You Mean People Go to Jail for That? Hidden Dangers of Handling a Trust Fund Recovery Penalty Investigation

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TSCPA Expo 2018

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US v. Capecelatro

A developing trend in criminal tax that historically has not seen very much use:

- Sec. 7202, Willful failure to collect, truthfully account for and pay over employment taxes (a 5-year felony).
- In lieu of (or in addition to) Sec. 6672, the civil "trust fund recovery penalty" (TFRP).

Employment tax deficiencies have traditionally been **ALMOST EXCLUSIVELY** the subject of civil enforcement.

Today, examinations traditionally presumed to be “civil” in nature are breeding grounds for bad surprises!

The historical non-use of criminal sanctions in connection with employment taxes means that a criminal investigation comes as a huge shock to the defendants (and their tax advisors).

Uncollected payroll taxes are a HUGE problem.

- As of December 2015, 1.4 million employers owed approximately **$45.6 billion** in unpaid employment taxes, interest, and penalties.

Source: Report of the Treasury Inspector General for Tax Administration, March 21, 2017

WHY IRS IS MAD

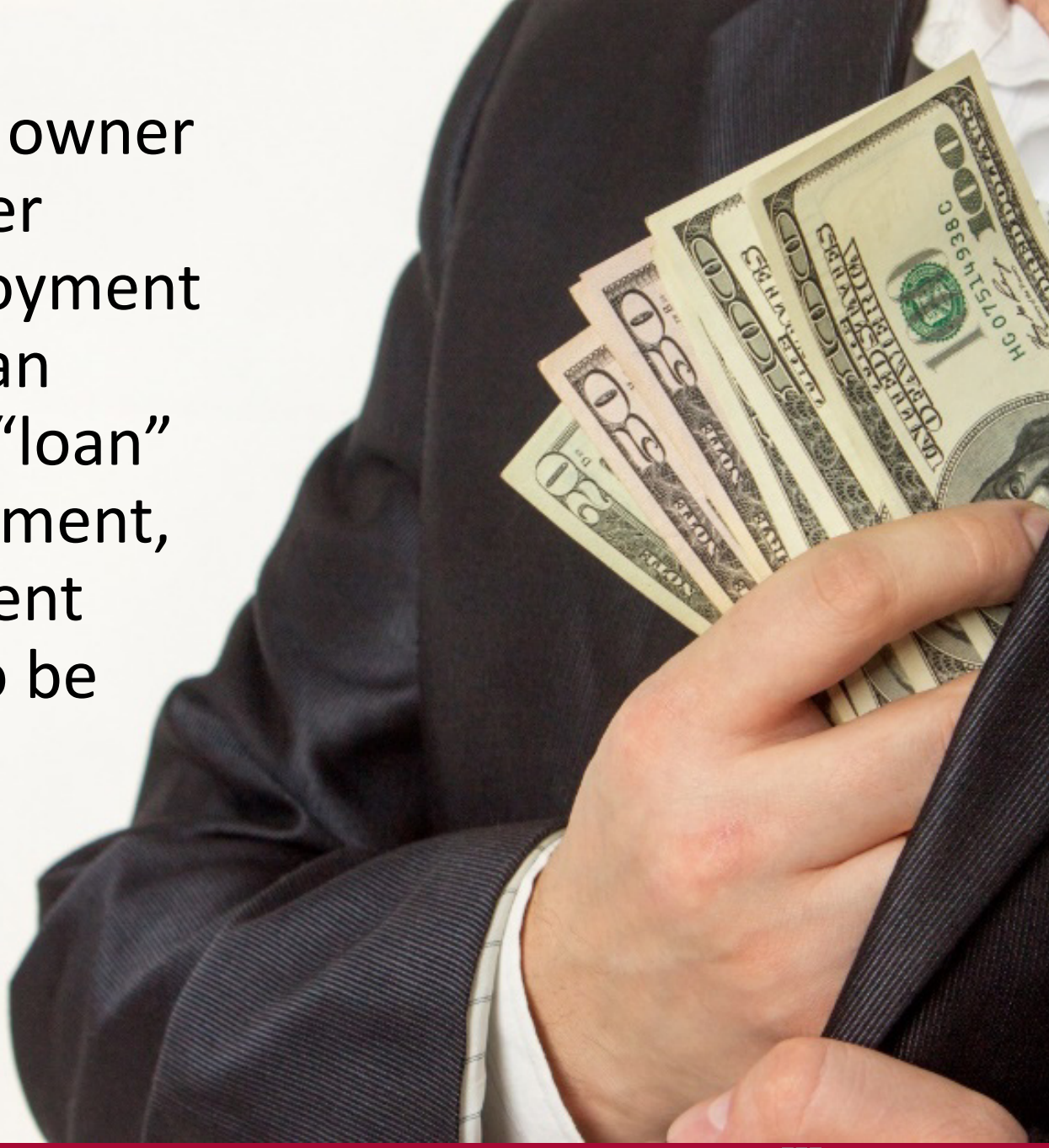
- Reg. section 1.31-1(a) provides: ‘‘If the tax has actually been withheld at the source, credit or refund shall be made to the recipient of the income **even though such tax has not been paid over to the Government by the employer”.**

