Trust Fund Recovery Penalty – IRS Tax Negotiated Settlement

Many taxpayers believe that if they operate as a Corporation, their personal assets are shielded by the "corporate veil". In many instances, that is true. However, Federal (and most state) payroll (and excise) taxes are an exception. If a Corporation does not pay their income tax withholding and withheld Social Security taxes, the IRS can - and almost always will - pursue its collection from officers, directors, stockholders, key employees and anyone else who could possibly be held liable for the Trust Fund Recovery Penalty (TFRP) under the Internal Revenue Code Section 6672(a).

Some years ago, the TFRP was known as the "*One Hundred Percent Penalty.*" This was so named because one-hundred percent of the withheld income tax and Social Security tax could be assessed against a responsible officer, employee, etc. of the corporation.

Section 6672 of the Internal Revenue Code says in part:

> *(a) GENERAL RULE - Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.*

This statute gives the IRS the ability to go collect withheld employment taxes where it is unable to collect from the corporate entity.

Section 6672 applies to trust fund taxes imposed by Section 7501 of the Internal Revenue Code. It does NOT apply to the corporation's portion of the social security taxes, interest and late payment penalties.

The civil nature of the penalty was codified in §6671(a) of the IRC that states, in relevant part:

> *The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the secretary, and shall be assessed and collected in the same manner as taxes...*

Potentially, there is a potential criminal aspect to trust fund taxes mentioned in section 7202 of the IRS.

> *Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails*

to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the cost of prosecution.

Historically, the IRS has not invoked the §7202 criminal statute in the vast majority of the §6672 cases. Regardless, any corporation that has not filed all of its required payroll returns should do so as quickly as possible. The failure to file - together with a failure to collect and/or pay over the required employment taxes - can be construed as sufficient evidence of willful intent to raise the possibility that the IRS will pursue criminal penalties.

WHO IS LIABLE FOR THE TRUST FUND RECOVERY PENALTY?

The IRS will usually seek collection of unpaid trust fund taxes from the corporate officers, directors or stockholders of the corporate entity. Those individuals will most likely meet the two requirements of section 6672 - "*willfulness*" and "*responsibility.*" The analysis required under Section 6672 involves:

1. determining whether the person was a *responsible* person within the meaning of §6671(b) and,
2. whether the person's failure to collect, account for, and pay over the trust fund taxes was "*willful*" as defined by the courts.

RESPONSIBLE PERSON

The definition of a responsible person is very broad and includes employees, shareholder, sureties, lenders and others outside the formal corporate organization. The responsible person is any person who can effectively control the finances or determine which bills should or should not be paid and when.

Section 6671(b) of the IRS states:

(b) PERSON DEFINED - The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

The courts have identified the responsible person quite broadly. Frequently, the responsible person was the one with the ability to sign checks on behalf of the corporation, or to prevent a check's issuance or to control the disbursement of payments. Godfrey v. U.S., 748 F2d 1568 (1984); Kalb v. U.S., 505 F2d 506 (1974); Gold v. U.S., 671 F2d 492 (1981); Calderone v. U.S., 799 F2d 254 (1986).

The authority to sign checks is only element that may establish responsibility. The courts

have considered other factors in asserting responsibility, including:

- contents of the corporation's bylaws,
- the identity of the officers, directors and shareholders of the corporation,
- the identity of the individual who hired and fired employees, and
- the identity of the individuals who were in control of the financial affairs of the corporation.

Significant control over the affairs of the corporation is another test courts have applied to determine responsibility. Factors that can indicate significant control include:

- holding corporate office,
- authorization to write checks on corporate accounts,
- control of corporate financial affairs,
- participating in corporate decision making,
- holding an equity interest in the business, and
- possessing any other significant authority such as the ability to hire and fire personnel.

Over the years, the courts have come down on both sides of the issue. Some persons were held responsible; while others were not. Frequently it depended on the evidence presented in the particular case. On balance, however, the courts have come down more frequently on holding a person responsible than not. Below are synopses of a few cases that give some indication of just how far some courts have been willing to go to hold a person responsible.

