IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

AGUERO TRANSPORTATION LLC

Plaintiff,

JURY DEMAND

CIVIL NO: 5:25-cv-301

vs.

UNITED STATES OF AMERICA

Defendant.

COMPLAINT

Aguero Transportation LLC (hereinafter "Plaintiff or "Aguero"), by and through its undersigned counsel files this Complaint against Defendant, United States of America ("Defendant" or "United States") pursuant to 26 U.S.C. § 7422. Plaintiff files this civil action for a federal tax refund totaling $132,673.51, claimed for refund against Plaintiffs' payroll tax returns for quarterly tax period ending September 30, 2021 (the 3rd quarter of 2021) that was duly and timely claimed and filed with the Defendant's nonparty agency, the Internal Revenue Service (the "IRS" or the "Service") no later than September 8, 2023, yet remain unchallenged and unpaid to Plaintiffs by the Defendant or the Service.

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I. JURISDICTION, VENUE, AND PARTIES

1. Jurisdiction of this Court is proper pursuant to 28 U.S.C. §§ 1340 and 1346.

2. Venue of this Court is proper pursuant to 28 U.S.C. § 1402.

3. Plaintiff, Aguero Transportation LLC, is a Limited Liability Company (LLC) formed under the laws of the State of Texas, and whose principal address is 13498 Port Drive, Laredo, TX 78045 and operates throughout many states beyond Texas.

4. Defendant is the United States of America and may be served by mailing two copies of this Complaint by certified mail to the civil-process clerk of the United States Attorney for the Southern District of Texas at 1000 Louisiana, Suite 2300, Houston, Texas 77002, and mailing two copies of the Complaint by certified mail to the Honorable Pamela Bondi, Attorney General of the United States, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001.

5. Defendant USA's nonparty agency, the Internal Revenue Service (the "IRS" or the "Service"), has factual relevance to this action, and the IRS may be additionally served by mailing two copies of this Complaint by certified mail, along with a copy of the Court-issued Summons, by certified mail to the Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224.

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II. NATURE OF THE FEDERAL TAX ISSUE AND ACTION

A. Federal Employment Taxes

6. Pursuant to federal law, employers are required to withhold certain federal income taxes and taxes from the Federal Insurance Contributions Act ("FICA Payroll Taxes") from their employee's wages and other compensation.

7. Pursuant to 26 U.S.C. §§ 3102, 3111, 3301, and 3402, employers are also required to pay their own portion of FICA Payroll Taxes and taxes from the Federal Unemployment Taxes and Federal Unemployment Tax Act ("FUTA Taxes"), and FICA Payroll Taxes and FUTA Taxes are collectively commonly referred to as "employment taxes" or "payroll taxes".

8. Pursuant to 26 U.S.C. §§ 6302 and 6157, as well as 26 C.F.R. §§ 31.6302-1, 31.6302(c)-1, and 31.6302(c)-3, employers are required to periodically deposit employment tax payments in certain prescribed federal deposit banks.

9. Pursuant to 26 U.S.C. § 6011, as well as 26 C.F.R. § 31.6071(a)-1, employers are further required to file quarterly payroll tax returns ("IRS Form 941" or "Form 941") and annual returns for their FUTA Taxes.

B. The COVID-19 Pandemic-Related "CARES" Act

Employee Retention Credit ("ERC")

10. At the outset of the global COVID-19 pandemic, the United States enacted the Coronavirus Aid, Relief, and Economic Security Act (the "CARES

Act") on March 27, 2020, which provided numerous federal government programs and funding in response to the economic challenges faced by the American people, businesses, and taxpayers.[1]

11. Amongst the CARES Act provisions, section 2301 provided for a new Employee Retention Credit ("ERC" or "ERTC"), which is a "refundable" tax credit applied against the employer-portion of businesses employment taxes for the period from March 12 through December 31, 2020.[2] Section 2301 of the CARES Act was later amended by the Taxpayer Certainty and Disaster Relief Act of 2020 (the "Relief Act") to extend ERC into the first two quarters of 2021.[3] The American Rescue Plan Act of 2021 ("ARPA" or "ARPA 2021") further extended ERC through the end of 2021.[4] The Infrastructure Investment and Jobs Act ("IIJA") later removed eligibility for most employers in the fourth quarter of 2021.[5] The ERC credit was ultimately codified as 26 U.S.C. § 3134, where Title 26 is the "Internal Revenue Code."

