Office of Chief Counsel
Internal Revenue Service
Memorandum

Number: **202430007**
Release Date: 7/26/2024

CC:EEE:EB:HW
PRESP-109138-23

UILC: 52.00-00, 414.03-00

date: June 17, 2024

to: Jeremy Fetter
Deputy Managing Counsel (Dallas/Farmers Branch)
Area Counsel
(CC:TEGEDC:GCDAL)

from: Laura Warshawsky
Deputy Associate Chief Counsel
(Employee Benefits)
(CC:EEE:EB)

Lynne Camillo
Deputy Associate Chief Counsel
(Exempt Organizations and Employment Taxes)
(CC:EEE:EOET)

---

subject: Application of the Controlled Group Rules under Section 52 to Tax-Exempt Organizations in Determining Eligibility for and the Amount of the Employee Retention Credit

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

How do the controlled group rules under section 52 of the Internal Revenue Code (Code) apply to organizations described in section 501(c) and exempt from tax under section 501(a) (tax-exempt organizations) when determining the application of the

Employee Retention Credit (ERC) under the circumstances described in this memorandum?

CONCLUSION

A tax-exempt organization must apply a reasonable, good faith interpretation of the controlled group rules under section 52 in determining its eligibility for and the amount of the ERC, and that reasonable, good faith interpretation must be applied consistently for all purposes of the Code. The application of Treasury Regulation § 1.414(c)-5(b) (with certain modifications, as discussed below) by a tax-exempt organization is treated as a reasonable, good faith interpretation of the controlled group rules under section 52 in determining eligibility for and the amount of the ERC.

FACTS

Employer X is an organization exempt from tax under section 501(c)(3) of the Code. National Organization is managed by a Board of Directors. (Members of a Board of Directors are referred to as “Directors” herein.) Employer X is an affiliate of National Organization and is a subordinate organization in a group exemption letter held by National Organization. However, Employer X asserts that it operates as an independent tax-exempt organization, has its own EIN, and is managed by a Board of Directors., None of the Directors of National Organization is a Director of Employer X. National Organization does not have the power to appoint any Directors of Employer X. National Organization also does not have the general power to remove any Director of Employer X or to designate a new Director of Employer X. In addition, no Director of Employer X is an agent or employee of National Organization. Further, Employer X does not have a

general power to appoint or remove any Director of National Organization or to designate a new Director of National Organization and no Director of National Organization is an agent or employee of Employer X.

Employer X functions under the direction of a chief executive officer (CEO) who is selected by and reports to Employer X's Board of Directors. The Directors have the ability under Employer X's bylaws to appoint or remove any Director of Employer X and to designate a new Director.

Employer X asserts that it is not aggregated with National Organization under section 52 in determining its eligibility for and the amount of the ERC. Employer X has claimed the ERC for the third calendar quarter of 2020.

Alternatively, assume that all facts remain the same as above except that National Organization has the general power to appoint and to remove or designate three of the five Directors (60 percent) of Employer X.

LAW AND ANALYSIS

The ERC is a credit against applicable employment taxes for an eligible employer, including a tax-exempt organization, that pays qualified wages (including certain health plan expenses) to some or all of its employees after March 12, 2020, and before January 1, 2021.[1] For calendar quarters in 2020,[2] an eligible employer is any

[1] As provided in section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020), as amended by section 206 of the Taxpayer Certainty and Disaster Tax Relief Act (Relief Act), which was enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (Dec. 27, 2020).
[2] Section 207 of the Relief Act, effective for calendar quarters beginning after December 31, 2020, amended section 2301 of the CARES Act to extend the application of the ERC 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. Section 9651 of the American Rescue Plan Act of 2021 (ARP), Pub. L. No. 117-2, 135 Stat. 4, enacted section 3134 of the Code, effective for calendar quarters

employer carrying on a trade or business[3] for which (1) the operation of the employer's trade or business is fully or partially suspended due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to the Coronavirus Disease 2019 (COVID-19), or (2) the employer had a significant decline in gross receipts.[4] In the case of a tax-exempt organization, the requirements relating to carrying on a trade or business and relating to a full or partial suspension of the operation of a trade or business due to a governmental order apply to all operations of the organization. In addition, in the case of a tax-exempt organization, any reference to gross receipts is treated as a reference to gross receipts within the meaning of section 6033 of the Code.

