Current Federal Tax Developments

Week of August 16, 2021

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ACCOUNTING
CONTINUING EDUCATION

KAPLAN

CURRENT FEDERAL TAX DEVELOPMENTS
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Kaplan Financial Education

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SECTION: ERC
TAXPAYER GIVEN A SAFE HARBOR TO EXCLUDE PPP FORGIVENESS AND CERTAIN GRANT REVENUE FROM GROSS RECEIPTS WHEN DETERMINING ERC QUALIFICATION

Citation: Revenue Procedure 2021-33, 8/10/21

A question that had bothered many employers that had borrowed money under the Paycheck Protection Program (PPP) was whether forgiveness of that loan, although excluded from taxable income, was nevertheless part of receipts under §448(c) that would impact the calculation of whether there had been a reduction in revenue that could qualify a taxpayer to claim the employee retention credit (ERC).

The IRS's answer, in Revenue Procedure 2021-33,[1] is that, yes, it is included in gross receipts under IRC §448(c)—but if you want to exclude it consistently in your calculations of gross receipts under IRC §448(c) for ERC purposes *only*, the agency will accept that as well.

General Rule: §448(c) Gross Receipts Includes PPP Forgiveness and ERC-Coordinated Grants

The IRS Revenue Procedure contains a description of the law, including the exclusion of income for forgiveness of a PPP loan, as well as the exclusion from income of amounts received from a shuttered venue operator grant or a restaurant revitalization grant (the two referred to in this procedure as ERC-Coordinated Grants).[2]

The procedure then goes on to give us the IRS's view that these items would be gross receipts under IRC §448(c):

> Although the amount of forgiveness of a PPP Loan is not included in gross income, that forgiveness amount would be included in gross receipts under § 448(c) of the Code and § 1.448-1T(f)(2)(iv), or § 6033 of the Code and § 1.6033- 2(g)(4), as applicable. Similarly, the amount of an ERC-Coordinated Grant received by a taxpayer is not included in gross income, but the amount would be included in gross receipts.[3]

EXAMPLE – PPP FORGIVENESS COUNTS AS GROSS RECEIPTS

TN, Inc. received a PPP loan of $200,000 in 2020. TN, Inc. has determined that the loan forgiveness income was triggered for income tax purposes on June 15, 2021. For the second quarter of 2021, TN, Inc. had gross receipts, other than receipts from forgiveness, of $750,000.

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[1] Revenue Procedure 2021-33, August 10, 2021, https://www.irs.gov/pub/irs-drop/rp-21-33.pdf (retrieved August 10, 2021)

[2] Revenue Procedure 2021-33, Section 2

[3] Revenue Procedure 2021-33, Section 3.01

In the second quarter of 2019, TN, Inc. had gross receipts of $1,000,000. With PPP forgiveness included in gross receipts for the second quarter of 2021, TN, Inc.'s gross receipts for that quarter under IRC §448(c) are $950,000, or 95% of the gross receipts for the same quarter in 2019. Thus, the amount is not less than 80% of the same quarter in 2019.

Assuming TN, Inc. was not subject to a full or partial shutdown in the second quarter of 2021 and that there was not a 20% drop in gross receipts from the first quarter of 2021 as compared with the first quarter of 2019, the inclusion of the PPP forgiveness in gross receipts would deny TN, Inc. the ability to claim the ERC in the second quarter of 2021. As well, it also could deny TN, Inc. any ERC in the third quarter of 2021, since TN, Inc. could not rely on a 20% drop in gross receipts in the immediately prior quarter to qualify for the ERC in the third quarter of 2021.

Safe Harbor to Exclude PPP Forgiveness and ERC-Coordinated Grants from §448(c) Gross Receipts for ERC Qualification

The IRS determined that the agency will provide a safe harbor method allowing the consistent exclusion of PPP forgiveness and ERC-Coordinated Grant income from gross receipts solely for ERC qualification purposes. The agency explained its justification as follows:

> Section 2301(g) of the CARES Act and § 3134(h) of the Code set forth a coordination rule providing that the employee retention credit does not apply to so much of the qualified wages paid by an eligible employer as are taken into account as payroll costs in connection with forgiveness of a PPP Loan or, in the case of § 3134(h), an ERC-Coordinated Grant (relief programs). This rule demonstrates a congressional intent that an employer be able to participate in the relief programs and also claim the employee retention credit, provided that the same dollar of wages that are paid for or reimbursed with relief program funds may not be treated as qualified wages for purposes of the employee retention credit. Including the amount of the forgiveness of a PPP Loan or the amount of an ERC-Coordinated Grant in gross receipts for determining eligibility to claim the employee retention credit could frustrate this congressional intent.[4]