An executive vice president who handled day-to-day operations for a company and had authority to collect and pay over the taxes, but who was ordered by the president and chairman of the board not to remit taxes, was not relieved of his status as a responsible person within the meaning of §6672. Roth V. U.S., 779 F2d 1567 (1986).

An employee of a corporation was found liable as a responsible person even though he discussed delinquent payroll taxes with one of the owners and was told it was none of his business and not to worry about it. The Court reasoned that even though the employee was not an officer, he was responsible for the ordinary day-to-day administrative operating functions of the business with authority to determine which creditors would be paid. Gephart v. U.S., 820 F2d 761 (1987).

An individual acting through a power of attorney for a corporation that had failed to pay withholding taxes was a responsible person even though the corporate comptroller actually signed over checks and prepared all the corporation's financial statements. Godfrey v. U.S. 748 F2d 1568 (1984), rev'g 3 Cl Ct 595 (1983).

WILLFULNESS

The IRC does not define willfulness for purposes of §6672(a). The courts have defined the term through their decisions as the *voluntary, conscious and intentional act of preferring other creditors over the United States.*

The term willfully does not require a criminal or other bad motive on the part of the responsible person, but simply a voluntary, conscious or intentional failure to collect, truthfully account for, and pay over taxes withheld from the employees.

Willfulness does not require a finding of attempt to defraud or to deprive the United States of taxes. It requires only that the choice to pay funds to other creditors instead of the Government be made voluntarily, consciously, and intentionally.

Some courts have gone so far as to state that failure to make the monthly deposits required by Regulations is sufficient to show willfulness.

THIRD PARTY LIABILITY

Besides the Trust Fund Recovery Penalty provision of §6672(a), liability may also be imposed for non-payment of withholding taxes on parties under §3505 of the IRC. Unlike §6672(a) however, §3505 imposes liability not on a responsible person of the corporation, but on third parties who make either direct payment of wages to the taxpayer's employees or who make advances to pay the taxpayer's employer. Examples of such third parties include lenders, sureties or other third parties.

§3505 has two distinct provisions: §3505(a) and §3505(b). §3505(a) imposes liability on lenders, sureties or persons other than the employer who pay wages directly to the taxpayer's employees.

§3505(a) states, in relevant part:

> *(a) DIRECT PAYMENT BY THIRD PARTIES - if a lender, surety, or other persons, who is not an employer under such sections with respect to any employee or group of employees, pays wages directly to such an employee or group of employees, employed by one or more employers, or to an agent on behalf of such employee or employees, such lender, surety, or the person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) required to be deducted and withheld from such wages by such employer.*

The liability is equal to the taxes (plus interest) that the employer is required to withhold from such wages. The liability under §3505(a) is imposed regardless of whether the payor knows that the employer does not plan to pay the withheld taxes.

Section 3505(b) imposes liability on a lender, surety or person who supplies funds to an employer for the specific purpose of paying wages - if the payor has actual notice or knowledge that the employer does not intend to, or will not be able to, make a timely deposit of the withheld taxes.

§3505(b) states the following:

(b) PERSONAL LIABILITY WHERE FUNDS ARE SUPPLIED - If a lender, surety, or other person supplies funds to or for the account of an employer for the specific purpose of paying wages of the employees of such employer, with actual notice of knowledge (within the meaning of section 6323(i)(1)) that such employer does not intend to or will not be able to make timely payment or deposit of the amounts of tax required by this subtitle to be deducted and withheld by such employer from such wages, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) which are not paid over the United States by such employer with respect to such wages. However, the liability of such lender, surety, or other person shall be limited to an amount equal to 25 percent of the amount so supplied to or for the account of such employer for such purpose.

The payor is required to exercise due diligence in determining the relevant facts before the lack of actual notice of knowledge will constitute a defense. Under §3505(b), the payor does not have an affirmative duty to investigate the employer's intent. However, there is a duty to investigate when suspicious circumstances exist.

In general, ordinary working capital loans to the employer do not result in §3505(b) liability even when the payor knows that some of the funds advanced may be used to pay wages in the ordinary course of business. An ordinary working capital loan is one which enables the employer to meet current obligations as they arise.

The payor is not required to ascertain how the funds will be used. Nevertheless, when the loan payor has actual notice or knowledge that the proceeds of the loan are to be specifically used to pay net wages, §3505(b) can apply. Treasury Regulation §31.3505-1(b)(3).

