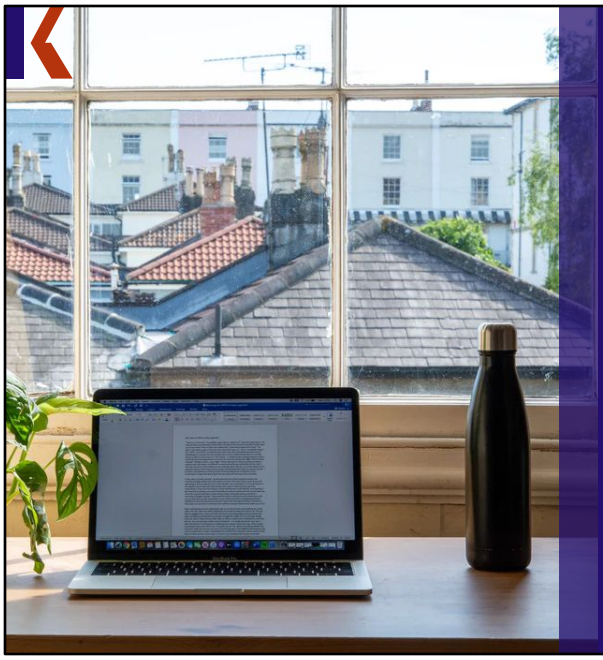

Current Federal Tax Developments

March 13, 2023

Kaplan Financial Education

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This Week We Look At:

IRS and OPR issue separate warnings on ERC claims

Ninth Circuit reverses *Seaview Holdings LLC* decision after en banc hearing, partnership return not forwarded to Ogden was never filed

IRS gives financial institutions RMD notice relief

S corporation accidentally ended its status by revising its LLC operating agreement

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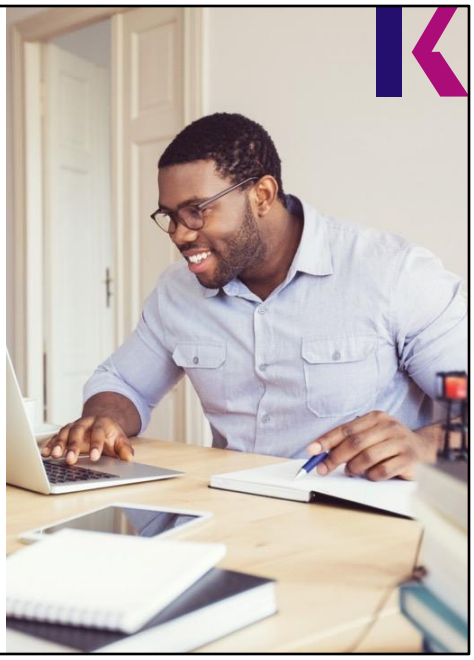

IRS and OPR issue separate warnings on ERC claims

Ninth Circuit reverses *Seaview Holdings LLC* decision after en banc hearing, partnership return not forwarded to Ogden was never filed

S corporation accidentally ended its status by revising its LLC operating agreement

IRS Repeats Warning on Employee Retention Credit Claims

- "IRS issues renewed warning on Employee Retention Credit claims; false claims generate compliance risk for people and businesses claiming credit improperly," IR-2023-40, March 7, 2023
  - IRS repeats warning issued on October 19, 2022 on ERC schemes
  - Promotions have continued, pushing ineligible employers to file
  - Also announced that OPR was working on additional guidance

https://www.irs.gov/newsroom/irs-issues-renewed-warning-on-employee-retention-credit-claims-false-claims-generate-compliance-risk-for-people-and-businesses-claiming-credit-improperly

IRS Repeats Warning on Employee Retention Credit Claims

"While this is a legitimate credit that has provided a financial lifeline to millions of businesses, there continue to be promoters who aggressively mislead people and businesses into thinking they can claim these credits," said Acting IRS Commissioner Doug O'Donnell. "Anyone who is considering claiming this credit needs to carefully review the guidelines. ***If the tax professional they're using raises questions about the accuracy of the Employee Retention Credit claim, people should listen to their advice.*** The IRS is actively auditing and conducting criminal investigations related to these false claims. People need to think twice before claiming this."

https://www.irs.gov/newsroom/irs-issues-renewed-warning-on-employee-retention-credit-claims-false-claims-generate-compliance-risk-for-people-and-businesses-claiming-credit-improperly