The justification explains the problem that seems to frustrate Congressional intent:

> Specifically, an employer that participated in one or more of the relief programs and that otherwise has the requisite percentage decline in gross receipts might be precluded from claiming an employee retention credit with respect to a calendar quarter in which there is the decline in gross receipts solely because its participation in the relief program resulted in a temporary increase in gross receipts within the meaning of the tax law.[5]

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[4] Revenue Procedure 2021-33, Section 3.02

[5] Revenue Procedure 2021-33, Section 3.02

Thus, the Revenue Procedure provides:

> Accordingly, this revenue procedure provides a safe harbor that permits an employer to exclude the amount of the forgiveness of a PPP Loan and the amount of ERC-Coordinated Grants from the definition of gross receipts solely for the purpose of determining eligibility to claim the employee retention credit (safe harbor). An employer is not required to apply this safe harbor. This safe harbor does not permit the exclusion of the amount of forgiveness of a PPP Loan or the amount of ERC-Coordinated Grants from the definition of gross receipts under § 448(c) or § 6033 of the Code for any other Federal tax purpose.[6]

The Revenue Procedure explains the application of the safe harbor as follows:

> An employer may exclude the amount of the forgiveness of a PPP Loan and the amount of any ERC-Coordinated Grants from its gross receipts in determining eligibility to claim the employee retention credit for a calendar quarter if the employer consistently applies this safe harbor in determining eligibility to claim the employee retention credit. An employer consistently applies this safe harbor by (i) excluding the amount of the forgiveness of any PPP Loan and the amount of any ERC-Coordinated Grant from its gross receipts for each calendar quarter in which gross receipts for that calendar quarter are relevant to determining eligibility to claim the employee retention credit, and (ii) applying the safe harbor to all employers treated as a single employer under the employee retention credit aggregation rules.[7]

The election to exclude the PPP forgiveness from income is made by simply excluding the income consistently when determining eligibility for the employee retention credit:

> An employer elects to use the safe harbor by excluding the amount of the forgiveness of a PPP Loan and the amount of ERC-Coordinated Grants from its gross receipts when determining eligibility to claim the employee retention credit on its employment tax return or adjusted employment tax return for that calendar quarter or, for employers that file employment tax returns on an annual basis, for the year including the calendar quarter.[8]

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[6] Revenue Procedure 2021-33, Section 3.02

[7] Revenue Procedure 2021-33, Section 3.03

[8] Revenue Procedure 2021-33, Section 3.04

EXAMPLE – ELECTION TO EXCLUDE PPP REVENUE FROM GROSS RECEIPTS

If TN, Inc. decides to elect the use of this Revenue Procedure, the company will now have gross receipts that are 75% of those in the same quarter in 2019 (750,000/1,000,000). Thus, TN, Inc. will qualify to claim the ERC in the second quarter of 2021 based on this decline.

As well, TN, Inc. will also automatically qualify to claim the ERC in the third quarter of 2021, since now the immediately preceding quarter had a greater than 20% decline in gross receipts.

If a taxpayer wishes to revoke this election after making it, the IRS allows this to be done via an amended payroll tax report:

> Subject to the rule in section 3.03 of this revenue procedure, an employer may revoke its safe harbor election by including the amount of the forgiveness of the PPP Loan or the amount of ERC-Coordinated Grants in its gross receipts when determining eligibility to claim the employee retention credit for a calendar quarter on its adjusted employment tax return for that calendar quarter or, for employers that file employment tax returns on an annual basis, for the year including the calendar quarter. Due to the consistency rule in section 3.03 of this revenue procedure, the employer must adjust all employment tax returns that are affected by the revocation of the safe harbor election.[9]

SECTION: 280F
IRS ANNOUNCES DEPRECIATION AND LEASE INCLUSION AMOUNTS ON VEHICLES FOR 2021

Citation: Revenue Procedure 2021-31, 8/6/21

The IRS has published the revised depreciation limits for vehicles under IRC §280F(d)(7) in Revenue Procedure 2021-31.[10] The limits on depreciation for such assets are adjusted for inflation each year.

