

# Current Federal Tax Developments

## December 26, 2023

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### IRS Releases Employee Retention Credit Voluntary Disclosure Program

In [Announcement 2024-3](#), the Internal Revenue Service (IRS) unveiled its Employee Retention Credit Voluntary Disclosure Program (VDP). This program is intended for entities that have previously received a tax refund under this scheme and are now seeking to voluntarily return those funds. Concurrently, the IRS issued [News Release IR-2023-247](#), providing a detailed overview of the program. Additionally, entities interested in participating in the VDP must utilize [Form 15434 \(December 2023\)](#) as part of their application process.

The program's duration is set for a three-month period, concluding on March 22, 2024.

### The Voluntary Disclosure Program

The IRS has summarized the program's details in the accompanying News Release as follows:

As part of an ongoing initiative aimed at combating dubious Employee Retention Credit (ERC) claims, the Internal Revenue Service today launched a new Voluntary Disclosure Program to help businesses who want to pay back the money they received after filing ERC claims in error.

The new disclosure program, which has been in the works for several months, is part of a larger effort at the IRS to stop aggressive marketing around ERC that misled some employers into filing claims. The special disclosure program runs through March 22, 2024, and the IRS added provisions allowing repayment of 80% of the claim received.

The News Release outlines the agency's rationale for requiring only 80% repayment of the claim, as follows:

The IRS selected an 80% repayment because many of the ERC promoters charged a percentage fee that they collected at the time of payment or in advance of the payment, and the recipients never received the full amount.

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It's important to note that the program is not limited solely to those who engaged a promoter on a contingent fee basis to secure the credit. Employers who independently applied for the credit are also eligible for the reduced repayment option offered by this program.

Furthermore, the News Release included an announcement that the IRS plans to dispatch an additional 20,000 letters outlining proposed adjustments. These adjustments aim to reclaim improperly claimed Employee Retention Credits (ERC).

As part of this expanding effort for employers that claimed an erroneous or excessive ERC, the IRS also announced today it has started sending up to 20,000 letters with proposed tax adjustments that will recapture the erroneously claimed ERC. These mailings – which are on top of the 20,000 denial letters announced earlier in December – are currently just for tax year 2020, and work continues for tax year 2021, with additional mailings planned. If the IRS identifies an employer that has received excessive or erroneous ERC, the agency will reclaim that ERC through normal tax assessment and collection procedures.

“These letters are another incentive for businesses that believe they received an erroneous Employee Retention Credit payment to come forward and participate in the disclosure program,” Werfel said. “Our compliance activities involving these payments continue to accelerate, and the disclosure program's 80% repayment figure is much more generous than later IRS action, which includes steeper costs and greater risk. We hope these taxpayers take advantage of this window now.”

### ***Eligibility to Enter the Program***

Announcement 2024-3 stipulates that an employer who has claimed the Employee Retention Credit (ERC) and subsequently received a credit or refund can participate in the program, subject to the following conditions:

- The participant is not under criminal investigation and they have not been notified that the IRS intends to commence a criminal investigation;
- The IRS has not received information from a third party alerting the IRS to the participant's noncompliance, nor has the IRS acquired information directly related to the noncompliance from an enforcement action;
- The participant is not under an employment tax examination by the IRS for any tax period(s) for which the taxpayer is applying for this Voluntary Disclosure Program; and
- The participant has not previously received notice and demand for repayment of all or part of the claimed ERC.

### ***Employer Used a Third-Party Payer***

In cases where an employer utilized a third-party payer (either an agent as defined under IRC §3504 or a professional employer organization) to claim the Employee Retention Credit (ERC) on an

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employment tax return using the third-party payer's Employer Identification Number (EIN) instead of the employer's EIN, Announcement 2024-3 clarifies that the employer is eligible to participate in the Voluntary Disclosure Program. However, the application process, as detailed in Section 4 of the Announcement, must be initiated by the third-party payer on behalf of the participating employer.