Why does it happen?

- "Employment tax noncompliance occurs for many reasons."
- "Sometimes, employers experiencing economic strain 'borrow the money for a short while' to use the withheld taxes to fund the employer's operations."
- "Other employers willfully divert the withheld taxes for their own personal benefit."

Source: Report of the Treasury Inspector General for Tax Administration ("TIGTA"), March 21, 2017

While a business owner may consider delinquent employment taxes to be an undocumented “loan” from the government, the government considers it to be THEFT.



The IRS' Traditional Answer to Payroll Tax Deficiencies:

Internal Revenue Code § 6672 provides that any person required to collect, account for, and pay over taxes who willfully fails to perform any of these activities can be assessed a Trust Fund Recovery Penalty (TFRP).

Who is a Responsible Person?

A "responsible person" is anyone who:

a) has the duty to perform

or

b) the power to direct

c) the act of collecting, accounting for, or paying over trust fund taxes.

Who is a Responsible Person?

Most TFRP cases involve officers of corporations. However, a responsible person may be one or more of the following:

- An officer or employee of a corporation
- A member or employee of a partnership
- A corporate director or shareholder
- A related controlling corporation

Who is a Responsible Person?

The IRS' view is that anyone with signatory authority is "responsible".

Hypothetical

You are the CFO of a company and the CEO instructs you NOT to pay the IRS and instead take care of other bills.

What should you do?

What is Willfulness?

"Willfulness" is the intentional act of paying other creditors instead of the IRS.

See, e.g.:

Howard v. United States, 711 F.2d 729, 736 (5th Cir. 1983)

Newsome v. United States, 431 F.2d 742 (5th Cir. 1970)

In former times, what little criminal enforcement there was with respect to payroll taxes was limited to Sec. 7215.

§ 7215 - Offenses with respect to collected taxes

(a)PENALTY

Any person who fails to comply with any provision of section 7512(b) shall, in addition to any other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

A criminal proceeding under § 7215 is a two-step process.

- It applies only to a person who "fails to comply with any provision of § 7512."
- § 7512 provides that if the IRS serves a delinquent taxpayer with a written notice "delivered in hand", the taxpayer must deposit all payroll taxes that are due within two banking days after payroll is made into a special trust account.
- If the taxpayer ignores and fails to abide by the warning in the § 7512 notice, THEN (and only then) is he subject to prosecution under § 7215.