For calendar quarters in 2020, the credit equals 50 percent of qualified wages with respect to each employee for each applicable quarter, subject to a limit of $10,000 of qualified wages per employee for all calendar quarters.[5] For large eligible employers in 2020, qualified wages are those wages paid by the large eligible employer with respect to which an employee is not providing services during a period in which the operation of a trade or business is fully or partially suspended due to a governmental

---

beginning after June 30, 2021, and provides an ERC for wages paid after June 30, 2021, and before January 1, 2022. Section 80604 of the Infrastructure Investment and Jobs Act (Infrastructure Act), Pub. L. 117-58, 135 Stat. 429 (2021), amended section 3134(n) of the Code to provide that the ERC under section 3134 shall apply only to wages paid after June 30, 2021, and before October 1, 2021 (or, in the case of wages paid by an eligible employer which is a recovery startup business, January 1, 2022).

[3] For purposes of the ERC, a tax-exempt organization described in section 501(c) of the Code that is exempt from tax under section 501(a) of the Code is deemed to be engaged in a "trade or business" with respect to all operations of the organization. *See* Notice 2021-20, 2021-11 IRB 922, Q/A-1.

[4] For calendar quarters in 2020, the period during which an employer experienced a significant decline in gross receipts begins with the first calendar quarter for which gross receipts are less than 50 percent of gross receipts for the same calendar quarter in 2019. *See* section 2301(c)(2)(B)(i) of the CARES Act, as amended by section 206 of the Relief Act.

[5] *See* section 2301(a) and (b)(1) of the CARES Act, as amended by section 206 of the Relief Act.

order or in which the employer had a significant decline in gross receipts.[6] For small eligible employers in 2020, qualified wages are those wages paid by the small eligible employer with respect to an employee during a period in which the operation of a trade or business is fully or partially suspended due to a governmental order or in which the employer had a significant decline in gross receipts.

All organizations that are members of a controlled group of corporations or trades or businesses under section 52(a) or (b) of the Code, members of an affiliated service group under section 414(m), or employers that are aggregated under section 414(o) are treated as a single employer in determining their eligibility for and the amount of the ERC.[7]

Employers required to be aggregated are treated as a single employer for the following rules applicable to the ERC, including but not limited to:[8]

(1) determining whether the employer has a trade or business operation that was fully or partially suspended due to orders related to COVID-19 from an appropriate governmental authority;

(2) determining whether the employer experiences a significant decline in gross receipts;

---

[6] For calendar quarters in 2020, a large employer is an employer that averaged more than 100 full-time employees in 2019. *See* section 2301(c)(3)(A)(i) of the CARES Act, as amended by section 206 of the Relief Act.

[7] *See* section 2301(d) of the CARES Act and section 3134(d) of the Code. Although the facts of this Chief Counsel Advice relate to an ERC claimed in the third calendar quarter of 2020, the analysis of the aggregation rules applies to all calendar quarters in which the ERC under section 2301 of the CARES Act and/or section 3134 of the Code can be claimed. The Relief Act, ARP, and Infrastructure Act did not modify the application of the aggregation rules for purposes of the ERC after the enactment of the CARES Act.

[8] In the third and fourth calendar quarters of 2021, the aggregation rules also apply in determining whether an employer is a recovery startup business and to the $50,000 aggregate limitation on the credit for a recovery startup business.

(3) determining whether the employer is a large employer; and

(4) determining the maximum credit amount per employee.

Section 52(a) and (b) and section 414(b) and (c) provide controlled group rules for parent-subsidiary groups, brother-sister groups, and combined groups. Sections 52(a) and 414(b) generally provide that corporations that are members of a controlled group of corporations are treated as a single employer. Sections 52(b) and 414(c) generally provide that trades or businesses that are partnerships, trusts, estates, corporations, or sole proprietorships under common control are members of a controlled group and are treated as a single employer. Sections 52(b) and 414(c) provide the same definitions for parent-subsidiary groups, brother-sister groups, and combined groups, except that for a parent-subsidiary group under section 52, "controlling interest" means more than 50 percent ownership, and under section 414, "controlling interest" means at least 80 percent ownership.[9]

While section 52 of the Code applies to tax-exempt organizations for purposes of determining the ERC, the Treasury Regulations under section 52 do not address the application of the controlled group rules to tax-exempt organizations.[10] However, Treasury Regulations under section 414, which set forth controlled group rules that are

[9] *Compare* Treas. Reg. § 1.52-1(c)(2) *with* § 1.414(c)-2(b)(2) (providing different ownership thresholds for the definition of controlling interest).