#### ***Terms of the ERC Voluntary Disclosure Program***

The Announcement outlines the terms of the Employee Retention Credit (ERC) Voluntary Disclosure Program as follows, with emphasis placed on key provisions:

- **Employment Tax Adjustments** – The participant is not eligible for, or entitled to, any ERC, including both the refundable and non-refundable portions, for the tax period(s) at issue.
- The participant will remit back to the Department of the Treasury 80% of the claimed ERC, including both the refundable and non-refundable portions.
- The participant will not be required to repay any overpayment interest received. If the participant makes full payment of 80% of the claimed ERC prior to executing the closing agreement, no underpayment interest will apply. If the IRS approves a request for an installment agreement, interest may apply from the agreement date.
- **Income Tax Effects** -- Because the settlement eliminates a participant's eligibility for and/or entitlement to all of the claimed ERC, participants are not required to reduce wage expense with respect to any of the previously claimed ERC. Consequently, if they had not previously reduced wage expense by any of the claimed ERC, participants need not file amended returns or Administrative Adjustment Requests (AARs) to reduce wage expense. Correspondingly, if they had previously reduced wage expense by any of the claimed ERC, participants should not reduce wage expense by any of the claimed ERC if they file an amended return or AAR adjusting the previous reduction to wage expense. Pursuant to the settlement, a participant has no income with respect to the resolution of the employment tax obligation by remittance of payment of only 80% of the claimed ERC, including both the refundable and non-refundable portions.
- **Preparer/Advisor Information** – If a return preparer or advisor assisted or advised the participant with any portion of the claim for credit or refund, the participant will provide the name, address, and phone number of the preparer(s) or advisor(s) who assisted with the claim for credit or refund and a description of services provided by the preparer or advisor.
- **Application of Penalties** – The IRS will not assert civil penalties related to the underpayment of employment tax attributable to the claimed ERC against a participant of this Voluntary Disclosure Program under Announcement 2024-3 that remits full payment of 80% of the claimed ERC prior to executing the closing agreement.
- The participant will execute a closing agreement, as more fully described in Section 4(3) of the Announcement.

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The News Release offers additional details regarding penalties and interest applicable to individuals who opt to settle their balance due through an installment agreement.

The IRS will not charge program participants interest or penalties on any credits they repay. However, if the employer is unable to repay the required 80% of the credit at the time of signing their closing agreement, then the employer will be required to pay penalties and interest in connection with entering into an installment agreement.

#### ***Procedures for the Program***

Section 4 of the Announcement details the specific procedures for participation in the Employee Retention Credit (ERC) Voluntary Disclosure Program.

#### ***Filing Form 15434, Application for Employee Retention Credit Voluntary Disclosure Program***

Individuals intending to participate in the program are required to submit Form 15434, a form specifically designed by the IRS for this program, as stipulated in the Announcement:

Participants in this Voluntary Disclosure Program must notify the IRS of their election by completing and submitting Form 15434, Application for Employee Retention Credit Voluntary Disclosure Program, on or before 11:59 pm local time on March 22, 2024. Participants must submit Form 15434 and any required attachments electronically via the Document Upload Tool at [irs.gov/DUT](https://irs.gov/DUT).

According to the Announcement, the Form must be prepared under the penalties of perjury and must adhere to the following criteria:

- Include the taxpayer's name, taxpayer identification number, current address, and daytime telephone number. If a practitioner will represent the taxpayer, the practitioner must provide a completed Form 2848, *Power of Attorney and Declaration of Representative*;
- Identify the tax period(s) for which the ERC was claimed, the form on which the ERC was claimed, and the full amount of the ERC claimed, including both the amounts that were refundable and non-refundable;
- If the tax period(s) for which the ERC was claimed include any tax period ending in 2020, a completed, signed ERC Voluntary Disclosure Program Form SS-10, *Consent to Extend the Time to Assess Employment Taxes, for the 2020 Tax Period(s)*, is required to be submitted with Form 15434. The ERC Voluntary Disclosure Program Form SS-10 is available at <https://www.irs.gov/pub/irs-utl/form-ss10-202-ercvd.pdf>;
- If the ERC was claimed by a third-party payer on behalf of the participant, as described in Section 2, the third-party payer must attach a copy of the relevant pages of the Schedule R (Form 941), *Allocation Schedule for Aggregate Form 941 Filers*, that was

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attached to each Form 941, *Employer's Quarterly Federal Tax Return*, on which the third-party payer claimed the ERC for the participant; and

- If a return preparer or advisor assisted with the claim for credit or refund, include the name, address, and phone number of the preparer(s) and advisor(s) who assisted with the claim for credit or refund and a description of services provided by the preparer or advisor (see this section of the form below).