It should also be noted that if the payor exercises substantial control over the employer's financial affairs and the payment of wages, a third basis for liability may apply. The payer may be found to be the "employer" and be held liable as such for all the employment taxes.

THE IRS PROCEDURE IN ASSERTING THE TFRP
NOTE: FOR ANY TRUST FUND RECOVERY PENALTY THAT IS PROPOSED AFTER MAY 20, 2005, PLEASE REFER TO THE NEW REVENUE PROCEDURE THAT IS REPRINTED AT THE BOTTOM OF THIS PAGE.

The Revenue Officer (RO) assigned the Corporate case, upon determining that the taxes are not readily collectible from the Corporation, will begin an investigation to obtain evidence to establish willfulness and responsibility of potential individuals. The RO will summons bank records (such as cancelled checks, signature cards and corporate resolutions), interview potentially liable persons and secure corporate records, such as

tax returns, articles of incorporation, etc. This is discussed in Exhibit 5601-1 of the Internal Revenue Manual ("IRM").

When the RO makes a decision to pursue assessment against a particular individual, the IRS will mail a notice of proposed assessment (IRS Letter 1153) to the individual, together with IRS Form 2751, Agreement to Assessment. The individual has 30 days in which to file an appeal. If he or she fails to respond with a request for an Appeals hearing, the penalty will be assessed without a hearing.

To file an appeal, the individual must do so in writing (if the amount of the proposed tax is more than $2,500) and state clearly his grounds for appeal. The grounds must include factual and legal arguments.

An Appeals Officer will hold a conference and consider the taxpayer's arguments. If, after the conference, the taxpayer and the IRS cannot agree, the taxpayer's only recourse is to wait for the IRS to assess the tax against him, pay it (or a divisible portion of it), and file a claim for a refund. If only a divisible portion of the tax is paid (such as one employee's tax for one quarter of the corporation's unpaid tax liability), the taxpayer has the additional requirement of posting a bond. See IRC §6672(b) and IRM 5755.2

The claim for a refund is filed on IRS Form 843. It must be filed within 30 days after notice and demand for payment in order to legally preclude the IRS from pursuing collection against the claimant. After 30 days, IRS' collection efforts are discretionary. In any event, the claim must be filed within 2 years after the tax (or divisible portion of it) is paid. Thereafter, the statute for filing a claim for a refund expires. See IRC §6511(a).

IRS has six months of exclusive jurisdiction to act on the claim administratively. Thereafter, the taxpayer has jurisdiction to sue the government in a U.S. District Court or the Court of Claims in Washington, D.C. If the IRS denies the claim within its exclusive six months or, in any case, before the taxpayer brings a suit, the taxpayer must file a suit within 30 days after the claim is denied. Failure to do so in that time frame entails the risk of having IRS pursue enforced collection. See IRC §6672(b)(2).

STATUTE OF LIMITATIONS

It should be noted that the IRS has 3 years from the later of the succeeding April 15th or from the date the return was filed to assess the Trust Fund Recovery Penalty against the responsible person. See IRM Exhibit 5600-2. For example, if the corporation files a 941 tax return for the period ended 9/30/90 by 10/31/90, the IRS has until 4/15/94 to assess the penalty against the responsible person for any unpaid trust fund taxes still outstanding for that quarter.

This assessment statute may be extended several ways:

a) by waiver, IRC §6501(c)(4);

b) through bankruptcy, IRC §6503(i); or

c) by absence from the U.S., IRC §5503(c).

The assessment statute is not extended by the target person filing an appeal, or by the corporation filing bankruptcy.

There is no statute of limitations for unsigned or fraudulent returns or those prepared by the IRS under IRC §6020(b). See IRC §6501(c) and IRC §6501(b)(3).