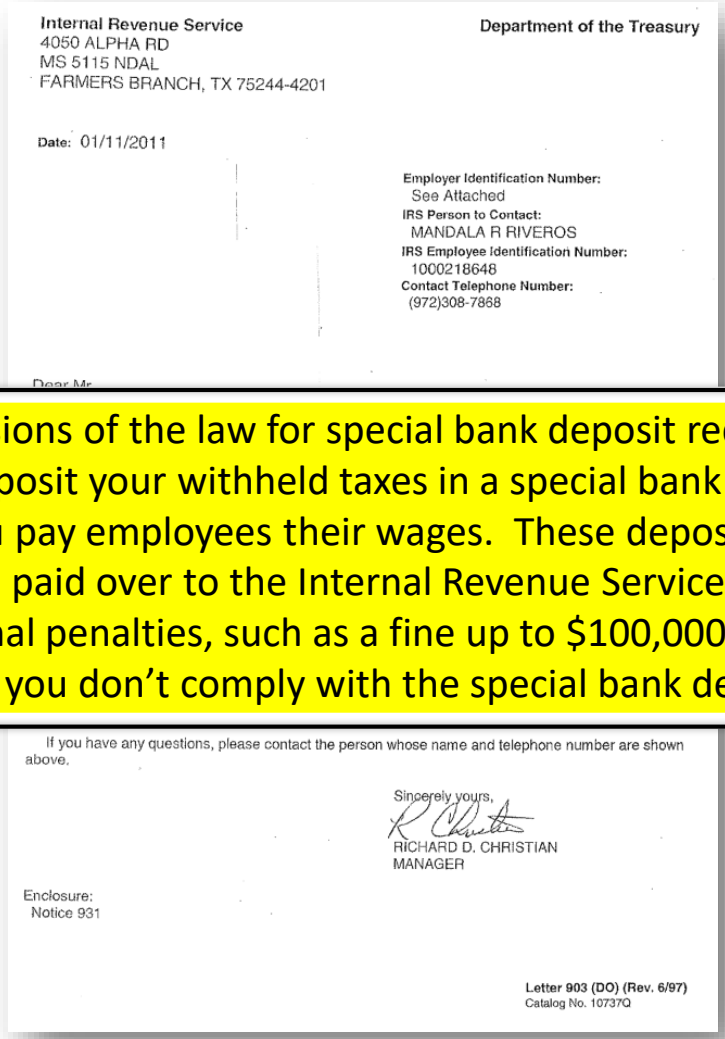
- NOTE that § 7215 does not include the word, "willful", i.e., it is a strict liability statute.
- ALSO NOTE that § 7215 is a misdemeanor offense, meaning that the maximum term of imprisonment is one year per count.

The Investigative Process

As part of the civil payroll tax delinquency investigation routine, taxpayers are given a copy of IRS letter 903.

The old version of this letter described the § 7215 process, leading taxpayers to believe that they would first be served with a notice requiring prompt deposit of payroll taxes before any criminal procedure would be instituted.

Old Version of Letter 903



Internal Revenue Service
4050 ALPHA RD
MS 5115 NDAL
FARMERS BRANCH, TX 75244-4201

Department of the Treasury

Date: 01/11/2011

Employer Identification Number:
See Attached
IRS Person to Contact:
MANDALA R RIVEROS
IRS Employee Identification Number:
1000218648
Contact Telephone Number:
(972)308-7868

Dear Mr.

Under the provisions of the law for special bank deposit requirements, we may also require you to deposit your withheld taxes in a special bank account within 2 banking days after you pay employees their wages. These deposits would remain in the bank account until paid over to the Internal Revenue Service. Under the law we may charge you criminal penalties, such as a fine up to $100,000 and up to one year in jail upon conviction, if you don't comply with the special bank deposit requirements.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