Taxpayer's name		Employer identification number (EIN)	
<b>Part V – Preparers/Advisors</b>			
16. Did an individual, business, and/or organization(s) advise you (or your client) to claim the ERC			
<input type="checkbox"/> Yes (compete lines 17-24 for each preparer/advisor)		<input type="checkbox"/> No (move to next section)	
Identify each preparer/advisor who assisted you in filing your ERC claim(s) for refund.			
<b>Preparers/Advisors 1.</b>			
17. Name		18. Company/Firm name	
19. Telephone number		20. Number and street	
21. City		22. State	23. ZIP code
24. Describe the services provided by the preparer/advisor			

The instructions specify the circumstances under which this section must be completed in full, as follows:

### **Line 16. Did an individual, business, and/or organization(s) advise you to claim the ERC**

Check the appropriate box (Yes/No) to indicate if an individual, business, and/or organization(s) advised you to claim the ERC. If “No”, move to the next section.

If “Yes”, compete lines 17-24 for the preparer/advisor. If more than one individual, business or organization advised you to claim ERC, click the “Add Additional Preparer/Advisor” button below Line 24 to add another set of Lines 17-24; repeat if necessary. Complete Lines 17-24 for each preparer/advisor who advised you to claim ERC.

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### *Payments Under the ERC Voluntary Disclosure Program*

Section 4(2) of the Announcement explicitly outlines the payments required from participants to enroll in and reap the benefits of this program. The Announcement states:

Form 15434 will help a participant calculate how much they will be required to pay to the Department of the Treasury under the terms of the ERC Voluntary Disclosure Program.

A participant must use the Electronic Federal Tax Payment System (EFTPS) to submit an online payment(s). Payment should be made separately for each tax period upon submission of Form 15434. For each EFTPS payment, select the category “Advanced Payment.” Participants should not make a single, lump-sum payment for multiple tax periods to ensure such payments are accurately credited to the correct tax period. Full payment of the liabilities under this Voluntary Disclosure Program should be made by the date the closing agreement described in subsection (3) is executed by the participant. Participants who are unable to remit full payment of the 80% of claimed ERC may be considered for an installment agreement, pending approval.

The relevant section of Form 15434, used for calculating the payable balance, is illustrated below. In this instance, the taxpayer had initially claimed \$30,000 of Employee Retention Credit (ERC) for each quarter. They are now obligated to repay \$168,000 out of the \$210,000 previously disbursed to the employer.

#### **Part IV – General Information**

Provide information regarding the filing and receipt of ERC for the applicable tax period ending date(s) below.

	June 30, 2020	September 30, 2020	December 31, 2020	March 31, 2021	June 30, 2021	September 30, 2021	December 31, 2021	Total All Periods
13a. Form	941▼	941▼	941▼	941▼	941▼	941▼	941▼	
13b. Reported Non-Refundable ERC	\$10,000.00	\$10,000.00	\$10,000.00	\$10,000.00	\$10,000.00	\$10,000.00	\$10,000.00	\$70,000.00
13c. Reported Refundable ERC	\$20,000.00	\$20,000.00	\$20,000.00	\$20,000.00	\$20,000.00	\$20,000.00	\$20,000.00	\$140,000.00
13d. Total Reported ERC (sum 13b+13c)	\$30,000.00	\$30,000.00	\$30,000.00	\$30,000.00	\$30,000.00	\$30,000.00	\$30,000.00	\$210,000.00
14. Reduction for ERC-VDP (20% of Line 13d)	\$6,000.00	\$6,000.00	\$6,000.00	\$6,000.00	\$6,000.00	\$6,000.00	\$6,000.00	\$42,000.00
15. Estimate due in ERC-VDP (Line 13d minus Line 14). Make a separate payment for each tax period via EFTPS. (See Form 15434 instructions "When and How to Pay" for payment guidance)	\$24,000.00	\$24,000.00	\$24,000.00	\$24,000.00	\$24,000.00	\$24,000.00	\$24,000.00	\$168,000.00

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According to the instructions for Form 15434, the Form is required to be filed in the following manner:

By 11:59 pm local time on March 22, 2024, upload your reply using your computer or mobile device via the Document Upload Tool at [irs.gov/DUT](https://irs.gov/DUT). You may also go to [irs.gov](https://irs.gov) and search DUT. See *Assembling the Application* for additional information.

After arriving at the DUT website, you'll acknowledge the authorized use and privacy statement. Next, indicate “No” for access code. After that, type 15434 to pull up Form 15434 submission portal and answer the questions to upload your documents. For additional information, go to [www.irs.gov/ERC](https://www.irs.gov/ERC) and click on the Voluntary Disclosure Program link to locate the VDP Frequently Asked Questions.