COLLECTION ISSUES

Once the tax has been assessed against the responsible person and any appeal and/or litigation has been exhausted, he must deal with the Collection Division of the IRS. Several relevant issues are worth noting:

(a) The IRS is not required to pursue collection of the unpaid withholding taxes from the corporation before attempting to assert TFRP against responsible officials of the corporation. The IRS frequently pursues collection of TFRP from the responsible officials even if the corporation is functioning and even if the corporation is making payments on the delinquent withholding taxes pursuant to a payment agreement with the IRS.

b) The IRS can, and frequently does, pursue collection of the Penalty against more than one responsible person. However, IRS can retain only the amount equal to the employer's trust fund taxes, together with interest. See the IRS Policy Statement P-5-60.

c) If the Penalty is fully paid by one responsible person, the assessments against any others will not be abated until after the two year statute of limitations for a refund has expired against the person that paid. See IRM §5638.1(7)(b). In fact, collection procedures may be undertaken against a second responsible person in some cases even if the first responsible person has paid all of the Penalty. IRS asserts that it may do so if the collection statute is about to expire against the second persons and he refuses to sign a waiver. See IRM 5638.1(11) and (12).

d) No Federal common-law right to indemnity or contribution for a tax liability assessed against a responsible person exists under §6672.

e) The IRS is under no obligation to credit the taxes collected by levy in any particular manner to suit the corporation or to minimize the liability of the responsible person. However, any voluntary payments made by the corporation may be designated to the trust fund taxes. See Internal Revenue Manual section 5634.12(2).

BANKRUPTCY ISSUES

The first thing that should be noted is that IRC §6672 taxes are not dischargeable in bankruptcy. See §§523(a)(1)(A) and 507(a)(7)(C) of the Bankruptcy Code. Thus any individual against whom the 100% Penalty has been assessed has no hope of discharging it through bankruptcy.

Nor does the filing of bankruptcy by the corporation stay the IRS from attempting to assess the Penalty against the responsible person, Quattrone Accountants, Inc. v. IRS, 895 F2d 921 (1990); American Bicycle Association v. U.S., 90-1 USTC §50,104 (1990). The U.S. Government has prevailed on this issue on jurisdictional grounds as well as through §7421 of IRC (anti-injunction statute).

However, the Chapter 11 corporations may propose a plan that requires any payments of the corporation to the IRS to be applied to the trust fund taxes first. In U.S. V. Energy Resources Co. Inc., 110 S.Ct. 2139 (1990) the court held that, even though the payments through Chapter 11 bankruptcy could not be considered voluntarily, the bankruptcy court had authority under §105 of the Bankruptcy Code to designate payment to the trust fund taxes if it felt that such designation would help the debtor's reorganization efforts.

The Supreme Court specifically declined to rule on the issue of whether such designation could be made in a Chapter 7 case. The lower courts have consistently held, however, that such designation is not allowed, In re: F.A. Dellastatious, Inc., #83-10240-A (Bank Ct. E. Va. - 1990).

LIMITED LIABILITY COMPANIES

The IRS released a new Revenue Ruling that addresses the issue of member liability for unpaid employment taxes:

Rev Rul 2004-41, 2004-18 IRB : A new revenue ruling has concluded that, absent fraudulent transfers or other special circumstances, IRS may not collect an LLC's employment taxes from its members if they are not liable for the LLC's debts under state law.

CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT

For corporations operating in California, the EDD has a similar provision to the TFRP of the IRS. This process is referenced in the EDD Information Sheet as "Personal Income Tax Adjustment."

The EDD does have a procedure whereby an assessment can be reduced through the filing of a Form DE 938P. This can result in a downward adjustment of the PIT (personal income tax) portion of the adjustment. The Information Sheet available on the EDD web site provides a good discussion of this form and the process.

Rev. Proc. 2005-34, 2005-24 IRB, 05/20/2005, IRC Sec(s).

Headnote:

Reference(s):

Full Text:

1. Purpose

This revenue procedure sets forth updated procedures for appeals of proposed trust fund recovery penalty assessments arising under section 6672 of the Internal Revenue Code.

2. Background

.01 Section 6672(a) imposes a penalty against any person required to collect, truthfully account for, and pay over any tax imposed by the Code who willfully fails to collect, or truthfully account for and pay over the tax, or who willfully attempts in any manner to evade or defeat the tax.

.02 Under section 6671(b), the term "person" includes an officer or employee of a corporation or a member or employee of a partnership, who, as an officer, employee, or member of the corporation or partnership, is under a duty to perform the act in respect of which the violation occurs.

