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2022 Nonprofit Tax Year-End Review

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Polling Question 1

Do you want CPE credit?

- Yes
- No

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Agenda

- Employee Retention Credit updates
- Accelerating Charitable Efforts (ACE) Act
- IRS Priority Guidance Plan 2022-2023
- State withholding rules for remote employees
- Lessons learned from recent IRS audits
- State enforcement in tax-exempt compliance matters

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Agenda

- 2023 key tax figures
- Form 990-T lessons learned
- General filing updates

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Employee Retention Credit Update

- Created by the CARES Act in 2020; has been modified and expanded by subsequent legislation
- Provides a refundable tax credit to eligible employers based upon qualified wages paid to employees
- [Now enshrined in Section 3134](#)
- Various IRS Notices have provided further guidance
 - [Notice 2021-20](#); [Notice 2021-23](#); [Notice 2021-49](#); [Notice 2021-65](#)

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Employee Retention Credit Update (cont.)

- Use the guidance provided in [Notice 2021-20](#) when determining whether you have experienced a full or partial suspension of services
- On [October 19, 2022](#), the IRS released a warning to all employers, stating that they should be “wary of third parties who are advising them to claim the [ERC] when they may not qualify. Some third parties are taking improper positions related to taxpayer eligibility for and computation of the credit.”
- Further, the IRS reminded employers that “taxpayers are always responsible for the information reported on their tax returns.”
- Targeted at those companies that charge a contingency fee or large upfront fees and that do not notify employers of income tax-related implications of receiving the ERC (i.e., wage deductions)
- This is important for organizations that file a Form 990-T

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Employee Retention Credit Update (cont.)

- TIGTA (Treasury Inspector General for Tax Administration) report from August 31, 2022 ([Report Number 2022-46-059](#))
 - First: the length of time it is taking to process the 941-X Forms
 - Several different suspensions of assessing the 941-X Forms were noted – many of which were suspended erroneously, according to TIGTA
 - As of January 29, 2022, there were 27,790 ERC (and other pandemic-related) claims that were in suspension
 - Further, the IRS was struggling with claims related to Q2 and Q3 of 2021 (TIGTA disputes any substantive difference)

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Employee Retention Credit Update (cont.)

- TIGTA (Treasury Inspector General for Tax Administration) report from August 31, 2022 ([Report Number 2022-46-059](#)), continued:
 - Second: referral of large refundable claims to Examination is now taking place
 - Third: identification of “fraudulent” 941-X Forms
 - March 10, 2022: The IRS stated that they had identified over 11,000 941-X Forms with over \$2 **trillion** of ERC claims (focused on identity theft and fake employers)

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Timeline of suspensions and resumptions

October 28, 2020: processing of 941-X Forms put on hold in order to develop uniform procedures

December 11, 2020: processes created for 941-X Forms

March/April 2021: sites begin processing 941-X Forms

May 28, 2021: processing of 941-X Forms suspended

July 12, 2021: processing resumes for tax periods ending before June 30, 2021

January 11, 2022: claims for tax periods after June 30, 2021 still not being processed

February 9, 2022: processing resumes



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Employee Retention Credit Update (cont.)

- Bottom line: it is taking a significant amount of time to receive these checks after the 941-X Forms have been submitted (6 – 16 months)
- Further, there are differences in timing depending on (1) the size of the credit, (2) when the 941-X Forms were submitted, and (3) what tax periods the 941-X Forms are amending
- The IRS's responses — increased training for staff, predominately — may not be suited to actually addressing the problem of the significant backlog
- May want to call the IRS 941 Form line at 800-829-4933 (expect long wait times)

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Employee Retention Credit Update (cont.)

- **Is the money running out?**
 - In a word, no. While the Congressional Budget Office (CBO) estimated that the ERC would cost about \$80 billion, it will clearly overrun that amount. However, there has been no word of Congress cutting short the timeline for claiming the ERC and/or shortening the timeframe for what wages may be claimed.
- **What is the deadline for claiming the ERC?**
 - The ERC is claimed using the [941-X Form](#), so the deadline is related to how long an employer has to amend prior payroll tax returns. There are two deadlines here:
 - For claims related to 2020 quarters: April 15, 2024
 - For claims related to 2021 quarters: April 15, 2025

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Accelerating Charitable Efforts (ACE) Act

- Sponsored by Senators Angus King (I-ME) and Chuck Grassley (R-IA)
- Introduced in Senate in July 2021; reintroduced in House February 2022
- Predominately meant to deal with perceived abuse of donor advised funds (DAFs)
- Would create additional restrictions on ability to claim charitable deductions based upon contributions to “nonqualified DAFs”
- A *qualified* donor advised fund is any DAF that has a written agreement that terminates the donor’s advisory privileges within 14 years from date of contribution
- Excise tax imposed on non-distributed funds after advisory privilege terminates
- Public support test: Contributions from DAFs not treated as being from a public charity unless the original donor is identified

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Polling Question 2

Has your organization reviewed whether it may be eligible for the Employee Retention Credit?