12. Pursuant to 26 U.S.C § 3134(c)(2)(A)(ii), ERC provides a few different avenues of qualification, and all aimed at both incentivizing and rewarding

[1] *See* The Coronavirus Aid, Relief and Economic Security Act (CARES Act), Pub. L. No 116-136, 134 Stat. 281 (2020).
[2] *See id.*
[3] *See* The Taxpayer Certainty and Disaster Relief Act of 2020, Pub. L. 116-260, Div. EE (2020).
[4] *See* The American Rescue Plan Act of 2021, Pub. L. 117-2, 135 Stat. 4 (March 11, 2021).
[5] *See* Infrastructure Investment and Jobs Act, Pub. L. 117-58, 135 Stat. 429 (Nov. 15, 2021).

businesses maintaining employment during the COVID-19 pandemic in 2020 and 2021. Specifically:

a. Certain businesses meeting certain defined business disruption criteria by quarter were equally eligible for the same per employee refundable ERC tax credit by quarter,

b. Businesses who demonstrated certain quantitatively defined gross receipt drops by quarter, as compared to pre-pandemic periods, were eligible for a per employee per quarter refundable ERC tax credit, or

c. Certain businesses defined as "recovery startup businesses."

C. ERC Qualification – Partial Suspension of Business Operations

13. Pursuant to section 2301(c) of the CARES Act, as amended by section 207(a)(1) of the Relief Act, additionally amended by ARPA and IIJA, and finally codified in 26 U.S.C. § 3134, employers are eligible for the ERC tax credit in quarters where the:

> "[O]peration of the trade or business described in clause (i) is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to the coronavirus disease 2019 (COVID–19)".[6]

14. In absence of a Treasury Regulation for authoritative interpretation of the Employee Retention Credit, the IRS Office of the Associate Chief Counsel

[6] CARES Act, Pub. L. No 116-136 at 2301(c).

issued Notice 2020-21, *Guidance on the Employee Retention Credit under Section 2301 of the Coronavirus Aid, Relief, and Economic Security Act*, on March 1, 2021. Notice 2020-21 offered much needed IRS interpretation of the Employee Retention Credit program, including 71 Questions and Answers providing a variety of qualitative interpretations for different ERC issues.

15. As applicable to partial suspension of operations, IRS Notice 2020-21 addresses this application in several areas, and per Question and Answer No. 17:

> "If all, or all but a nominal portion, of an employer's business operations may continue, but the operations are subject to modification due to a governmental order (for example, to satisfy distancing requirements), such a modification of operations is considered to be a partial suspension of business operations due to a governmental order if the modification required by the governmental order has more than a nominal effect on the business operations under the facts and circumstances."[7]

16. Further, Question and Answer No. 18 of Notice 2021-20 clarifies that a modification due to a government order alone is not enough but additionally clarifies that a partial suspension exists with a more than nominal effect on the business as a result of the government order and is based on the facts and circumstances of the respective taxpayer and claim.[8]

[7] IRS Notice 2021-20, Q/A 17, pgs 34-45.
[8] *Id* at Q/A 18, pgs. 39-40.

17. Additionally, Question and Answer No. 20 of Notice 2021-20 interprets that, for employers operating in multiple jurisdictions nationwide, company policies that comply with local government orders, as well as the Centers for Disease Control and Prevention (CDC) recommendations and the Department of Homeland Security (DHS) guidance, and that are established to operate in a consistent manner companywide can establish a partial suspension of operations for ERC tax credit qualification.[9]

D. COVID-19 Government Orders

18. Throughout 2020 and 2021, all states and most local jurisdictions (e.g. cities, counties, etc) issued orders mandating various restrictions, prohibitions, and requirements as to personal behavior that limited commerce, travel, or group meetings due to COVID-19.

19. As a part of the government orders per statement no. 18 above, several states and many local jurisdictions mandated restrictions and requirements to even essential business and services, who despite permitted to operate: yet such mandates still limited commerce, travel, or group meetings due to COVID-19 as to essential services.

20. Throughout 2020 and 2021, several United States federal departments and agencies, including CDC and DHS, further issued recommendations and

[9] *Id* at Q/A 20, pgs. 40-41.

guidance, which if applied, limited commerce, travel, or group meetings due to COVID-19.

