

Buyback Tax Clues

Addressing the stock buyback tax's unpopular "funding rule" in Notice 2023-2, 2023-3 IRB 374, Vallabhaneni noted that the government has received "quite a bit of feedback," and told attendees and the conference that "hopefully you'll like what happens in the proposed rules better." The concerns underlying the rule haven't changed, he added, but the manner of addressing them may change in the proposed rules.

For payment of the buyback excise tax, Vallabhaneni clarified that the proposed regs aren't likely to require companies to pay in the same quarter that the regs come out. For companies with fiscal years that would otherwise make the tax payment fall in that quarter, payment is expected to be due in the next full quarter, as is provided in the interim guidance in Notice 2023-2.

"I don't think there's any plan to jam folks one way or the other on this," Vallabhaneni said about the timing of payment requirements. "I think whatever we would put out would be consistent with the guidance [already] out there." ■

ERC Voluntary Disclosure Program Barrels Toward Uncertain End

by Nathan J. Richman and Lauren Loricchio

The IRS is urging employers to consider a deal through its employee retention credit voluntary disclosure program before it closes, but tax professionals say businesses have been hesitant to bite.

The ERC voluntary disclosure program, which lets employers who submitted improper claims repay 80 percent of the amount received while also avoiding penalties and interest, is set to end March 22. Some tax professionals are getting more inquiries about the program with the deadline approaching, while others say they haven't seen much interest in it.

"Certainly the activity — the conversations that are taking place in the month of March — is far greater than it was in January and February," Justin Elanjian of Stout Risius Ross LLC told *Tax Notes*.

With tax season underway, more conversations are occurring between tax advisers and their clients, Elanjian said. Taxpayers might be waiting to apply at the last minute because they can earn investment income on the money they received, he said.

Similarly, Rebecca Sheppard of Frost Law said her firm has been getting a lot of calls from businesses interested in discussing the program.

"Any employer that thinks there is a question about their eligibility or their calculations should be looking at getting an analysis done," Sheppard told *Tax Notes*. "The point of the program is that people are actually reviewing their claims, making sure that they are comfortable with the representations they made and the payments they've received from the government."

Observing that voluntary disclosure is only available to companies that received checks before December 21, 2023, when the program rolled out, Sheppard said the time frame is somewhat limiting to taxpayers, although the IRS hasn't issued many payments since it instituted its moratorium on processing ERC claims in September 2023.

Tom Cullinan of Chamberlain, Hrdlicka, White, Williams & Aughtry said there are "some

big factors that are probably keeping most people away.”

First and foremost is that taxpayers might be reluctant to give money back to the IRS, according to Cullinan. Second, the statute of limitations will run out on April 15 for some claims made in 2020, and if the IRS hasn't gotten to those taxpayers by now, Cullinan said he thinks they're probably considering the odds of the IRS getting to them in the next month. The rules for determining eligibility are also subjective, particularly under the partial suspension test, he said.

While the terms of the program aren't ungenerous, Cullinan, a former adviser to the IRS commissioner, explained that only a narrow universe of taxpayers should consider the program: those who took aggressive positions but didn't engage in fraud.

According to Cullinan, those taxpayers will have to evaluate how strong their arguments are. “Why would you just capitulate when you feel like you've got a pretty good position and you've already got the money?” he asked.

Daniel Mayo of Withum Smith+Brown PC said he will have handled three or four voluntary disclosure filings by the March 22 deadline. The taxpayers asking about voluntary disclosure haven't been just those that have made highly aggressive claims but also some businesses seeking reassurance in the face of the IRS's public relations campaign, he said.

For example, a taxpayer may have replaced an employee since filing its claim, which may have raised questions about the business's ERC eligibility on reassessment, Mayo said. Maybe that business owner wants to rest more easily at night and decides to enter the ERC voluntary disclosure program, he said.

Elanjian said he has also seen some reluctance from employers. He agreed that the ERC voluntary disclosure program is a nonevent for taxpayers that think they have a reasonable interpretation justifying their claims.

“Some taxpayers who have been considering the program are perhaps more inclined to play the audit lottery because they don't have the funding to pay it back, despite even an installment agreement being a potential option for repayment,” Elanjian said.

Criminals Beware

Unlike a traditional voluntary disclosure made to the IRS Criminal Investigation division, the ERC voluntary disclosure program won't shield taxpayers from criminal liability.

The IRS implemented an offshore voluntary disclosure program for undeclared offshore income and assets, which ended in 2018. By the time it closed, that program allowed taxpayers to avoid criminal liability for failing to report offshore assets in exchange for payment of tax due plus interest, accuracy-related and failure-to-file penalties, and a further penalty equal to 27.5 percent to 50 percent of the unreported assets' value.