For passenger automobiles acquired after September 27, 2017 and placed in service during 2021, the limitation on depreciation if §168(k)'s bonus depreciation applies is:

- 1st tax year - $18,200
- 2nd tax year - $16,400
- 3rd tax year - $9,800

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[9] Revenue Procedure 2021-33, Section 3.05

[10] Revenue Procedure 2021-31, August 6, 2021, https://www.taxnotes.com/research/federal/irs-guidance/revenue-procedures/irs-announces-limits-on-depreciation-deduction-for-cars/76zx8 (retrieved August 13, 2021)

- Each succeeding year - $5,860.[11]

For such a passenger automobile where §168(k)'s bonus depreciation rules do not apply, including when the taxpayer has elected not to have them apply or for vehicles acquired on or before September 27, 2017, the limits are:

- 1st tax year - $10,200
- 2nd tax year - $16,400
- 3rd tax year - $9,800
- Each succeeding year - $5,860.[12]

The revenue procedure also includes a table to determine the lease inclusion amount under Reg. §1.280F-7(a) for passenger automobiles with a lease term beginning in 2021.[13]

SECTION: 7502
TAXPAYERS NOT ALLOWED TO PROVIDE OTHER PROOF OF TIMELY MAILING WHEN USPS FAILED TO PLACE A POSTMARK ON THEIR CLAIM FOR REFUND

Citation: McCaffery v. United States, Case No. 1:19-CV-01112, US Court of Federal Claims, 8/9/21

In holding that the taxpayers in the case of *McCaffery v. United States*[14] had failed to prove their claim for refund was filed timely, the US Court of Federal Claims decision took the position that the US Tax Court had developed a method of showing timely filing for an envelope lacking a postmark that is at odds with the Internal Revenue Code.

The Court described the facts of this case as follows:

> Plaintiffs filed their federal income tax return for the 2013 tax year on April 15, 2014 with a total tax liability of $70,977. Compl. ¶¶ 6-7; Def.'s App. B at B-1-B-2 (ECF 11-1). In 2017, Plaintiffs filed an amended tax return claiming an overpayment of $69,080 for the 2013 tax year and requesting a refund in that amount. Compl. ¶ 8; Def.'s Mot. to Dismiss at 3; Def.'s App. B at B-15, B-17. The parties agree

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[11] Revenue Procedure 2021-31, Table 1

[12] Revenue Procedure 2021-31, Table 2

[13] Revenue Procedure 2021-31, Table 3

[14] *McCaffery v. United States*, Case No. 1:19-CV-01112, US Court of Federal Claims, August 9, 2021, https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/court-holds-return-wasn%25e2%2580%2599t-timely-filed%253b-refund-suit-dismissed/7754m (retrieved August 10, 2021)

> (and it appears to the Court) that the deadline for claiming an overpayment was April 18, 2017. Def.'s Mot. to Dismiss at 5; Pls.' Opp. at 1, 3.4 But the IRS noted the receipt date of Plaintiffs' amended return as April 24, 2017 — six days later.[15]

The IRS did not keep a copy of the envelope in which the return was mailed, but the agency did have a scanned image of the envelope. The opinion describes the image as follows:

> The image has Plaintiffs' surname and address handwritten on the top left, the IRS's address centered, and four postage stamps in the top right corner. Each stamp bears the same two lines of text: "US POSTAGE $0.49" and "SOLD APR [ ] FIRST CLASS."). Id. The bottom-right stamp appears to read "SOLD APR 17, 2017 FIRST CLASS," but the exact dates on the others are illegible. Id. The envelope bears the partly legible date "04/24/201[ ]" near the bottom right, and an alphanumerical sequence — "09B 030" — across the stamps along the right edge. Several dots and lines appear near the middle of the top edge of the envelope, but they do not form any distinct characters, shapes, or images, and there is no way to tell how they were made.[16]

The IRS disallowed the claim as not timely filed, noting:

> "The received date on your return is Apr. 24, 2017. The last day to file a timely claim or return for tax year 2013 was Apr. 15, 2017 [sic]. We can't allow your claim or return because the received date isn't on or before the deadline." Pls.' Ex. B (ECF 1-1).[17]

As a taxpayer must first file a timely claim for refund before being able to bring suit for a refund in the US Court of Federal Claims, the IRS argued when the taxpayers filed suit in the case that the Court had to dismiss the case for lack of subject matter jurisdiction. As the parties agreed, the only issue was whether the taxpayers could show timeliness under the rules for mailing a document to the IRS:

