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118TH CONGRESS
2D SESSION

H. R. 9738

To increase the penalties applicable to persons facilitate fraud with respect to any COVID-related employee retention credit, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 20, 2024

Mr. SCHWEIKERT introduced the following bill; which was referred to the Committee on Ways and Means

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A BILL

To increase the penalties applicable to persons facilitate fraud with respect to any COVID-related employee retention credit, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ENFORCEMENT PROVISIONS WITH RESPECT TO COVID-RELATED EMPLOYEE RETENTION CREDITS.

(a) INCREASE IN ASSESSABLE PENALTY ON COVID–ERTC PROMOTERS FOR AIDING AND ABETTING UNDERSTATEMENTS OF TAX LIABILITY.—

(1) IN GENERAL.—If any COVID–ERTC promoter is subject to penalty under section 6701(a) of

the Internal Revenue Code of 1986 with respect to any COVID–ERTC document, notwithstanding paragraphs (1) and (2) of section 6701(b) of such Code, the amount of the penalty imposed under such section 6701(a) shall be the greater of—

(A) $200,000 ($10,000, in the case of a natural person), or

(B) 75 percent of the gross income derived (or to be derived) by such promoter with respect to the aid, assistance, or advice referred to in section 6701(a)(1) of such Code with respect to such document.

(2) NO INFERENCE.—Paragraph (1) shall not be construed to create any inference with respect to the proper application of the knowledge requirement of section 6701(a)(3) of the Internal Revenue Code of 1986.

(b) FAILURE TO COMPLY WITH DUE DILIGENCE REQUIREMENTS TREATED AS KNOWLEDGE FOR PURPOSES OF ASSESSABLE PENALTY FOR AIDING AND ABETTING UNDERSTATEMENT OF TAX LIABILITY.—In the case of any COVID–ERTC promoter, the knowledge requirement of section 6701(a)(3) of the Internal Revenue Code of 1986 shall be treated as satisfied with respect to any COVID–ERTC document with respect to which such promoter provided aid, assistance, or advice, if such promoter fails to comply with the due diligence requirements referred to in subsection (c)(1).

(c) ASSESSABLE PENALTY FOR FAILURE TO COMPLY WITH DUE DILIGENCE REQUIREMENTS.—

(1) IN GENERAL.—Any COVID–ERTC promoter which provides aid, assistance, or advice with respect to any COVID–ERTC document and which fails to comply with due diligence requirements imposed by the Secretary with respect to determining eligibility for, or the amount of, any COVID-related employee retention tax credit, shall pay a penalty of $1,000 for each such failure.

(2) DUE DILIGENCE REQUIREMENTS.—Except as otherwise provided by the Secretary, the due diligence requirements referred to in paragraph (1) shall be similar to the due diligence requirements imposed under section 6695(g).

(3) RESTRICTION TO DOCUMENTS USED IN CONNECTION WITH RETURNS OR CLAIMS FOR REFUND.—Paragraph (1) shall not apply with respect to any COVID–ERTC document unless such document constitutes, or relates to, a return or claim for refund.

(4) TREATMENT AS ASSESSABLE PENALTY, ETC.—For purposes of the Internal Revenue Code of 1986, the penalty imposed under paragraph (1) shall be treated in the same manner as a penalty imposed under section 6695(g).

(5) SECRETARY.—For purposes of this subsection, the term "Secretary" means the Secretary of the Treasury or the Secretary's delegate.

(d) ASSESSABLE PENALTIES FOR FAILURE TO DISCLOSE INFORMATION, MAINTAIN CLIENT LISTS, ETC.—For purposes of sections 6111, 6112, 6707 and 6708 of the Internal Revenue Code of 1986—

(1) any COVID-related employee retention tax credit (whether or not the taxpayer claims such COVID-related employee retention tax credit) shall be treated as a listed transaction (and as a reportable transaction) with respect to any COVID–ERTC promoter if such promoter provides any aid, assistance, or advice with respect to any COVID–ERTC document relating to such COVID-related employee retention tax credit, and

(2) such COVID–ERTC promoter shall be treated as a material advisor with respect to such transaction.

