of the examination. The IRS does not issue refunds or make credit adjustments to the client entities themselves, but rather any credits/refunds are paid to TPP. Any credits claimed against the employment taxes reported on the Form 941, reduce the reported liability of the TPP. Moreover, any adjustment to a credit claimed by a TPP on the Form 941 will affect the total employment tax liability on the TPP aggregate filer's employment tax return. Schedule R only provides a portion of the information (the allocable share of wages and credits on a client-by-client basis) which was used by the TPP, in part, to determine its own total tax liability on the return. Since the Schedule R information is not itself determinative of the TPP's ultimate tax liability, the IRS would not be able to determine the appropriate refund to issue to the TPP based solely on the Schedule R information on a client-by-client basis for any particular employment tax credit. Rather, until the IRS determines entitlement to the entire line item amount claimed on the Form 941, no refunds or credits are paid out to the TPP. Please note that offsetting a TPP's outstanding tax liability is, in fact, providing the credit to the TPP by way of a reduction in the TPP's liability.

Although employers who utilize TPPs (such as PEOs in the fact pattern examples provided by TAS) may encounter difficulties receiving payment of the refundable tax credits they may be entitled to if the TPP they have chosen has outstanding federal tax liabilities, this is a civil matter strictly between the TPP/PEO and the client employer.

Please let me know if you have any follow up questions or would like to discuss further. Thanks!