AGGREGATION OF RELATED ORGANIZATIONS FOR PURPOSES OF THE EMPLOYER RETENTION CREDIT

By Mike Batts, CPA

Nonprofit Special Alert™

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Our firm continues to probe the eligibility requirements and rules for claiming the Employee Retention Credit (ERC). In doing so, we wanted to provide updated information to our clients about the issue of aggregation of related organizations for ERC purposes. This article addresses only the issue of aggregation of related organizations for ERC purposes. For more information and context about the ERC in general, see a link to our article below.[1]

The law and guidance surrounding the ERC are not abundantly clear with respect to whether affiliated nonprofit organizations are required or permitted to aggregate their activities and operations in determining eligibility for or the amount of an ERC claim. For example, assume that a charity has the authority to control its separately incorporated foundation via the appointment of the foundation's board members or that a church has such authority with respect to its separately incorporated school. In such cases, are the "parent" organizations required or permitted to aggregate their activities and operations with their "subsidiary" organizations for ERC purposes? The answer could make a huge difference in eligibility for, or the amount of, an ERC claim depending on the circumstances.

For example, assume that a charity had 450 full-time employees in 2019 and that its subsidiary foundation had 70 employees in 2019. Aggregation would have a very negative effect on the potential amount of an ERC claim since the total 2019 full-time employee count is over 500. (See a link to our article below for the relevance of the 2019 full-time employee count.[1])

On the other hand, assume that a church and its subsidiary school had a total of 300 full-time employees in 2019 (200 in the church and 100 in the school). Assume further that the school (but not the church) had a partial suspension of its operations due to government orders during the first three quarters of 2021. Based on IRS guidance as we understand it, aggregation of the church and the school would mean that the church is deemed to have a partial suspension of operations due to government orders for the same period as the school for ERC claim purposes. Aggregation would cause the church to be eligible for a very sizable ERC claim, even though it would not otherwise qualify on its own.

Since there is very little official guidance on the matter of aggregation of affiliated tax-exempt entities for ERC purposes, our firm works with our clients on a case-by-case basis in addressing this issue, together with special legal counsel. Thus far, legal counsel seems to be generally advising our clients that aggregation is required in situations where one exempt organization controls another exempt organization…except in cases where one of the exempt organizations is a church. Where one of the entities is a church, counsel seems to generally be concluding that the church may elect to aggregate but is not required to do so. Notwithstanding my commentary here about conclusions generally being reached by our clients' legal counsel, I would reiterate my strong recommendation that this issue should be addressed case-by-case and that special legal counsel should provide guidance to each affiliated group on the matter of aggregation – especially if the amounts of ERC that would be claimed would be significantly affected by the conclusion.

[1] Source: https://nonprofitcpa.com/the-employee-retention-credit-a-potential-source-of-sizable-federal-aid-for-qualifying-nonprofits/

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