[10] Section 52 of the Code was enacted to provide the controlled group rules applicable to section 51, relating to the work opportunity tax credit (WOTC). In general, a tax-exempt organization cannot claim the WOTC; therefore, the regulations under section 52 do not address tax-exempt organizations. But see sections 52(c)(2) and 3111(e) for the credit for qualified tax-exempt organizations employing certain veterans.

substantially the same as the rules under section 52, provide rules applicable to certain tax-exempt organizations.[11]

Treasury Regulation § 1.414(c)-5 provides rules regarding the aggregation of certain tax-exempt organizations under section 414(c). Section 1.414(c)-5(b) provides that common control generally exists between a tax-exempt organization and another organization if at least 80 percent of the directors or trustees of one organization are either representatives of, or directly or indirectly controlled by, the other organization. A trustee or director is treated as a representative of another exempt organization if they are also a trustee, director, agent, or employee of the other exempt organization. A trustee or director is controlled by another organization if the other organization has the general power to remove the trustee or director and designate a new trustee or director. Whether a person has the power to remove or designate a trustee or director is based on facts and circumstances.

Because Treasury Regulations have not been issued regarding the application of section 52 to tax-exempt organizations, a tax-exempt organization must apply a reasonable, good faith interpretation of the controlled group rules in determining its eligibility for and the amount of the ERC. The application of Treasury Regulation § 1.414(c)-5(b) (modified by substituting “more than 50 percent” in place of “at least 80 percent” each place it appears in § 1.414(c)-5(b)) by a tax-exempt organization would be treated as a reasonable, good faith interpretation of the controlled group rules in

[11] *See* Treas. Reg. § 1.414(c)-5(a).

determining eligibility for and the amount of the ERC,[12] provided that the tax-exempt organization applies the controlled group rules on a consistent basis for all purposes under the Code.

Guidance also has not been issued regarding the application of section 52 to churches or qualified church-controlled organizations.[13] Therefore, a church, or qualified church-controlled organization must apply a reasonable, good faith interpretation of the controlled group rules under section 52 in determining eligibility for and the amount of the ERC for churches or qualified church-controlled organizations (taking into account the reason the controlled group rules were included in the ERC).

Although Treasury Regulation § 1.414(c)-5 generally does not apply to churches (as defined in section 3121(w)(3)(A)) and qualified church-controlled organizations (as defined in section 3121(w)(3)(B)),[14] the application of the controlled group rules provided in § 1.414(c)-5(b) (but substituting "more than 50 percent" in place of "at least 80 percent" each place it appears in § 1.414(c)-5(b)) by a church or qualified church-controlled organization would be treated as a reasonable, good faith interpretation of the controlled group rules in determining eligibility for and the amount of the ERC.

The failure of a tax-exempt organization, including a church or a qualified church-

---

[12] This is consistent with the approach set forth in the preamble to Treasury Regulations regarding section 9010 of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010), and the No Surprises Act, Pub. L. 116-260, Div. B, tit. I, 134 Stat. 1182 (2020). *See* T.D. 9643, 78 FR 71476, 71481 (Nov. 29, 2013) (in the preamble, in the Explanations of Provisions and Summary of Comments section, under the heading *Controlled Groups*); T.D. 9951, 86 FR 36872, 36896 (July 13, 2021) (in the preamble, in the Overview of the Interim Final Rules—Departments of HHS, Labor, and the Treasury section, under the heading *Eligible Databases*).

[13] Section 336 of the Protecting Americans from Tax Hikes Act of 2015, Pub. L. 114-113, 129 Stat. 2242 amended section 414(c)(2) to provide special rules for church plans for purposes of determining controlled groups, automatic enrollment arrangements, certain plan transfers and mergers, and investments in collective trusts. However, these rules are not applicable for purposes of determining controlled group status under section 52.

[14] *See* Treas. Reg. § 1.414(c)-5(a).

controlled organization, to apply a reasonable, good faith interpretation of the controlled group rules under section 52 in determining eligibility for and the amount of the ERC may result in the denial of the credit and the imposition of applicable penalties.

DISCUSSION

No Director of either Employer X or National Organization is a representative (that is, a director, agent, or employee) of the other organization. In addition, neither organization is controlled by the other because neither organization has the general power to appoint a Director of the other organization or the general power to remove a Director and designate a new Director. Because Employer X and National Organization are not members of a controlled group under section 52, Employer X is not required to be aggregated with National Organization to determine the amount of the ERC for which Employer X is eligible. Employer X's application of the controlled group rules under section 52 in determining its eligibility for and the amount of the ERC is a reasonable, good faith interpretation provided that Employer X applies the controlled group rules on a consistent basis for all purposes under the Code.

In applying the alternative facts, Employer X's assertion that Employer X and National Organization are not members of a controlled group under section 52 is not a reasonable, good faith interpretation because National Organization has the general power to appoint and to remove or designate more than 50 percent (that is, 60 percent) of the Board of Directors of Employer X. Employer X and National Organization are members of a controlled group under section 52, and Employer X is required to be aggregated with National Organization to determine its eligibility for and the amount of the ERC.

Please contact the EEE Health and Welfare Branch at (202) 317-5500 if you have any further questions.