- Yes
- No

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IRS Priority Guidance Plan 2022-2023

- Released annually around November
- Provides a roadmap for what the IRS hopes to focus on in the upcoming fiscal year
- Exempt Organization highlights:
 - Guidance related to group exemption letters (group rulings put on hold since Notice 2020-36 was released May 18, 2020)
 - Final regulations for supporting organizations (proposed regulations were published February 2016)
 - Various regulations regarding donor advised funds (sections 4966 and 4967), including the public-support computation

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State Withholding Rules for Remote Employees

- During the pandemic, many states adopted temporary rules exempting employees temporarily resident in the state from state income tax withholding
- Many of these statutes have expired, but these employees have not returned “home”
- These states now expect you to withhold from resident employee wages

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State Withholding Rules for Remote Employees (cont.)

- What should you be doing?
 - Perform a review of the state of residence of all remote employees
 - Identify any states represented in this group with an income tax withholding requirement you are not complying with
 - Register with that state as a withholding agent
 - This should not require you to register with the Secretary of State as a foreign corporation in that state
 - Cease withholding in the employee’s previous state of residence

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Lessons Learned from Recent IRS Audits

- Between May 2020 and November 2022 (30 months), 5 clients have been selected for IRS audits
 - None were selected in the preceding 48 months
- They represent a cross-section of activities:
 - 1 DAF sponsoring organization and its supporting organization
 - 1 organization involved in international activities
 - 1 (c)(4) organization
 - 1 nonprofit organization without any distinguishing characteristics

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Lessons Learned from Recent IRS Audits (cont.)

- 3 of these audits resulted in “no change”
- 2 are ongoing
- There does not appear to be any “targeting” going on
 - The nature of the organizations’ exempt purpose has not been raised in any of the audits
- 4 audits were done remotely with no face-to-face interaction with the IRS agent
 - The most recent is set to be conducted at the client’s offices

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Lessons Learned from Recent IRS Audits (cont.)

- Lessons
 - Audits are expensive
 - \$10,000 is a good starting point to set expectations
 - But every audit is different, and the amount could be more
 - Having been audited before is no guarantee you won't be audited again — and on the same issues
 - The quality of governance is a consistent theme
 - Clients have been required to provide board minutes and been questioned about the absence of meaningful discussion shown in the minutes

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Lessons Learned from Recent IRS Audits (cont.)

- Lessons
 - Expect the agent to ask for details around expenditures
 - How did the expenditure serve your exempt purpose?
 - Expect the agent to examine any significant noncash transactions
 - Did you have a Form 8282 filing requirement?
 - How did you value the gift on your financials?
 - Did your donor receipt conform to the requirements?

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Lessons Learned from Recent IRS Audits (cont.)

- Lessons
 - Patience is important!
 - In each audit except the newest, we've had a change in assigned IRS auditor
 - We've had to go over plowed ground a second time >> more cost!
 - Auditor competence has varied from not very good to above average
 - 2 audits took 2 years to complete
 - 1 audit took 9 months
 - 1 audit is in its 11th month

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Polling Question 3

In a Form 990 audit, the IRS is particularly interested in governance of nonprofit organizations.

- True
- False

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State Regulation of Exempt Organizations

- The absence of meaningful IRS regulation of nonprofits leaves oversight to the states
- State oversight typically comes in two forms:
 - Charitable Solicitation Registration
 - State Attorney General inquiries

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Key Tax Figures Update – 2023

- Standard Deduction
 - Married Filing Joint \$ 27,700
 - Head of Household \$ 20,800
 - Single/Married Filing Separate \$ 13,850
- FICA Wage Base \$160,200
- 401(k)/403(b) Elective Deferral Limit \$ 22,500
- 401(k)/403(b) Over Age 50 Catchup Limit \$ 7,500

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Key Tax Figures Update – 2023

- HSA Contributions Limits
 - Self-only \$ 3,850
 - Family \$ 7,750
- Foreign Earned Income Exclusion \$120,000
- Annual Gift Tax Exclusion \$ 17,000

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Form 990-T Lessons Learned

- IRC 512(a)(6) – Final regulations were published in the Federal Register on December 2, 2020 (applicable to tax years beginning on or after December 2, 2020)
 - Separate UBTI calculation for each unrelated trade or business using 2-digit NAICS code or specific non-NAICS business activity codes (90XXXX)
 - Net operating loss (NOL) deduction limited to 80% of taxable income, can only be used to offset income in same silo, carryback eliminated

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Form 990-T Lessons Learned (cont.)