> The parties do not dispute that Plaintiffs' refund application was delivered to the IRS after the April 18, 2017 actual-delivery deadline. Given that this Court lacks jurisdiction over tax refund claims that are not timely presented to the IRS, see *Dalm*, 494 U.S. at 602, the issue is whether Plaintiffs have established timeliness under the deemed delivery rule.[18]

The Court found that the envelope clearly lacked a postmark and the taxpayers had not used certified or registered mail (where the date stamped on the receipt by a USPS

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[15] *McCaffery v. United States*, Case No. 1:19-CV-01112, US Court of Federal Claims, August 9, 2021

[16] *McCaffery v. United States*, Case No. 1:19-CV-01112, US Court of Federal Claims, August 9, 2021

[17] *McCaffery v. United States*, Case No. 1:19-CV-01112, US Court of Federal Claims, August 9, 2021

[18] *McCaffery v. United States*, Case No. 1:19-CV-01112, US Court of Federal Claims, August 9, 2021

employee would establish a postmark date). Thus, the issue was if there was a way to show timely filing of an envelope that lacked the postmark.

The taxpayers provided evidence other than a postmark or certified or registered mail receipt to show the document was mailed on April 17, 2021. But the Court found it could not consider such evidence:

> But on the plain text of section 7502, the deemed delivery rule only applies if a postmark or equivalent marking was made: The date of the postmark is what matters, not the date of the mailing. I.R.C. § 7502(a) ("[T]he date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery[.]"). Similarly, the regulations provide for extrinsic evidence only to prove the contents of an illegible postmark, not to prove time of mailing when there was no postmark. 26 C.F.R. § 301.7502-1 ("If the postmark on the envelope is made by the U.S. Postal Service ***but is not legible***, the person who is required to file the document or make the payment has the burden of proving the date that the postmark ***was made***.") (emphasis added). As noted above, exceptions to a statutory requirement should generally be treated as exclusive. Without even an illegible postmark, the deemed delivery rule does not apply, and extrinsic evidence about the date of mailing is beside the point. That leaves only the dispositive fact that the amended return was delivered to the IRS after the delivery deadline.[19]

But the taxpayers point to a series of cases from the United States Tax Court where such extrinsic evidence was deemed to show timely mailing in the absence of a postmark. The opinion lists those various cases the taxpayer was relying upon:

> They cite a line of cases from the Tax Court holding that extrinsic evidence as to timely mailing must be considered when an envelope contains no postmark at all. Pls.' Opp. at 5 (citing to *Sylvan v. Comm'r*, 65 T.C. 548 (1975); *Seely v. Comm'r*, 119 T.C.M. (CCH) 1031, 2020 WL 201751 (2020); *Williams v. Comm'r*, 117 T.C.M. (CCH) 1328, 2019 WL 2373552 (2019); *Blake v. Comm'r*, 94 T.C.M. (CCH) 51, 2007 WL 2011294 (2007); *Menard, Inc. v. Comm'r*, 41 T.C.M. (CCH) 1279, 1981 WL 10531 (1981); *Monasmith v. Comm'r*, 38 T.C.M. (CCH) 60, 1979 WL 3117 (1979); *Ruegsegger v. Comm'r*, 68 T.C. 463 (1977)).[20]

But in this decision, the Court argues that these cases are based on what the judge finds to be a significant error in the *Sylvan* decision:

> In that case, much like this one, the Tax Court confronted an envelope with no postmark that was delivered after a deadline. The court found a gap in the statute: "There is nothing at all in the statute or legislative history indicating what Congress intended where the postmark is illegible; where there is no postmark because the petition was inserted

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[19] *McCaffery v. United States*, Case No. 1:19-CV-01112, US Court of Federal Claims, August 9, 2021

[20] *McCaffery v. United States*, Case No. 1:19-CV-01112, US Court of Federal Claims, August 9, 2021

> in a new postal cover when the original cover was damaged; or where no postmark is affixed due to oversight or malfunction of a machine." *Sylvan*, 65 T.C. at 552. "[I]n these circumstances," the court reasoned, its "task . . . is to ask what Congress would have intended on a point not presented to its mind, if the point had been present." *Id.* (quotes omitted). The court concluded, over a dissent, that extrinsic evidence should be admitted to prove the date of mailing for purposes of the deemed delivery rule not only when a postmark is illegible, but where it is absent.[21]