.03 Section 6672(b), as amended by the Taxpayer Bill of Rights 2, Pub. L. No.104-168, 110 Stat. 1465 (TBOR 2), provides that the Internal Revenue Service is required to send a notice of proposed assessment to any taxpayer against whom it intends to assess a trust fund recovery penalty. In this context, section 6672(b) uses the broader term "taxpayer" because the notice of proposed assessment must be sent to taxpayers who may not ultimately fit within the definition of "person" as set forth in section 6671(b) and as used in , , sections 6672(a), (c), (d) and (e).

.04 Rev. Proc. 84-78, 1984-2 C.B. 754, which sets forth procedures for appeal of the trust fund recovery penalty, does not reflect the amendments made to section 6672 by TBOR 2.

3. Scope

The procedures in this revenue procedure apply to trust fund recovery penalty cases relating to employment and excise taxes imposed under the Internal Revenue Code, except when collection is in jeopardy.

See section 6672(c) for procedures relating to a stay of collection if a bond is furnished. See section 6672(d) for provisions regarding the right to contribution if more than one person is liable for the trust fund recovery penalty. See section 6672(e) for rules regarding the exception for voluntary board members of tax-exempt organizations.

4. Procedure in Area Collection Divisions

.01 If the Service determines that a taxpayer is liable for the trust fund recovery penalty, the Service will propose the assessment of the penalty and inform the taxpayer of the determination by notice. The notice of proposed assessment will provide the

taxpayer an opportunity to sign a form agreeing to the proposed assessment or to dispute the proposed assessment by appealing the proposed assessment within 60 days of the date on the notice (75 days if the notice is addressed to the taxpayer outside of the United States) and requesting an Appeals conference.

.02 The Service will assess the penalty if the taxpayer fails to appeal the proposed assessment within the period specified in Section 4.01 of this revenue procedure and the Service has not received a signed agreement from the taxpayer agreeing to the assessment. If the taxpayer submits a timely appeal in response to the notice of proposed assessment and requests that the case be referred to Appeals, the case will be reviewed in the appropriate compliance office to determine whether further action or development is required before referring the case to Appeals.

5. Procedure for Appealing a Proposed Assessment and Requesting an Appeals Conference

.01 Small Case Appeals. If the proposed penalty assessment for any tax period is $25,000 or less, the taxpayer may appeal the proposed assessment by completing and submitting in writing two copies of a small case appeal request. The request should be mailed to the attention of the IRS officer or employee named on the notice of proposed assessment as the "Person to Contact" at the address shown on the front of the notice. The request must include the following:

(1) A copy of the notice of proposed assessment or the date and number of the notice and the taxpayer's name and social security number, along with any information that will help the Service locate the taxpayer's file;

(2) A statement that the taxpayer is requesting an Appeals conference; and

(3) A list of the issues that the taxpayer is contesting and an explanation of the basis for the taxpayer's disagreement. The explanation should include the following:

(a) The taxpayer's duties and responsibilities during the tax periods listed in the notice of proposed assessment. In particular, the taxpayer should describe whether the taxpayer had the duty and authority to collect, account for, and pay over trust fund taxes; and

(b) If the taxpayer contests the Service's calculation of the penalty, the taxpayer should identify the dates and amounts of payments that the taxpayer believes the Service failed to consider and/or any computational errors made by the Service.

.02 Large Case Appeals. If the proposed penalty for any tax period is more than $25,000, the taxpayer may appeal the proposed assessment by submitting a formal written protest. In addition to the items required by section 5.01(1) and (2) of this revenue procedure, the formal written protest must include the following:

(1) The tax period(s) involved;

(2) A list of the findings the taxpayer is contesting;
(3) A statement of facts that describes the following:
(a) The basis for the taxpayer's disagreement with the proposed assessment, including specific facts that support the taxpayer's arguments;
(b) The taxpayer's duties and responsibilities during the tax periods listed in the notice of proposed assessment. In particular, the taxpayer should describe whether the taxpayer had the duty and authority to collect, account for, and pay trust fund taxes; and
(c) If the taxpayer contests the Service's calculation of the penalty, the dates and amounts of payments that the taxpayer believes the Service failed to consider and/or any computational errors made by the Service;
(4) An explanation of any law or other supporting authorities on which the taxpayer relies; and
(5) The following signed declaration under penalties of perjury that the statement of facts required by section 5.02(3) is true:

"Under penalties of perjury, I declare that I have examined the facts presented in this statement and any accompanying information, and to the best of my knowledge and belief, they are true, correct, and complete."