RICHARD D. CHRISTIAN
MANAGER

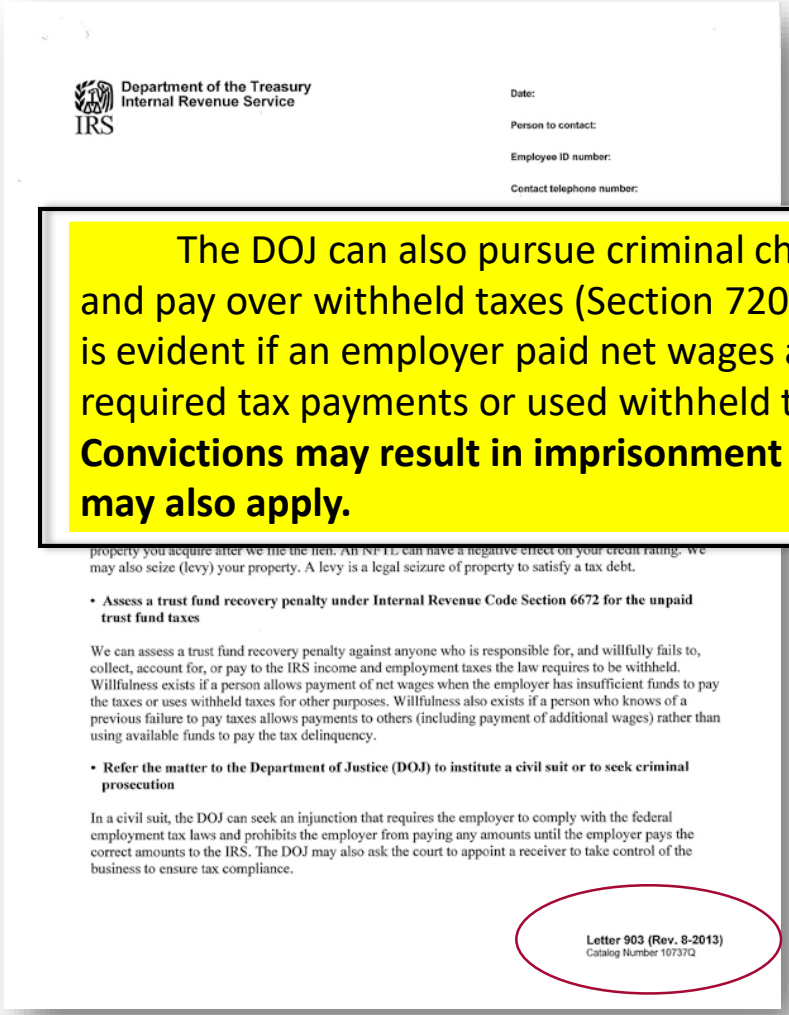
Enclosure:
Notice 931

Letter 903 (DO) (Rev. 6/97)
Catalog No. 10737Q

In 2013, things started to change …

The IRS altered the form of its Letter 903 to remove references to § 7215 and instead, to emphasize the possibility of prosecution under § 7202.

New Version of Letter 903



Department of the Treasury
Internal Revenue Service
IRS

Date:

Person to contact:

Employee ID number:

Contact telephone number:

property you acquire after we file the lien. An NFTL can have a negative effect on your credit rating. We may also seize (levy) your property. A levy is a legal seizure of property to satisfy a tax debt.

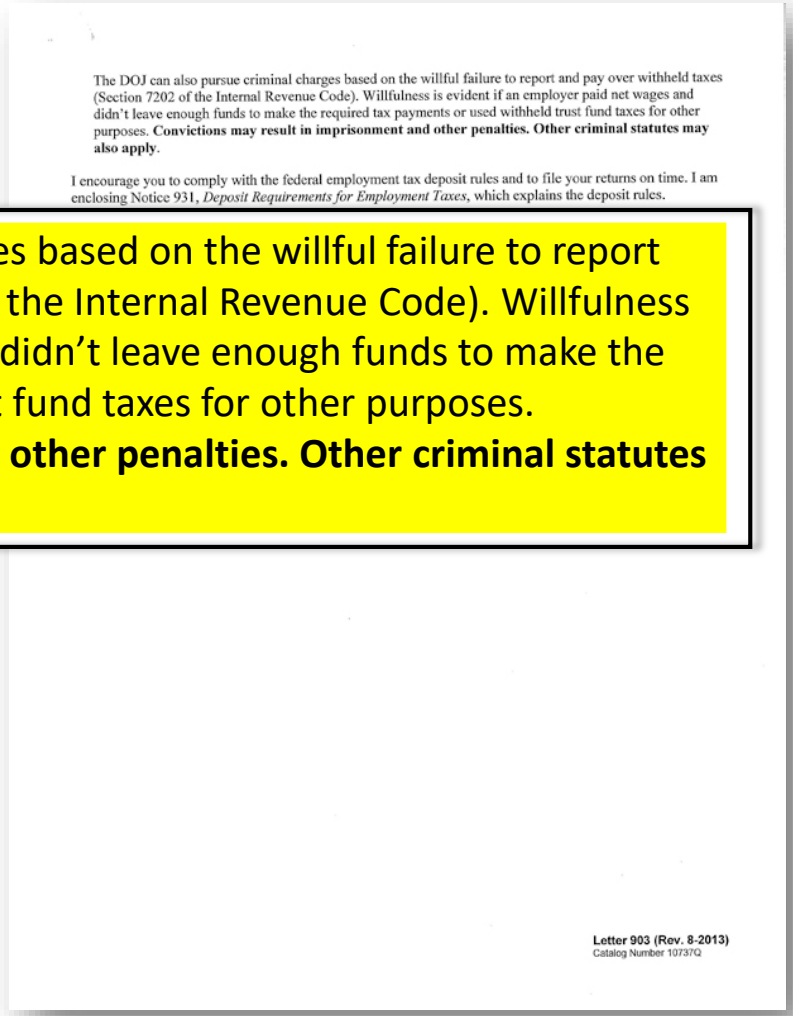
- **Assess a trust fund recovery penalty under Internal Revenue Code Section 6672 for the unpaid trust fund taxes**