When the OVDP closed because of low uptake, the IRS shifted its focus to a general voluntary disclosure program incorporating the lessons it learned from the OVDP.

The ERC voluntary disclosure program makes sense for the average American small business that relied on an ERC company to submit a claim, according to Daniel N. Price of the Law Offices of Daniel N. Price PLLC. But if somebody has criminal exposure, the traditional voluntary disclosure practice would be the only appropriate path, he said.

Price, who was involved in the IRS's voluntary disclosure program when he worked for the agency, said the ERC voluntary disclosure is a “nice parallel” to the streamlined filing compliance procedures for taxpayers to correct non-willful failures to report foreign financial assets. Both provide an effective settlement mechanism, he said.

As the OVDP evolved, the IRS added more features, including separate streamlined filing compliance procedures. The streamlined procedures allowed taxpayers who professed that their failure to report offshore assets wasn't willful to file fewer amended returns with smaller miscellaneous penalties, but without the certainty of a closing agreement with criminal protection.

Unlike the OVDP, the streamlined filing procedures remain available, but taxpayers who incorrectly professed their non-willfulness have faced criminal charges.

Taxpayers who received an ERC check but haven't cashed or deposited it can still withdraw

their claims without interest or penalties. The IRS said taxpayers “should quickly pursue” the process in a March 15 release.

Price said the absence of criminal protection in the ERC voluntary disclosure program makes him wish the IRS had instead called it something like a “settlement initiative” to reduce confusion.

An end date for taking back claims hasn’t been announced yet, and tax professionals aren’t expecting that option to end anytime soon. Price predicted that the IRS’s paper processing backlogs are large enough that withdrawal will be an option for a while.

Elanjian also expects withdrawal to remain open for some time. If the IRS believes there are many improper claims, it would likely want to continue to leave open the opportunity for taxpayers to rescind their claims, he said.

Renewal?

Meanwhile, tax professionals said there’s a chance the IRS will reopen the program. But if taxpayers wait, the terms will likely become less favorable. As the OVDP evolved over the years, its terms also became less beneficial.

If the \$79 billion tax package passes the Senate and the IRS has more time to deal with the issue, Cullinan said the IRS could extend the program to reflect changes in the House-passed Tax Relief for American Families and Workers Act of 2024 (H.R. 7024) that would extend the statute of limitations on assessments to six years from the date of the claim.

But Cullinan said the terms, like those of the OVDP, will probably become less generous. “They don’t want people to just sit and try to wait it out,” he said.

On the other hand, if taxpayers rack up a string of court victories, the IRS could change its calculus and reopen or extend the ERC voluntary disclosure program with more generous terms, Cullinan said, adding that the reverse — worse terms after IRS victories — is also possible.

Passage of H.R. 7024 could also drive interest in the withdrawal program for taxpayers that filed ERC claims after the January 31 closing date from that bill, Cullinan said.

Price predicted that if the uptake rate has been substantial enough, the IRS will extend the

program, possibly for six months and on the same terms.

“The IRS kind of dropped the ball on the timing. They talked a lot about [the voluntary disclosure program] last year, but we saw it so late,” Price said. “There’s a good business reason to simply extend it for six months, especially if the uptake rate is healthy.”

Mayo also predicted that the IRS will extend the ERC voluntary disclosure program but on the same or worse terms. “If they thought it was worthwhile to do up until March 22, and they’re getting a positive response, why not continue that?” he said.

Elanjian noted a February 28 IRS posting for comment on Form 15434, “Application for Employee Retention Credit (ERC) Voluntary Disclosure Program,” that closes April 29. That could imply the IRS is considering either extending the end date for the ERC voluntary disclosure program or later reopening it, he said.

Price cautioned against reading too much into the Form 15434 comment period because the IRS is required to open a comment period for any new form.

Mayo agreed on the lack of importance ascribable to the Form 15434 comment period but instead highlighted the number of taxpayers estimated to use the form: 5,000.

The IRS has probably received 4 million ERC claims by now, and even discounting that number by treating it as per quarter while treating the Form 15434 estimate as per taxpayer — an otherwise apples-to-oranges comparison — that still results in an expected uptake of a fraction of 1 percent, Mayo noted. Further, if the average ERC claim is around \$200,000, that means the IRS expects to collect around \$1 billion (before accounting for the 20 percent incentive) from the current program, he said.

However, that low uptake rate doesn’t reflect poorly on the IRS given that its goal with the program was to publicize concerns about improper ERC claims, Mayo said.

The IRS didn’t respond to a request for statistics on the program by press time. ■