IRS Repeats Warning on Employee Retention Credit Claims

The IRS has been warning about this scheme since last fall, but there continue to be attempts to claim the ERC during the 2023 tax filing season. ***Tax professionals note they continue to be pressured by people wanting to claim credits improperly.*** The IRS Office of Professional Responsibility is working on additional guidance for the tax professional community that will be available in the near future.

https://www.irs.gov/newsroom/irs-issues-renewed-warning-on-employee-retention-credit-claims-false-claims-generate-compliance-risk-for-people-and-businesses-claiming-credit-improperly

IRS Repeats Warning on Employee Retention Credit Claims

- "IRS issues renewed warning on Employee Retention Credit claims; false claims generate compliance risk for people and businesses claiming credit improperly," IR-2023-40, March 7, 2023
  - Suggests again that illegal promotions should be reported using Form 14242, *Report Suspected Abusive Tax Promotions or Preparers*

https://www.irs.gov/newsroom/irs-issues-renewed-warning-on-employee-retention-credit-claims-false-claims-generate-compliance-risk-for-people-and-businesses-claiming-credit-improperly

OPR Issues Guidance to Circular 230 Practitioners on ERC Issues

- Professional Responsibility and the Employee Retention Credit, Alerts from Office of Professional Responsibility (OPR), Issue Number 2023-02, 3/7/23
  - OPR sent out guidance the IRS referred to later the same day
  - Looks at Circular 230 issues arising from ERC credit claims
  - Begins with diligence as to accuracy

https://content.govdelivery.com/accounts/USIRS/bulletins/34d3150

OPR Issues Guidance to Circular 230 Practitioners on ERC Issues

Section 10.22(a) of Circular 230 requires a practitioner to exercise due diligence in preparing and filing tax returns or other documents on a client's behalf with the IRS and in ensuring the correctness of the practitioner's written or oral representations to clients and the IRS. Practitioners who prepare income, employment, and other tax returns for clients have a duty of due diligence to inquire of their clients with sufficient detail to ascertain the information necessary to determine clients' eligibility for the ERC and to claim the proper amount of the ERC on the clients' returns.

https://content.govdelivery.com/accounts/USIRS/bulletins/34d3150

OPR Issues Guidance to Circular 230 Practitioners on ERC Issues

For purposes of exercising due diligence, section 10.34(d) allows a practitioner to generally rely, in good faith and without verification, on information from the client. Good-faith reliance, however, contemplates that a practitioner will make reasonable inquiries of a client to confirm eligibility for the ERC and to determine the correct amount of the credit. A practitioner may accept the client's responses at face value if it is reasonable. ***But a practitioner may not ignore the implications of information the practitioner knows or has received from the client. If the information from the client appears to be incorrect, incomplete, or inconsistent with other facts the practitioner knows, the practitioner cannot simply accept the client's information but must make further inquiries of the client to reconcile the incomplete, incorrect, or inconsistent facts.***

https://content.govdelivery.com/accounts/USIRS/bulletins/34d3150

OPR Issues Guidance to Circular 230 Practitioners on ERC Issues

If the practitioner cannot reasonably conclude (consistent with the standards discussed in this guidance) that the client is or was eligible to claim the ERC, then the practitioner should not prepare an original or amended return that claims or perpetuates a potentially improper credit.

https://content.govdelivery.com/accounts/USIRS/bulletins/34d3150

OPR Issues Guidance to Circular 230 Practitioners on ERC Issues

- Professional Responsibility and the Employee Retention Credit, Alerts from Office of Professional Responsibility (OPR), Issue Number 2023-02, 3/7/23
  - Looks at standards for tax returns and other documents
  - Specifically indicates what a practitioner must inform clients about regarding penalties
  - Also dealing with becoming aware client has filed an excessive ERC

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OPR Issues Guidance to Circular 230 Practitioners on ERC Issues

When a practitioner assists or advises a client in reporting income or other items on a tax return, in filing amended returns or claims for refund, or with positions taken on a return or claim for refund, the standards in section 10.34 apply to the practitioner's activities. For example, section 10.34(b) prohibits advising a client to take a position that lacks a reasonable basis or is an unreasonable position under section 6694(a)(2) of the Internal Revenue Code. ***Additionally, section 10.34(c) requires a practitioner to advise a client of any potential penalties likely to apply to a position taken on a tax return the practitioner prepares for the client or when the practitioner has advised the client about the position taken. Under section 10.34(c), a practitioner must also inform the client of any opportunity to avoid penalties through adequate disclosure by, for example, filing Form 8275, Disclosure Statement.***

https://content.govdelivery.com/accounts/USIRS/bulletins/34d3150

OPR Issues Guidance to Circular 230 Practitioners on ERC Issues

In the context of an ERC, a practitioner acting as a preparer or adviser to a client may determine that the client had previously claimed an excessive ERC. ***In addition to meeting their obligation under section 10.21, as a best practice, the practitioner should consider advising the client of the option of filing an amended return.*** The practitioner is not obligated to prepare the amended ERC claim unless asked by the client and then only if the practitioner feels competent to do so (see section 10.35 of Circular 230).