(e) COVID–ERTC PROMOTER.—For purposes of this section—

(1) IN GENERAL.—The term "COVID–ERTC promoter" means, with respect to any COVID–ERTC document, any person which provides aid, assistance, or advice with respect to such document if—

(A) such person charges or receives a fee for such aid, assistance, or advice which is based on the amount of the refund or credit with respect to such document and, with respect to such person's taxable year in which such person provided such assistance or the preceding taxable year, the aggregate gross receipts of such person for aid, assistance, and advice with respect to all COVID–ERTC documents exceeds 20 percent of the gross receipts of such person for such taxable year, or

(B) with respect to such person's taxable year in which such person provided such assistance or the preceding taxable year—

(i) the aggregate gross receipts of such person for aid, assistance, and advice with respect to all COVID–ERTC documents exceeds 50 percent of the gross receipts of such person for such taxable year, or

(ii) both—

(I) such aggregate gross receipts exceeds 20 percent of the gross receipts of such person for such taxable year, and

(II) the aggregate gross receipts of such person for aid, assistance, and advice with respect to all COVID–ERTC documents (determined after application of paragraph (3)) exceeds $500,000.

(2) EXCEPTION FOR CERTIFIED PROFESSIONAL EMPLOYER ORGANIZATIONS.—The term ''COVID–ERTC promoter'' shall not include a certified professional employer organization (as defined in section 7705).

(3) AGGREGATION RULE.—For purposes of paragraph (1)(B)(ii)(II), all persons treated as a single employer under subsection (a) or (b) of section 52 of the Internal Revenue Code of 1986, or subsection (m) or (o) of section 414 of such Code, shall be treated as 1 person.

(4) SHORT TAXABLE YEARS.—In the case of any taxable year of less than 12 months, paragraph (1) shall be applied with respect to the calendar year in which such taxable year begins (in addition to applying to such taxable year).

(f) COVID–ERTC DOCUMENT.—For purposes of this section, the term ''COVID–ERTC document'' means any return, affidavit, claim, or other document related to any COVID-related employee retention tax credit, including any document related to eligibility for, or the calculation or determination of any amount directly related to any COVID-related employee retention tax credit.

(g) COVID-RELATED EMPLOYEE RETENTION TAX CREDIT.—For purposes of this section, the term ''COVID-related employee retention tax credit'' means—

(1) any credit, or advance payment, under section 3134 of the Internal Revenue Code of 1986, and

(2) any credit, or advance payment, under section 2301 of the CARES Act.

(h) LIMITATION ON CREDIT AND REFUND OF COVID-RELATED EMPLOYEE RETENTION TAX CREDITS.—Notwithstanding section 6511 of the Internal Revenue Code of 1986 or any other provision of law, no credit or refund of any COVID-related employee retention tax credit shall be allowed or made after January 31, 2024, unless a claim for such credit or refund is filed by the taxpayer on or before such date.

(i) AMENDMENTS TO EXTEND LIMITATION ON ASSESSMENT.—

(1) IN GENERAL.—Section 3134(l) of the Internal Revenue Code of 1986 is amended to read as follows:

"(l) EXTENSION OF LIMITATION ON ASSESSMENT.—

"(1) IN GENERAL.—Notwithstanding section 6501, the limitation on the time period for the assessment of any amount attributable to a credit claimed under this section shall not expire before the date that is 6 years after the latest of—

"(A) the date on which the original return which includes the calendar quarter with respect to which such credit is determined is filed,

"(B) the date on which such return is treated as filed under section 6501(b)(2), or

"(C) the date on which the claim for credit or refund with respect to such credit is made.

"(2) DEDUCTION FOR WAGES TAKEN INTO ACCOUNT IN DETERMINING IMPROPERLY CLAIMED CREDIT.—

"(A) IN GENERAL.—Notwithstanding section 6511, in the case of an assessment attributable to a credit claimed under this section, the limitation on the time period for credit or refund of any amount attributable to a deduction for improperly claimed ERTC wages shall not expire before the time period for such assessment expires under paragraph (1).

"(B) IMPROPERLY CLAIMED ERTC WAGES.—For purposes of this paragraph, the term 'improperly claimed ERTC wages' means, with respect to an assessment attributable to a credit claimed under this section, the wages with respect to which a deduction would not have been allowed if the portion of the credit to which such assessment relates had been properly claimed.".