The instructions outline the following guidelines for compiling the application:

To ensure the application is timely and correctly processed, submit all required documents in the following order:

1. Form 15434 *Application for Employee Retention Credit Voluntary Disclosure Program*.
2. *ERC-VDP Form SS-10, Consent to Extend the Time to Assess Employment Taxes*, if Part IV, General Information, includes tax period(s) ending in 2020. See Part IV below for more information.
3. *Form 8822-B, Change of Address or Responsible Party – Business*, if applicable. See Part I, Taxpayer Address, later.
4. *Form 2848, Power of Attorney and Declaration of Representative*, if applicable. See Part III, Authorizing another individual to represent you before the IRS.

Complete every applicable line item on Form 15434. Ensure Taxpayer's Name and EIN fields at the top of page 2 and any additional pages of Form 15434 are completed, and match Line 1 and Line 2 on page 1. Only complete submissions that include all pages of Form 15434 and any required attachments can be processed. Typing the information on Form 15434 can help ensure timely processing. (**Note:** The form instructions don't need to be submitted.)

Additionally, the instructions include guidance for taxpayers who need to amend a previously filed Form 15454:

If you need to correct a previously submitted Form 15454 application package and have not received a letter notifying you of an error with your application, submit a new, complete, corrected, Form 15434 with “amended” written at the top of Form 15434 so it is understood to process the new form and disregard prior submission(s). Submit the amended Form 15434 following *When and Where to File*, above. Exception: If an IRS employee assigned to process your previously submitted Form 15434 has contacted you, submit the amended Form 15434 to that employee.

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### ***Closing Agreement to Be Executed***

Participants in the Employee Retention Credit Voluntary Disclosure Program (ERC VDP) will be obligated to sign a closing agreement, as prepared by the IRS, in accordance with Section 4(3) of the Announcement. The Announcement specifies:

After receiving the requested information, the IRS will prepare a closing agreement under section 7121 of the Code in accordance with the terms of the settlement.

The IRS will mail the closing agreement to the participant who must sign and return it to the IRS within 10 days of the date of mailing by the IRS. The IRS may grant an extension for good cause to participants who request additional time within the 10-day period. Full payment of the liabilities under this Voluntary Disclosure Program should be made by the date the closing agreement is executed by the participant.

As discussed in Section 4(2), participants who are unable to remit full payment of the liabilities under this Voluntary Disclosure Program may be considered for an installment agreement, pending approval.

### ***The Not So Great “Other Matters”***

Section 4 concludes with two additional points, both of which may not significantly alleviate the concerns of those participating in the program.

- Denial of a participant’s request to participate in this Voluntary Disclosure Program is not subject to judicial review or administrative appeal.
- Execution of a closing agreement under this Voluntary Disclosure Program does not preclude the IRS from investigating any associated criminal conduct or recommending prosecution for violation of any criminal statute, and does not provide any immunity from prosecution.

## **IRS FAQ on the Voluntary Disclosure Program**

The IRS has also published a list of [frequently asked questions](#) regarding the Voluntary Disclosure Program. Question 5 offers specific warnings to those who opt not to participate in the program, choosing instead to gamble on the likelihood that their claim will not be examined or that they will succeed if subjected to an examination. It starts by cautioning employers about the IRS's enhanced techniques for detecting dubious claims:

The IRS continues to identify new methods of analyzing ERC claims to identify ineligible taxpayers. If you claimed and received ERC you're not entitled to, and you don't participate in ERC-VDP to correct it, you risk detection by the IRS, which could lead to substantial interest and penalties and increase your risk of criminal investigation and prosecution.



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Subsequently, the IRS includes a table detailing various interest charges and penalties that a taxpayer might incur following an examination. These charges would not be applicable if the taxpayer is accepted into the Voluntary Disclosure Program (VDP). Additionally, in response to this question, the IRS also issues a caution regarding the possibility of criminal charges:

Criminal charges related to taxes can include, but are not limited to, tax evasion (IRC 7201), filing a false return (IRC 7206(1)), false claims (18 USC 287) and false statements (18 USC 1001). A person convicted of tax evasion is subject to a prison term of up to five years and a fine of up to \$250,000. Filing a false return subjects a person to a prison term of up to three years and a fine of up to \$250,000.

Even if an employer enters into the VDP and signs a closing agreement, the IRS cautions that it will not fully protect the employer from potential criminal charges.

Please note that if you willfully filed an employment tax return that fraudulently claimed ERC, or if you assisted or conspired in such conduct, filing for ERC-VDP will not exempt you from potential criminal investigation and prosecution.