https://content.govdelivery.com/accounts/USIRS/bulletins/34d3150

OPR Issues Guidance to Circular 230 Practitioners on ERC Issues

- Professional Responsibility and the Employee Retention Credit, Alerts from Office of Professional Responsibility (OPR), Issue Number 2023-02, 3/7/23
  - Notes issues with claiming the practitioner relied on the advice of the promoter

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OPR Issues Guidance to Circular 230 Practitioners on ERC Issues

A related provision—section 10.37(a)(3) concerning written advice provided by a practitioner—allows the practitioner in their advice to a client to rely on the advice of others only if the reliance is reasonable under all the facts and circumstances, including whether the other adviser had a conflict of interest within the meaning of section 10.29. Thus, if the other adviser, who may have advised the client to claim the ERC, has a conflict because of the amount or character of the fee the adviser charged for the advice at the time, then the practitioner's reliance on that advice may not be reasonable.

https://content.govdelivery.com/accounts/USIRS/bulletins/34d3150

Financial Institutions Granted Guidance on Erroneous RMD Notices Due to Late 2022 Law Change

- Notice 2022-23, 3/7/23
  - SECURE 2.0 Act of 2022 again changed the required beginning date late in 2022
  - Many financial institutions were already notifying those who would attain age 72 in 2023 of the need to take RMDs by April 1, 2024 or could not make changes in time to properly report status on Form 5498
  - Will not be considered in error if notify affected customers of error by April 28, 2023

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https://www.irs.gov/pub/irs-drop/n-23-23.pdf

Financial Institutions Granted Guidance on Erroneous RMD Notices Due to Late 2022 Law Change

For IRA owners who will attain age 72 in 2023, the RMD statement required under Notice 2002-27 should not be sent, and the 2022 Form 5498 should not include a check in Box 11 or any entries in Box 12a or 12b. However, in recognition of the short amount of time that financial institutions have had to change their systems for furnishing the RMD statement since the enactment of the SECURE 2.0 Act, relief is being provided with respect to this reporting. ***Under this relief, the Internal Revenue Service (IRS) will not consider an RMD statement provided to an IRA owner who will attain age 72 in 2023 to have been provided incorrectly if the IRA owner is notified by the financial institution no later than April 28, 2023, that no RMD is actually required for 2023.***

https://www.irs.gov/pub/irs-drop/n-23-23.pdf

Ninth Circuit Reverses Prior Decision on Filing of a Partnership Return

- *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, 3/10/23
  - Original ruling, in May of 2022, found that partnership had filed its return by delivering it to an IRS agent who requested it
  - Ruling held that Reg. 1.6031-1(e)(1) only applied to timely filed returns

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/en-banc-ninth-circuit-affirms-tax-court%3b-fpaa-was-timely/7g4f9

Ninth Circuit Reverses Prior Decision on Filing of a Partnership Return

(e) Procedural requirements

(1) Place for filing.

The return of a partnership must be filed with the service center prescribed in the relevant IRS revenue procedure, publication, form, or instructions to the form (see section 601.601(d)(2)).

(2) Time for filing.

The return of a partnership must be filed on or before the date prescribed by section 6072(b).

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/en-banc-ninth-circuit-affirms-tax-court%3b-fpaa-was-timely/7g4f9

Ninth Circuit Reverses Prior Decision on Filing of a Partnership Return

- *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, 3/10/23
  - Taxpayer claimed filed the return timely in 2001
  - In July 2005, agent informed partnership IRS had no record of the return - asked for any copy retained and proof of mailing
    - Sent copy of the return
    - Also sent certified mail receipt

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/en-banc-ninth-circuit-affirms-tax-court%3b-fpaa-was-timely/7g4f9

Ninth Circuit Reverses Prior Decision on Filing of a Partnership Return

- *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, 3/10/23
  - In July 2007 while partnership was under exam, faxed another copy to IRS attorney, indicating it was a copy of the return
  - Neither IRS employee forwarded a copy of the return to Ogden for processing