(2) APPLICATION TO CARES ACT CREDIT.—Section 2301 of the CARES Act is amended by adding at the end the following new subsection:

"(o) EXTENSION OF LIMITATION ON ASSESSMENT.—

"(1) IN GENERAL.—Notwithstanding section 6501 of the Internal Revenue Code of 1986, the limitation on the time period for the assessment of any amount attributable to a credit claimed under this section shall not expire before the date that is 6 years after the latest of—

"(A) the date on which the original return which includes the calendar quarter with respect to which such credit is determined is filed,

"(B) the date on which such return is treated as filed under section 6501(b)(2) of such Code, or

"(C) the date on which the claim for credit or refund with respect to such credit is made.

"(2) DEDUCTION FOR WAGES TAKEN INTO ACCOUNT IN DETERMINING IMPROPERLY CLAIMED CREDIT.—

"(A) IN GENERAL.—Notwithstanding section 6511 of such Code, in the case of an assessment attributable to a credit claimed under this section, the limitation on the time period for credit or refund of any amount attributable to a deduction for improperly claimed ERTC wages shall not expire before the time period for such assessment expires under paragraph (1).

"(B) IMPROPERLY CLAIMED ERTC WAGES.—For purposes of this paragraph, the term 'improperly claimed ERTC wages' means, with respect to an assessment attributable to a credit claimed under this section, the wages with respect to which a deduction would not have been allowed if the portion of the credit to which such assessment relates had been properly claimed.''.

(j) EFFECTIVE DATES.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, the provisions of this section shall apply to aid, assistance, and advice provided after March 12, 2020.

(2) DUE DILIGENCE REQUIREMENTS.—Subsections (b) and (c) shall apply to aid, assistance, and advice provided after the date of the enactment of this Act.

(3) LIMITATION ON CREDIT AND REFUND OF COVID-RELATED EMPLOYEE RETENTION TAX CREDITS.—Subsection (h) shall apply to credits and refunds allowed or made after January 31, 2024.

(4) AMENDMENTS TO EXTEND LIMITATION ON ASSESSMENT.—The amendments made by subsection (i) shall apply to assessments made after the date of the enactment of this Act.

(k) TRANSITION RULE WITH RESPECT TO REQUIREMENTS TO DISCLOSE INFORMATION, MAINTAIN CLIENT

LISTS, ETC.—Any return under section 6111 of the Internal Revenue Code of 1986, or list under section 6112 of such Code, required by reason of subsection (d) of this section to be filed or maintained, respectively, with respect to any aid, assistance, or advice provided by a COVID–ERTC promoter with respect to a COVID–ERTC document before the date of the enactment of this Act, shall not be required to be so filed or maintained (with respect to such aid, assistance or advice) before the date which is 90 days after such date.

(l) PROVISIONS NOT TO BE CONSTRUED TO CREATE NEGATIVE INFERENCES.—

(1) NO INFERENCE WITH RESPECT TO APPLICATION OF KNOWLEDGE REQUIREMENT TO PRE-ENACTMENT CONDUCT OF COVID–ERTC PROMOTERS, ETC.—Subsection (b) shall not be construed to create any inference with respect to the proper application of section 6701(a)(3) of the Internal Revenue Code of 1986 with respect to any aid, assistance, or advice provided by any COVID–ERTC promoter on or before the date of the enactment of this Act (or with respect to any other aid, assistance, or advice to which such subsection does not apply).

(2) REQUIREMENTS TO DISCLOSE INFORMATION, MAINTAIN CLIENT LISTS, ETC.—Subsections

(d) and (k) shall not be construed to create any inference with respect to whether any COVID-related employee retention tax credit is (without regard to subsection (d)) a listed transaction (or reportable transaction) with respect to any COVID–ERTC promoter; and, for purposes of subsection (j), a return or list shall not be treated as required (with respect to such aid, assistance, or advice) by reason of subsection (d) if such return or list would be so required without regard to subsection (d).

(m) REGULATIONS.—The Secretary (as defined in subsection (c)(5)) shall issue such regulations or other guidance as may be necessary or appropriate to carry out the purposes of this section (and the amendments made by this section).

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