E. ERC – Credit Amount Determination

21. For the July 1 through September 30, 2021 time period (the third quarter of 2021) and pursuant to sections 2301(a) and (b)(1) of the CARES Act, as amended by sections 207(b) and (c) of the Relief Act, additionally amended by ARPA and IIJA and latter codified in 26 U.S.C. §§ 3134(a) & (b)(1)(A), eligible employers receive a tax credit against employment taxes of up to 70 percent ($10,000 per employee per calendar quarter including certain health care expenses), but no more than $7,000 per quarter per employee for each eligible 2021 quarter.

22. Section 2301(g) of the CARES Act, as amended by section 206(c)(2) of the Relief Act, and 26 U.S.C. § 3134(h)(2) provide that any payroll costs covered as "forgiven" by the Paycheck Protection Program (PPP) of the 2020 CARES Act are excluded "qualifying wages" for purposes of the ERC tax credits.[10]

F. ERC – Refundability and Amendment for Refund Claim

23. Pursuant to section 2301(b), *et al*, and 26 U.S.C. § 3134(b), ERC tax credit claims are first used to offset employment taxes for the respective period, and

[10] *See also* The Coronavirus Aid, Relief and Economic Security Act (CARES Act), Pub. L. No 116-136, 134 Stat. 281(2020).

any excess is further "refunded" to the taxpayer claimant per 26 U.S.C. §§ 6402(a) and 6413(b).

24. Pursuant to 26 U.S.C. § 6511, taxpayers have up to three (3) years from the date of filing a tax return to amend the same return for a claim for refund or credit of taxes, and further pursuant to 26 U.S.C. § 6513(c), the date of filing for payroll tax returns are deemed filed on April 15th of the succeeding calendar year.

G. Submitting Amended Tax Returns and Other Tax Documents to the IRS

25. Pursuant to 26 U.S.C. § 7502, the "date of delivery" of any taxpayer's submission or filing of "any return, claim, statement, or other document" submitted by mail is the postmark date of the mailing.

26. Pursuant to 26 U.S.C. § 7502(c) and 26 C.F.R. § 301.7502-1, such mailings described in statement no. 25 above that are mailed via the United States Postal Service (USPS) via "registered mail" or "certified mail" is *prima facie* evidence that such a mailing was "delivered" to the IRS on the postmark date; the postmark date being the date of registered mail registration and/or certified mail payment.

27. Further, pursuant to 26 U.S.C. § 7502(c) and 26 C.F.R. § 301.7502-1, the IRS may also identify "Private Delivery Services" ("PDS"), e.g. DHL Express, FedEx, and UPS, from time-to-time that are permitted to serve in place of USPS

mailings for purposes of applying the rules of 26 U.S.C. § 7502 and 26 C.F.R. § 301.7502-1.[11]

III. PLAINTIFF BACKGROUND AND FACTUAL ASSERTIONS

A. Company Overview

28. Plaintiff Aguero is a transportation company, registered with the U.S. Department of Transportation ("USDOT"), USDOT No. 1668514, headquartered in Laredo, Webb County, Texas, and a USDOT transportation business since at least 2003.

29. Aguero is a carrier engaged in various material transport activities, including general freight, household goods, metal goods, tow away, lumber, building materials, machinery/large objects, fresh produce, intermodal passengers, oilfield equipment, grain/feed/hay, dry commodities, paper products, utilities, agricultural products, and construction materials.

30. Throughout 2020 and 2021, including the 3rd quarter of 2021, Plaintiff transported goods and materials throughout many states beyond Texas.

31. During the 3rd quarter of 2019, Plaintiff had less than 500 employees for its payroll tax return filings that were subject to FICA Payroll Taxes.

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[11] *See also* Private Delivery Services PDS, Internal Revenue Service, https://www.irs.gov/filing/private-delivery-services-pds.

B. COVID-19 Impact and Partial Suspensions of Operations

32. Prior to 2020-2021 and during 2019, Plaintiff had various transportation services, each of which were more than nominal portions of Aguero's business, separately and independently.

33. Throughout the 3rd quarter of 2021, various state and local COVID-19 orders and mandates, per statement nos. 18 through 19 above, impacted Aguero's transportation services.

34. Due its transportation operations across many states beyond Texas and its impact by many COVID-19 government orders and mandates, throughout the 3rd quarter of 2021, Plaintiff had policies of mandatory compliance with CDC and DHS recommendations and guidance as to COVID-19 (e.g social distancing, occupancy limits, etc.).

35. Due to both applications to many COVID-19 state and local orders and its company policy of CDC and DHS compliance, per statement nos. 33 and 34 above, Plaintiff had to modify its operations for its transportation services.