.03 A taxpayer may contest all of the periods listed in the notice in a single protest; however, if the proposed penalty for any one of the periods is more than $25,000, the taxpayer must submit a formal written protest described in section 5.02.

6. Representation at Conference

A taxpayer may represent himself at an Appeals conference or be represented by someone who is authorized to represent taxpayers under Treasury Circular 230, Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers before the Internal Revenue Service (31 C.F.R. Part 10). If an authorized representative attends an Appeals conference without the taxpayer, the representative must have filed a power of attorney, see 26 C.F.R. §§ 601.501 through 601.509, which also will authorize the representative to receive or inspect confidential tax information. If a representative prepares and signs a request for appeal or a written protest on behalf of the taxpayer, the representative must submit a declaration stating whether he or she knows personally that the facts stated in the protest and accompanying documents are true and correct.

7. Extension of the Period of Limitations for Assessment

If the notice of proposed assessment is mailed or delivered before the period for assessing the trust fund recovery penalty ends, the assessment period will not end before the later of:

(1) The date that is 90 days after the Service mailed or delivered the notice of proposed assessment; or

(2) If the taxpayer has filed a timely appeal in response to the notice of proposed

assessment, the date that is 30 days after the Secretary makes a final determination regarding the appeal.

8. Procedure in Area Director's Office for Disposing of Claims

.01 If the Service has assessed the trust fund recovery penalty because of the failure of the taxpayer to respond to the notice of proposed assessment within the 60-day period (or 75-day period, if applicable) or on the basis of the decision of Appeals, the taxpayer generally must pay the appropriate portion of the penalty and file a claim for refund in order to pursue judicial review.

.02 Once an assessment has been made, the Service generally will not consider any claim for abatement unless the taxpayer establishes to the compliance area director's satisfaction that unusual circumstances merit consideration of such a claim. If the compliance area director decides not to consider a taxpayer's abatement claim, the taxpayer will be notified of that decision.

.03 Only Appeals may consider a claim for abatement if the assessment was made on the basis of a decision of Appeals. If the assessment was made based on a decision of Appeals, the area director will forward the claim to Appeals for consideration. The taxpayer will be notified if Appeals decides not to consider a taxpayer's abatement claim.

9. Effect On Other Documents

Rev. Proc. 84-78 is superceded.

10. Effective Date

This revenue procedure is effective for all trust fund recovery penalties proposed on or after May 20, 2005.

A comment about filing suit in District Court.

The time frame (2 years) within which a deemed responsible person has to file for judicial review is strictly applied as evidenced in this recent court decision:

BREWER v. U.S., Cite as 95 AFTR 2d 2005-1750, 03/08/2005 , Code Sec(s) 6532; 7422; 6672

Larry C. BREWER, PLAINTIFF v. UNITED STATES OF AMERICA; Anne Moore, Chapter 7 Trustee; and HMH Motor Service, Inc., DEBTOR-DEFENDANTS.

Case Information:

Code Sec(s):	6532; 7422; 6672
Court Name:	U.S. District Court, Southern District of Georgia,
Docket No.:	CIVIL ACTION NO. CV204-147,
Date Decided:	03/08/2005.
Prior History:	Earlier proceedings at (2005, DC GA) 95 AFTR 2d 2005-1609, vacating (2005, DC GA) 95 AFTR 2d 2005-1264.
Disposition:	Decision for Govt.

HEADNOTE

1. Refund actions—limitations periods on suit—equitable tolling—100% penalty for failure to pay over trust fund taxes. Bankrupt corp.'s pres.'s action for refund of Code Sec. 6672 penalties was dismissed as untimely: taxpayer failed to file suit within Code Sec. 6532 's strict 2-year period as measured from date of IRS's disallowance notice mailing. And, Code Sec. 6532 wasn't subject to equitable tolling, so facts that taxpayer had made timely, intervening attempts to pursue judicial remedies and had filed earlier, albeit defective, suit were irrelevant.