### **Relief Granted from Certain Failure-to-Pay Penalties During Period IRS Suspended Sending Out Automated Reminder Notices**

The IRS has announced in [Notice 2024-7](#) the waiver of specific failure-to-pay penalties, pertaining to the suspension period of certain notices initiated during the COVID-19 pandemic.

### **Failure-to-Pay Penalties and IRS Automatic Notice Procedures**

The Notice outlines various Internal Revenue Code (IRC) provisions imposing penalties for the failure of taxpayers to timely pay different taxes.

Section 6651(a)(2) of the Internal Revenue Code (Code)<sup>1</sup> generally imposes an addition to the tax owed by a taxpayer for the failure to pay the amount shown as tax on a return required to be filed by the taxpayer, on or before the date prescribed for payment of such tax, including any extension of time for payment. Section 6651(a)(3) generally imposes an addition to the tax owed by the taxpayer for the failure to pay the amount required to be shown on a return that is not so shown within 21 calendar days from the date of notice and demand or 10 business days if the amount in the notice and demand is \$100,000 or greater. Sections 6651(a)(2) and 6651(a)(3) apply to returns required to be filed under the authority of any provision of subchapter A of chapter 61 of the Code, (for example, §§6012 through 6017 requiring the filing of income tax returns) and do not apply to information returns required to be filed or furnished under part III of such subchapter (that is, §§6031 through 6056 of the Code). Sections 6651(a)(2) and 6651(a)(3) do not apply if the taxpayer can show

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that the failure to pay the tax shown or required to be shown on the return is due to reasonable cause and not due to willful neglect.

Under normal circumstances, the IRS issues a range of automated notices to taxpayers with outstanding taxes, reminding them of their unpaid tax liabilities and the potential for incurring additional penalties if they fail to promptly settle the balance due. The Notice details this process.

When a taxpayer does not fully pay a tax liability, the Internal Revenue Service (IRS) sends an initial balance due notice, which includes Notices CP14 and CP161.2 An initial balance due notice informs the taxpayer of the amount of tax owed and instructs the taxpayer how to pay the tax liability. If the taxpayer does not pay the tax liability after receiving the initial notice, the IRS normally sends the taxpayer certain automated reminder notices.

### **COVID-19 Pandemic Suspension of the Sending of Certain Notices**

The Notice outlines the measures the IRS implemented concerning various notices throughout the COVID-19 pandemic.

On March 13, 2020, the President of the United States declared a national emergency in response to the ongoing Coronavirus Disease 2019 (COVID-19) pandemic. The same day, the President also issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. (Emergency Declaration). The Emergency Declaration instructed the Secretary of the Treasury “to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to 26 U.S.C. 7508A(a).” In response, the Department of the Treasury (Treasury Department) and the IRS issued a series of notices and other guidance to provide relief to affected taxpayers.

On February 9, 2022, the IRS announced in IRS News Release IR-2022-31 (IR-2022-31) the temporary suspension of the mailing of certain automated reminder notices. The IRS did not suspend the mailing of initial balance due notices. The additions to tax for the failure to pay taxes owed under §§6651(a)(2) and 6651(a)(3) continued to accrue for taxpayers who did not fully pay their balance due.

The Notice further indicates that the agency will resume issuing the previously suspended automated reminder notices.

The IRS will fully resume issuing automated reminder notices in calendar year 2024 for balances due for taxable years 2021 and earlier, thereby resuming the normal notice process for these taxable years. The Treasury Department and the IRS have determined that the relief described in section III of this notice will help certain taxpayers, who were not sent reminder notices during the temporary suspension of certain automated reminder notices, meet their Federal tax obligations.

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### Relief Granted by This Notice

In Section III of the Notice, the IRS commences with an overview of the comprehensive relief being provided.

Taxpayers described in section III.A of this notice (eligible taxpayers) who have filed tax returns specified in section III.B of this notice (eligible returns) will have the accrual of additions to tax for the failure to pay taxes owed for taxable year 2020 or 2021 waived for the relief period described in section III.C (relief period) or, to the extent previously assessed or paid, will have such additions to tax automatically abated, refunded, or credited to other outstanding tax liabilities, as appropriate, for the relief period. There is no need for taxpayers to request this relief. The IRS will issue a notice to each eligible taxpayer that reflects the updated amount owed and any refund or credit resulting from the automatic abatement. The relief granted in this notice applies to additions to tax under §§6651(a)(2) and 6651(a)(3) for the failure to pay taxes owed, but does not apply to any amount of interest that accrues as a result of any underpayment.