The opinion begins an extended discussion about the issues it finds with the *Sylvan* decision. The first is to object to the claim that the law did not provide for a result if there was no postmark applied:

> That was erroneous for several reasons. To begin with, the Tax Court was mistaken that the Internal Revenue Code contains "nothing at all . . . indicating what Congress intended" in cases of absent postmarks. Id. Section 6511(a) contains a deadline, and section 7502 contains a deemed-delivery exception that is textually inapplicable when a postmark is missing. There is thus no gap to be filled; a late-received envelope lacking a postmark is simply untimely, whatever the extrinsic evidence might be. When a court treats circumstances covered by a general rule as falling into a gap, the court is not really "ask[ing] what Congress would have intended," *Sylvan*, 65 T.C. at 552, but presuming that the statute should say something different. See also Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012) ("As Justice Louis Brandeis put the point: 'A casus omissus does not justify judicial legislation.' And Brandeis again: 'To supply omissions transcends the judicial function.'") (citing *Ebert v. Poston*, 266 U.S. 548, 554 (1925), and *Iselin v. United States*, 270 U.S. 245, 251 (1926)).[22]

In the Court's view, the law simply provided this document was not timely filed regardless of what evidence might otherwise be advanced to show the document was mailed on April 17.

The opinion also complained that the Tax Court was, effectively, creating additional provisions beyond those contained in the Treasury Regulations governing this provision:

> Besides, when *Sylvan* was decided, the Treasury had already promulgated the regulation providing for extrinsic evidence of the contents of illegible postmarks, but not absent ones. See *Republication*, 32 Fed. Reg. 15241, 15355 (Nov. 3, 1967); see also *Sylvan*, 65 T.C. at 560 (Drennen, J., dissenting) (noting that the regulations then in effect "provide[ ] that if the postmark on the envelope is not legible, the petitioner has the burden of proving the time when the postmark was made"). By sanctioning proof by extrinsic evidence in other circumstances, the Tax Court merely created a new exception that

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[21] *McCaffery v. United States*, Case No. 1:19-CV-01112, US Court of Federal Claims, August 9, 2021

[22] *McCaffery v. United States*, Case No. 1:19-CV-01112, US Court of Federal Claims, August 9, 2021

> neither Congress nor the administering agency authorized. That, too, is inappropriate: A judge should not "elaborate unprovided-for exceptions to a text, as Justice Blackmun noted while a circuit judge: 'If the Congress had intended to provide additional exceptions, it would have done so in clear language.'" Scalia & Garner, supra, at 93 (citing *Petteys v. Butler*, 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting)). Nor should a court assume that because a legislature provided relief from a general rule in one circumstance, similar relief should be applied in other circumstances. See *Easterbrook*, supra, at 541 ("Legislators seeking only to further the public interest may conclude that the provision of public rules should reach so far and no farther[.]")[23]

Thus, the Court of Federal Claims concludes that the missing postmark means automatically that the filing was late when it was not received by the IRS by the last date in the statute. Despite the fact that the result may seem harsh, the opinion concludes that it must follow the text of the statute:

> Yet the text controls. The Supreme Court recently addressed a strikingly similar situation in *Pereida v. Wilkinson*, which held that noncitizens challenging removal orders under the Immigration and Nationality Act have the burden of proving "all aspects of their eligibility" for relief. 141 S. Ct. 754, 758 (2021). Much like the McCafferys, the noncitizen facing removal in *Pereida* argued that under the Court's interpretation, some individuals entitled to relief might be unable to prove it "through no fault of [their] own," perhaps because of "poor state court record-keeping practices." *Id.* at 766. The Court answered that it was bound to the policy choice reflected in the statute: "It is hardly this Court's place to pick and choose among competing policy arguments like these along the way to selecting whatever outcome seems to us most congenial, efficient, or fair. Our license to interpret statutes does not include the power to engage in such freewheeling judicial policymaking." *Id.* at 766-67; see also *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021) (observing that a court's task "is to discern and apply the law's plain meaning as faithfully as we can, not 'to assess the consequences of each approach and adopt the one that produces the least mischief'") (quoting *Lewis v. Chicago*, 560 U.S. 205, 217 (2010)). The same is true here.[24]

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[23] *McCaffery v. United States*, Case No. 1:19-CV-01112, US Court of Federal Claims, August 9, 2021

[24] *McCaffery v. United States*, Case No. 1:19-CV-01112, US Court of Federal Claims, August 9, 2021