Reference(s): ¶ 65,325.01(75) ; ¶ 65,325.04(35) ; ¶ 74,225.05(45) Code Sec. 6532 ; Code Sec. 7422 ; Code Sec. 6672

OPINION

In the United States District Court for the Southern District of Georgia Brunswick Division,

ORDER

Judge:

Plaintiff, Larry C. Brewer, filed the above-captioned case against Defendants, the United States of America, Anne Moore, and HMH Motor Service, Inc. ("HMH"), claiming that he is due a tax refund or abatement because he was not a "responsible person" for the federal employment taxes due.

Presently before the Court are the United States' motion to dismiss the com [pg. 2005-1751] plaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and Brewer's motion to allow amendment to the pleadings. Because Brewer's complaint is untimely, the Government's motion to dismiss will be GRANTED. Because the proposed amendment would be futile if allowed, Brewer's motion to allow amendment to the pleadings will be DISMISSED as moot.

Here is another case involving the issue of another individual also potentially being liable for the trust fund taxes.

*

MCLAREN v. IRS APPEALS OFFICE, Cite as 100 AFTR 2d 2007-XXXX, 09/10/2007

THOMAS McLAREN and RITA McLAREN, Plaintiffs, v. IRS APPEALS OFFICE and MICHAEL JEKA, Defendants.

Case Information:

Code Sec(s):	
Court Name:	IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA BUTTE DIVISION,
Docket No.:	CV-06-53-BU-RFC-CSO,
Date Decided:	09/10/2007.
Disposition:	

HEADNOTE

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Reference(s):

OPINION

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA BUTTE DIVISION,

FINDINGS AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

Judge: Carolyn S. Ostby United States Magistrate Judge

Plaintiffs Thomas McLaren ("Mr. McLaren") and Rita McLaren ("Mrs. McLaren") (collectively "the McLarens") initiated this action against Defendants the Internal Revenue Service ("IRS") and IRS appeals officer Michael Jeka (collectively "Defendants") on July 26, 2006.*Cmplt.* (Court's Doc. No. 1) *at 1.* The McLarens challenge Defendants' determination of taxes due from Anaconda Ace Hardware LLP, and assessed against Mr. McLaren by the IRS. *Id.* The McLarens have attached to their Complaint as Exhibin 1 the IRS "Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330" and the IRS "Enclosure to Notice of Determination" addressed to Mr. McLaren. *Cmplt. at Ex. 1.*

Before the Court is the United States' Motion to Dismiss (Court's Doc. No. 16). Having reviewed the motion, Defendants' brief, and the record, it is recommended that

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Defendants' motion be granted for the reasons stated herein.

I. BACKGROUND

The McLarens allege in their Complaint, in relevant part, as follows:

III.

> Mr. Jenka (sic) of the IRS Appeals office made a determination involving our due taxes from Anaconda Ace Hardware LLP - We believe that we are not responsible for the full amount because of our partnership. Another partner should share in the notal amount owed but was dismissed by Mr. Jenka (sic) of responsibility for the taxes.

IV.

> The relief we seek is that Mr. John Corrigan be added to the owed taxes and that the amount be reduced and/or the penalties reduced so we can afford to make payments or restitution.

Cmplt. at ¶¶ III and IV.

On July 16, 2007, Defendants filed their Motion to Dismiss. They advance three primary arguments in support of their motion.*Memorandum in Support of United States' Motion to Dismiss ("Defts' Br.") at 1–2* .

First, Defendants argue that the Court lacks subject matter jurisdiction over Mrs. McLaren's claims because the outstanding tax liability is Mr. McLaren's. Thus, Defendants argue, Mrs. McLaren lacks standing, the Court lacks subject matter jurisdiction over her claims, and dismissal of her claims is appropriate under Rule 12(b)(1), Fed. R. Civ. P. [1] *Id. at 1, 6–7*.

Second, Defendants argue that the McLarens failed to serve the United States within 120 days of filing the complaint as required by Rule 4(m). [2] Thus, Defendants argue, dismissal is appropriate under Rule 12(b)(5) for insufficiency of service of process. *Id. at 2*.