Section III proceeds to elaborate on the taxpayers eligible for this relief, specifying the returns they have filed that qualify, the designated relief period, and certain exceptions to the relief.

#### **Eligible Taxpayers**

The Notice grants relief from failure-to-pay penalties under IRC §§6651(a)(2) and 6651(a)(3) for the specified relief period. “Eligible taxpayers” include any taxpayer:

- Whose assessed income tax for taxable year 2020 or 2021, as of December 7, 2023, is less than \$100,000, excluding any applicable additions to tax, penalties, or interest;
- Who was issued an initial balance due notice (including, but not limited to Notice CP14 or Notice CP161) on or before December 7, 2023, for taxable year 2020 or 2021; and
- Who is otherwise liable during the relief period for accruals of additions to tax for the failure to pay under §6651(a)(2) or 6651(a)(3) with respect to an eligible return for taxable year 2020 or 2021.

#### **Eligible Returns**

Besides qualifying as an eligible taxpayer, the individual must have filed an “eligible return” to which the relief applies. An “eligible return” encompasses one of the following income tax returns:

- Income Tax Returns of Individuals:
  - Form 1040, *U.S. Individual Income Tax Return*
  - Form 1040-C, *U.S. Departing Alien Income Tax Return*
  - Form 1040-NR, *U.S. Nonresident Alien Income Tax Return*
  - Form 1040-PR, *Declaración de la Contribución Federal sobre el Trabajo por Cuenta Propia*

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- Form 1040-SR, *U.S. Tax Return for Seniors*
- Form 1040-SS, *U.S. Self-Employment Tax Return*
- Income Tax Returns of Trusts, Estates, Certain Taxable Corporations, and Certain Tax-Exempt Organizations:
  - Form 1120, *U.S. Corporation Income Tax Return*
  - Form 1120-C, *U.S. Income Tax Return for Cooperative Associations*
  - Form 1120-F, *U.S. Income Tax Return of a Foreign Corporation*
  - Form 1120-FSC, *U.S. Income Tax Return of Foreign Sales Corporation*
  - Form 1120-H, *U.S. Income Tax Return for Homeowners Associations*
  - Form 1120-L, *U.S. Life Insurance Company Income Tax Return*
  - Form 1120-ND, *Return for Nuclear Decommissioning Funds and Certain Related Persons*
  - Form 1120-PC, *U.S. Property and Casualty Insurance Company Income Tax Return*
  - Form 1120-POL, *U.S. Income Tax Return for Certain Political Organizations*
  - Form 1120-REIT, *U.S. Income Tax Return for Real Estate Investment Trusts*
  - Form 1120-RIC, *U.S. Income Tax Return for Regulated Investment Companies*
  - Form 1120-S, *U.S. Income Tax Return for an S Corporation*
  - Form 1120-SF, *U.S. Income Tax Return for Settlement Funds (Under Section 468B)*
  - Form 1041, *U.S. Income Tax Return for Estates and Trusts*
  - Form 1041-N, *U.S. Income Tax Return for Electing Alaska Native Settlement Trusts*
  - Form 1041-QFT, *U.S. Income Tax Return for Qualified Funeral Trusts*
  - Form 990-T, *Exempt Organization Business Income Tax Return*

### ***Relief Period***

The Notice specifies the “relief period” in the following terms:

For purposes of the relief granted in this notice, the “relief period” is the period that begins on the date the IRS issued an initial balance due notice to the eligible taxpayer, or February 5, 2022, whichever is later, and ends on March 31, 2024. Eligible taxpayers will remain liable for any addition to The Notice concludes by outlining the following exceptions to the relief: tax for the failure to pay tax that accrued before or after the relief period. Eligible taxpayers will also remain liable for interest that accrues during the relief period as a result of any underpayment of tax for taxable year 2020 or 2021.

### ***Exceptions to Relief***

The Notice concludes with the following exceptions to relief:

The relief described in this notice does not apply to any addition to tax, penalty, or interest that is not specifically listed in the grant of relief under section III of this notice. In addition, the relief described in section III of this notice is not available with respect to any return for

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which the penalty for fraudulent failure to file under §6651(f) or the penalty for fraud under §6663 applies. The relief described in section III of this notice also does not apply to any addition to tax for the failure to pay in an offer in compromise under §7122 that is accepted by the IRS because acceptance of the offer conclusively settles all of the liabilities in the offer under §301.7122-1(e)(5) of the Procedure and Administration Regulations (26 CFR part 301). Finally, the relief described in section III of this notice does not apply to any addition to tax for the failure to pay that is settled in a closing agreement under §7121 or finally determined in a judicial proceeding.