36. Due to the operational modifications as described in statement no. 35 above, Aguero's operations of its services, were more than nominally impacted under the facts and circumstances.

37. Plaintiff experienced one or more partial shutdowns due to COVID-19 government orders throughout the 3rd quarter of 2021.

C. Plaintiff ERC Credit Claim At Issue

38. For the 3rd quarter of 2021, Plaintiff timely determined and executed its quarterly and annual employment tax payment and reporting; most specifically through its timely filed quarterly report via the IRS Form 941. For its original timely filing, Plaintiff did not claim the ERC tax credit.

39. Subsequent to its original reporting and payments, Plaintiff determined it experienced one or more partial suspensions of operations to qualify for ERC tax credit for the 3rd quarter of 2021, per statement nos. 32 through 37 above.

40. Aguero calculated its ERC tax credit for the 3rd quarter of 2021 as $132,673.51 and summarized in the table below:

41. No later than September 8, 2023, Plaintiff timely filed an amended quarterly federal employment tax report with Defendant's nonparty agency, the IRS, for the 3rd quarter of 2021 with a claim for refund requested pursuant to the ERC tax credits for this quarter (hereafter collectively referred to as the "Plaintiff ERC Credit Claim At Issue") in the amounts in statement no. 40 above.

42. Since the filings described in statement no. 41 above, Defendant or Defendant's nonparty agency, the IRS, has failed to issue refunds to the Plaintiff for the ERC Credit Claim At Issue.

43. On December 12, 2024, Defendant's nonparty agency, the IRS notified Plaintiff it was summarily disallowing the ERC Credit Claim At Issue via a form letter 105C.

44. Since the filings described in statement no 41 above, Defendant or Defendant's nonparty agency, the IRS, have made no claim to the Plaintiff of any federal taxes owed by Plaintiff, regardless of nature and time period, under Title 26 of the United State Code that the ERC credits for the Plaintiff Pending ERC Credit Claim would be appropriate to use as an offset for any such owed taxes.

IV. CAUSE OF ACTION – 26 U.S.C. §§ 7422 & 6532

45. An taxpayer of the United States is permitted to file a delayed refund suit against the United States, pursuant to 26 U.S.C. §§ 7422 and 6532, for the recovery of taxes imposed under Title 26 of the U.S. Code in U.S. District Court, provided:

a. a claim for refund has been filed with the IRS,

b. it has been at least six months from the date of such filing, or

c. it has yet been two years from the date the IRS notified the taxpayer that such a claim has been disallowed.

46. Plaintiff is a taxpayer of the United States who has filed claims for refunds of its employment taxes imposed under Title 26 of $132,673.51 for its 3rd quarter of 2021 no later than September 8, 2023.

47. Defendant, the United States of America, via its nonparty agency, the IRS, has failed to issue the claimed refunds to the Plaintiff.

48. It has been longer than six months since the Plaintiff has filed the refund claims, and it has yet been two years from any claim disallowance.

49. Plaintiff is entitled to the credits and its claims for refund as claimed and identified in statement no. 46 above, including any additional interest it is entitled to under 26 U.S.C. § 6611.

50. Plaintiff is entitled to reasonable attorney's fees and legal costs associated with this cause of action pursuant to 26 U.S.C. § 7430.

V. PRAYER FOR RELIEF

51. WHEREFORE, the Plaintiff prays this Court orders the Defendant, United States:

a. Issue refunds for the Plaintiff's claim for refund of taxes of $132,673.51.

b. Issue additional refunds to Plaintiff for any interest entitled to it under 26 U.S.C. § 6611.

c. Award Plaintiff reasonable attorney's fees and other legal costs permissible under 26 U.S.C. § 7430.

VI. TRIAL BY JURY DEMANDED

52. Plaintiff demands a trial by jury for all issues triable.

Dated: December 30, 2025

Respectfully submitted,

/s/ Justin H. DiLauro

JUSTIN H. DILAURO, ESQ.
Sr. Tax Attorney and Owner/Manager
DiLauro Tax Law PLLC
9639 Hillcroft Street, Suite 844
Houston, Texas 77096
(888) 463-5829
(713) 456-2027 (fax)
JHD@DiLauroTaxLaw.com
USDC TXSD: 3865386
Texas State Bar No: 24055404

Counsel for Plaintiff
Aguero Transportation LLC