- NOLs are used on a first-in, first-out basis
- 3 buckets:
 - Pre-2018 NOL deduction – offset aggregate UBTI, carryforward 20 years, carryback 2 years (reported on Form 990-T, Line 6)
 - 2018 – 2020 NOL deduction (CARES Act NOLs) – offset income in specific silo only for current year and going forward (reported on Schedule A, Line 16), carryforward indefinitely, carryback 5 years to offset aggregate UBTI
 - 2021 and beyond NOL deduction – offset income in specific silo only, carryforward indefinitely, no carryback, deduction is limited to 80% of income (reported on Schedule A, Line 16)

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Form 990-T Lessons Learned (cont.)

- Estimated payments
 - Required if total estimated tax is \$500 or more (use worksheet in Form 990-W to calculate)
 - Installments due 15th day of the 4th, 6th, 9th, and 12th months (5th, 6th, 9th, 12th for private foundation)
 - Underpayment penalties apply (calculated on Form 2220 attached to Form 990-T)
 - Must use electronic funds transfer (EFTPS)

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Form 990-T Lessons Learned (cont.)

- Depreciation – IRC Section 179 and bonus depreciation are elective regimes
- State ramifications
- Deductibility of wages for which ERC was claimed; may need to amend

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Form 990-T Lessons Learned (cont.)

- 2021 Form 990-T Updates
 - 990-T, Part IV Statements Regarding Certain Activities and Other Information – Added fields to report pre-2108 and post-2017 NOLs

4 Enter available pre-2018 NOL carryovers here ▶ \$ Do not include any post-2017 NOL carryover shown on Schedule A (Form 990-T). Don't reduce the NOL carryover shown here by any deduction reported on Part I, line 4.

5 Post-2017 NOL carryovers. Enter available Business Activity Code and post-2017 NOL carryovers. Don't reduce the amounts shown below by any NOL claimed on any Schedule A, Part II, line 17 for the tax year. See instructions.

Business Activity Code	Available post-2017 NOL carryover
.....	\$
.....	\$
.....	\$
.....	\$

- Form 990-T, Schedule A - Instructions were enhanced to include specific information required to be provided in Part XI Supplemental Information when an organization deems it necessary to change 2-digit NAICS code for a previously reported activity

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Polling Question 4

Does your organization now owe unrelated business income tax due to the recently implemented 80% NOL deduction limitation?

- Yes
- No
- Not applicable

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General Filing Updates

- Exempt organization and tax practitioner challenges
 - Business Master File (EO BMF)
 - IRS notices
 - E-filing issues
 - Difficulties reaching the IRS

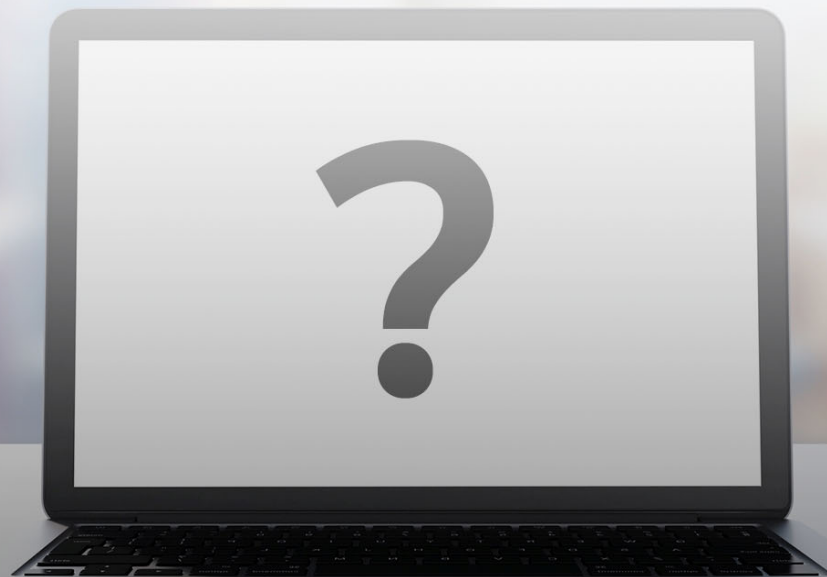
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General Filing Updates

- Upcoming IRS shutdown dates for filing business returns – dates not yet announced, but it usually falls right before or after Christmas
- Disaster filing relief: [irs.gov/newsroom/tax-relief-in-disaster-situations](https://www.irs.gov/newsroom/tax-relief-in-disaster-situations)

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Questions?



Merry Christmas!

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