Third, Defendants argue that the McLarens have failed to state a claim upon which relief can be granted. Thus, they argue, Rule 12(b)(6) mandates dismissal. *Id. at 1, 8–13*.

The McLarens failed to respond to Defendants' motion to dismiss.

II. DISCUSSION

The Court has considered the record and the arguments presented. Having done so, the Court concludes that the motion to dismiss should be granted for two reasons.

First, under the Local Rules of this Court, the McLarens' failure to respond is a concession that the motion is well-taken. Rule 7.1(i) of the Local Rules of Procedure of the United States District Court for the District of Montana provides that the "[f]ailure to file a brief by the adverse party shall be deemed an admission that the motion is well taken." The McLarens' failure to respond to Defendants' motion indicates that they do not contest the motion and concede that it should be granted.

Second, the Court concludes that the McLarens' Complaint fails to state a claim upon which relief can be granted. Thus, the Court recommends that the Complaint be dismissed under Rule 12(b)(6).

Under Rule 12(b)(6), a reviewing court ""must construe the complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true."" Syverson v. Int'l Bus. Machines Corp., 472 F.3d 1072, 1075 (9th Cir. 2007) (quoting Shwarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000)). Dismissal is proper only when there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

In the case at hand, the IRS assessed Mr. McLaren with taxes under 26 U.S.C. § 6672(a). *Cmplt. at Ex. 1* (indicating "Tax Type/Form Number" as "IRC [Internal Revenue Code] 6672 / TFRP"); 26 U.S.C. § 6672(a). The McLarens do not contest the assessed tax liability. Rather, they claim only that they "are not responsible for the full amount" and urge that "[a]nother partner should share in the total amount owed ...." *Cmplt. at ¶ III*.

Even if the Court, construing the facts of the Complaint in the light most favorable to the McLarens, determines that another person also may be liable, as the McLarens contend, the McLarens still are unable to prevail with this action under the law.

"Liability under Section 6672 is joint and several." 14 Mertens Law of Fed. Income Tax'n § 54:105 (Sept. 2007) ("Mertens") (citing Hartman v. U.S., 538 F.2d 1336, 1340 (8th Cir. 1976); see also Schultz v. U.S., 918 F.2d 164, 167 (Fed. Cir. 1990); Brown v. U.S., 591 F.2d 1136, 1142 (5th Cir. 1979); Savage v. U.S., 2006 WL 449117 2 n.2 (E.D. Cal. 2006) (citing cases). Also, the IRS is not required to seek payment from every responsible person and may assess the tax against one responsible person and not another. 14 Mertens § 54:105 (citing Howard v. U.S., 711 F.2d 729, 735 (5th Cir. 1983)). Thus, even if some other person may share responsibility with Mr. McLaren for the tax that he admits is owed, the IRS has no obligation to pursue that individual and, under Section 6672, is permitted to pursue Mr. McLaren. Thus, he has failed to state a claim herein upon which relief can be granted. This, coupled with the fact that the McLarens did not respond to Defendants' motion to dismiss, convinces the Court that dismissal is appropriate. Because of this conclusion, the Court does not address Defendants' other arguments in support of their motion to dismiss.

III. CONCLUSION

Based on the foregoing,

IT IS RECOMMENDED that the United States' Motion to Dismiss (Court's Doc. No. 16) be GRANTED.

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendations of the United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to these findings must be filed with the Clerk of Court and copies served on opposing counsel within ten (10) days after receipt hereof, or objection is waived.

DATED this 10th day of September, 2007.

Carolyn S. Ostby

United States Magistrate Judge

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[1] All references to Rules herein are to the Federal Rules of Civil Procedure unless indicated otherwise.

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2 Defendants also argue that the United States is the only proper defendant for two reasons. First, they argue, the IRS is an agency of the United States and, as such, it enjoys sovereign immunity. Congress has not waived this immunity. Thus, they argue, the IRS is not an entity subject to suit and the United States is properly substituted in its place.

Second, Defendants argue that Jeka, an IRS Appeals Officer, is sued herein in his official, and not individual, capacity. Thus, Defendants argue, a claim against him is actually a claim against the United States. Consequently, the United States is the only proper defendant in this action. *Id. at 3*.

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