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/en-banc-ninth-circuit-affirms-tax-court%3b-fpaa-was-timely/7g4f9

Ninth Circuit Reverses Prior Decision on Filing of a Partnership Return

- *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, 3/10/23
  - In October 2010 the IRS issued FPAA, taxpayer argued it was well past the statute of limitations date
  - Full panel held that the regulation applied to all returns, regardless of whether they were timely filed
  - Also noted the taxpayer did not indicate that either time it provided a copy it was treating it as a filing event

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/en-banc-ninth-circuit-affirms-tax-court%3b-fpaa-was-timely/7g4f9

Ninth Circuit Reverses Prior Decision on Filing of a Partnership Return

- *Seaview Trading LLC v. Commissioner*, CA9, Case No. 20-72416, 3/10/23
  - Note this indicates a risk if you only provide the return to the agent if the IRS is stating it wasn't filed
  - That may true even though they may indicate you shouldn't mail it in (Seaview did not allege they were told not to send the return to Ogden)

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/en-banc-ninth-circuit-affirms-tax-court%3b-fpaa-was-timely/7g4f9

Ninth Circuit Reverses Prior Decision on Filing of a Partnership Return

Seaview's accountant complied with this request in September 2005 by faxing a copy of its 2001 Form 1065 to the revenue agent's office in South Dakota, along with a certified mail receipt for an envelope that had been mailed to the Ogden Service Center in July 2002. Seaview initially claimed that it included its 2001 partnership return in that envelope, **which contained the tax return of another related entity,** but Seaview conceded on appeal that it could not prove that the IRS received its 2001 return as part of that mailing.

https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/en-banc-ninth-circuit-affirms-tax-court%3b-fpaa-was-timely/7g4f9

Another LLC/S Corporation Termination

- LTR 202331001, 3/10/23
  - Taxpayer formed SMLLC and elected S status
  - Later admitted 2 more individuals and modified the operating agreement
  - This turned out to be a problem

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https://www.taxnotes.com/research/federal/irs-private-rulings/letter-rulings-%26-technical-advice/termination-of-s-corp-election-was-inadvertent/7g4d0

Another LLC/S Corporation Termination

The information submitted states that X is a limited liability company organized under the laws of State on Date 1. On Date 1, and until Date 3, only one individual held an interest in X. On Date 3, two additional individuals acquired interests in X. X made a timely election to be an S corporation effective Date 2.

On Date 3, the members of X entered into Agreement. Agreement provided that different types of profits and losses would be allocated in differing percentages, other than proportionately, including allocations based on any outstanding negative capital account balances. Agreement also provided that, with respect to certain types of transactions, distributions would be paid to members in accordance with their respective positive capital account balances, as adjusted pursuant to section 704 of the Code, and then would be paid pursuant to differing percentages. **Thus, shares of stock of the corporation could confer non-identical rights to distribution and liquidation proceeds.**

https://www.taxnotes.com/research/federal/irs-private-rulings/letter-rulings-%26-technical-advice/termination-of-s-corp-election-was-inadvertent/7g4d0

Another LLC/S Corporation Termination

Reg. §1.1361-1(l)(1)

(1) General rule. A corporation that has more than one class of stock does not qualify as a small business corporation. Except as provided in paragraph (l)(4) of this section (relating to instruments, obligations, or arrangements treated as a second class of stock), a **corporation is treated as having only one class of stock if all outstanding shares of stock of the corporation confer identical rights to distribution and liquidation proceeds.** Differences in voting rights among shares of stock of a corporation are disregarded in determining whether a corporation has more than one class of stock. Thus, if all shares of stock of an S corporation have identical rights to distribution and liquidation proceeds, the corporation may have voting and nonvoting common stock, a class of stock that may vote only on certain issues, irrevocable proxy agreements, or groups of shares that differ with respect to rights to elect members of the board of directors.

https://www.taxnotes.com/research/federal/irs-private-rulings/letter-rulings-%26-technical-advice/termination-of-s-corp-election-was-inadvertent/7g4d0

Another LLC/S Corporation Termination

- LTR 202331001, 3/10/23
  - Discovered the problem, revised the agreement to meet
  - IRS did provide relief - but only after a PLR was requested, paid for and granted
  - Interesting to consider how this could have happened

https://www.taxnotes.com/research/federal/irs-private-rulings/letter-rulings-%26-technical-advice/termination-of-s-corp-election-was-inadvertent/7g4d0


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