### **Use of Wrong FedEx Service Meant Taxpayer's Tax Court Petition Was Not Timely Filed**

In the case of [\*Nguyen v. Commissioner, TC Memo 2023-151\*](#), the taxpayer's choice of an incorrect delivery service resulted in the filing of their Tax Court petition beyond the designated final filing date.

### **Timely Mailing, Timely Filing Rule Under IRC §7502**

IRC §7502(a) establishes the principle of “timely mailing is timely filing” for federal tax documents, including petitions to the Tax Court. This section of the law states:

**(a) General rule.**

**(1) Date of delivery.** If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the 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 or the date of payment, as the case may be.

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IRC §7502(c) offers a method for obtaining proof of postmark through the use of registered mail. Additionally, it authorizes the IRS to accord similar status to certified mail, as outlined in the regulations issued by the agency.

### **(c) Registered and certain mailing; electronic filing.**

**(1) Registered mail.** For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United States registered mail--

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and

(B) the date of registration shall be deemed the postmark date.

**(2) Certified mail; electronic filing.** The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing.

Subsequently, Congress broadened this provision by introducing IRC §7502(f), which extends similar treatment to designated private delivery services.

### **(f) Treatment of private delivery services.**

**(1) In general.** Any reference in this section to the United States mail shall be treated as including a reference to any designated delivery service, and any reference in this section to a postmark by the United States Postal Service shall be treated as including a reference to any date recorded or marked as described in paragraph (2)(C) by any designated delivery service.

**(2) Designated delivery service.** For purposes of this subsection, the term “designated delivery service” means any delivery service provided by a trade or business if such service is designated by the Secretary for purposes of this section. The Secretary may designate a delivery service under the preceding sentence only if the Secretary determines that such service--

(A) is available to the general public,

(B) is at least as timely and reliable on a regular basis as the United States mail,

(C) records electronically to its data base, kept in the regular course of its business, or marks on the cover in which any item referred to in this section

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is to be delivered, the date on which such item was given to such trade or business for delivery, and

(D) meets such other criteria as the Secretary may prescribe.

**(3) Equivalents of registered and certified mail.** The Secretary may provide a rule similar to the rule of paragraph (1) with respect to any service provided by a designated delivery service which is substantially equivalent to United States registered or certified mail.

The IRS has issued Notice 2016-30, enumerating the private delivery services (PDSs) considered equivalent to registered and certified mail. The designated PDSs were:

- DHL Express:
  - DHL Express 9:00
  - DHL Express 10:30
  - DHL Express 12:00
  - DHL Express Worldwide
  - DHL Express Envelope
  - DHL Import Express 10:30
  - DHL Import Express 12:00
  - DHL Import Express Worldwide
- FedEx:
  - FedEx First Overnight
  - FedEx Priority Overnight
  - FedEx Standard Overnight
  - FedEx 2 Day
  - FedEx International Next Flight Out
  - FedEx International Priority
  - FedEx International First
  - FedEx International Economy
- UPS:
  - UPS Next Day Air Early AM
  - UPS Next Day Air
  - UPS Next Day Air Saver
  - UPS 2nd Day Air
  - UPS 2nd Day Air A.M.
  - UPS Worldwide Express Plus
  - UPS Worldwide Express

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The services listed in Notice 2016-30 were the officially recognized private delivery services (PDSs) as of the date when the taxpayer filed their petition with the U.S. Tax Court.

### **Facts of the Taxpayer's Case**

The U.S. Tax Court received the taxpayer's petition one day beyond the final date permitted for filing.

The Petition in this case was filed on January 12, 2023, one day after expiration of the 90-day filing period. In urging that we nonetheless have jurisdiction, petitioners rely on the “timely mailed, timely filed” rule in section 7502. It sets forth the general rule that, for any document “delivered by United States mail . . . the date of the United States postmark stamped on the cover . . . shall be deemed to be the date of delivery.” §7502(a)(1).

Petitioners did not send their Petition to the Court by U.S. mail, but rather used FedEx, a private delivery service. Section 7502(f), captioned “Treatment of Private Delivery Services,” provides that “[a]ny reference in this section to the United States mail shall be treated as including a reference to any designated delivery service.” Section 7502(f)(2) defines a “designated delivery service” to mean a private delivery service “if such service is designated by the Secretary for purposes of this section.”

The Court acknowledged the earlier-mentioned IRS publication listing designated PDSs. It noted that the taxpayers utilized FedEx Ground, a service not included on that list, for delivering their petition to the Tax Court.

The IRS has published a list of all private delivery services that have been designated by the Secretary for purposes of section 7502. See I.R.S. Notice 2016-30, 2016-18 I.R.B. 676. This list includes certain forms of delivery made available by FedEx, but not FedEx Ground, the delivery service petitioners used. Notice 2016-30, 2016-18 I.R.B. at 676, specifically states that “FedEx . . . [is] not designated with respect to any type of delivery service not enumerated in this list.” Because petitioners did not use a “designated delivery service” as defined by section 7502, they are unable to avail themselves of the “timely mailed, timely filed” rule. Cf. *Guralnik v. Commissioner*, 146 T.C. 230, 240-42 (2016) (holding that the “timely mailed, timely filed” rule does not apply to “FedEx First Overnight” because that service is not a designated private delivery service); *Raczkowski v. Commissioner*, T.C. Memo. 2007-72, 93 T.C.M. (CCH) 1045, 1046 (holding that the “timely mailed, timely filed” rule does not apply to “UPS Ground” because that service is not a designated private delivery service).



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The taxpayers contended that FedEx Ground, in this instance, was substantially similar to FedEx 2-Day—a service included in the IRS's list of designated PDSs. They argued that this similarity should permit them to utilize the timely mailing rule. However, the Tax Court did not concur with this perspective.

Petitioners do not dispute that their Petition was filed after the 90-day period specified in section 6213(a), nor do they dispute that FedEx Ground is not on the list of private delivery services that have been “designated by the Secretary.” Rather, they contend that FedEx Ground is “substantially identical” to “FedEx 2-Day,” a delivery service that has been designated by the Secretary for purposes of section 7502. On the basis of this asserted similarity between the two delivery services, petitioners contend that the “timely mailed, timely filed” rule should be available to them.

Unfortunately we must disagree. FedEx Ground may well be substantially similar to the FedEx 2-Day delivery service. But this Court may not rely on general equitable principles to expand the statutorily prescribed time for filing a petition. See *Eichelburg v. Commissioner*, T.C. Memo. 2013-269, 106 T.C.M. (CCH) 606, 607. Congress has chosen to make the “timely mailed, timely filed” rule available for a private delivery service only “if such service [has been] designated by the Secretary.” §7502(f)(2). Because FedEx Ground has not been so designated, our hands are tied. We are not at liberty to make a designation that Congress has explicitly committed to the Secretary’s discretion.

The Court determined that the taxpayers cannot contest the IRS's assessment in the Tax Court. However, other alternatives, likely less favorable, remain available for the taxpayers to further pursue the issue.

Because the Petition was not filed within the time prescribed by section 6213(a) and the “timely mailed, timely filed” rule is not available, we lack jurisdiction and must grant respondent’s Motion to Dismiss. Although petitioners may not prosecute this case in the Tax Court, we note that they may pursue with the IRS an administrative resolution of their 2017 and 2018 tax liabilities. Another remedy potentially available to them is to pay the tax in dispute and file a claim for refund with the IRS. If that claim is denied (or not acted upon after six months), petitioners may file a suit for refund in the appropriate U.S. district court or the U.S. Court of Federal Claims. See *McCormick v. Commissioner*, 55 T.C. 138, 142 n.5 (1970).

### **What About Equitable Relief?**

Recall that in *Culp v. Commissioner*, 75 F.4th 196, 205 (3d Cir. 2023), the Third Circuit acknowledged the Tax Court's authority to grant equitable relief. Does this precedent have applicability in the current case, potentially allowing it to progress? Regrettably for the taxpayer, any appeal in this instance would fall under the jurisdiction of the Tenth Circuit Court of Appeals. As indicated in a footnote to the opinion:

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Absent stipulation to the contrary this case is appealable to the Tenth Circuit, and we thus follow its precedent, which is squarely on point. See *Golsen v. Commissioner*, 54 T.C. 742, 756-57 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971). The Tenth Circuit has long agreed with this Court's holdings that the statutory period prescribed by section 6213(a) is a jurisdictional requirement. See *Armstrong v. Commissioner*, 15 F.3d at 973 n.2; *Foster v. Commissioner*, 445 F.2d 799, 800 (10th Cir. 1971). Thus, we need not address a recent ruling by the U.S. Court of Appeals for the Third Circuit that the statutory filing deadline in deficiency cases is a non-jurisdictional "claims-processing" rule. See *Culp v. Commissioner*, 75 F.4th 196, 205 (3d Cir. 2023).