We can assess a trust fund recovery penalty against anyone who is responsible for, and willfully fails to, collect, account for, or pay to the IRS income and employment taxes the law requires to be withheld. Willfulness exists if a person allows payment of net wages when the employer has insufficient funds to pay the taxes or uses withheld taxes for other purposes. Willfulness also exists if a person who knows of a previous failure to pay taxes allows payments to others (including payment of additional wages) rather than using available funds to pay the tax delinquency.

- **Refer the matter to the Department of Justice (DOJ) to institute a civil suit or to seek criminal prosecution**

In a civil suit, the DOJ can seek an injunction that requires the employer to comply with the federal employment tax laws and prohibits the employer from paying any amounts until the employer pays the correct amounts to the IRS. The DOJ may also ask the court to appoint a receiver to take control of the business to ensure tax compliance.

Letter 903 (Rev. 8-2013)
Catalog Number 10737Q



The DOJ can also pursue criminal charges based on the willful failure to report and pay over withheld taxes (Section 7202 of the Internal Revenue Code). Willfulness is evident if an employer paid net wages and didn't leave enough funds to make the required tax payments or used withheld trust fund taxes for other purposes. **Convictions may result in imprisonment and other penalties. Other criminal statutes may also apply.**

I encourage you to comply with the federal employment tax deposit rules and to file your returns on time. I am enclosing Notice 931, *Deposit Requirements for Employment Taxes*, which explains the deposit rules.

Letter 903 (Rev. 8-2013)
Catalog Number 10737Q

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Hypothetical

Your client has a hard time keeping up to date on his payroll taxes. The IRS revenue officer has gotten upset and has issued a 903 letter.

Why should you be worried?

What should the action plan be?

DOJ Climbs on Board

In 2014, the DOJ's *Criminal Tax Manual* was amended by inserting the following notice in the portion of that document dealing with prosecutions under § 7215:

> *"Notice: § 7215, which makes it a misdemeanor to fail to comply with § 7512(b) is obsolete, because the IRS no longer issues notices under § 7212(b) requiring the use of special deposit procedures for collected employment taxes."*

Prior to 2016, the Federal Sentencing Guidelines *"Commentary"* pertaining to Section 7202 (§2T1.6) contained the following observation:

> ***"Background: The § 7202 offense is a felony that is infrequently prosecuted."***

And then…

- In 2016, the Federal Sentencing Guidelines' reference to § 7202 being "infrequently prosecuted" was removed.
- The 2016 Guidelines do not provide a basis for this change (the former reference to "infrequent prosecution" was simply removed).
- Some say that this amendment was because some lawyers used the "infrequency of prosecution" language to urge courts to give more lenient sentences; but a better reason is because as a matter of fact, prosecutions under § 7202 are no longer "infrequent".

Department of Justice, Tax Division, *Criminal Tax Manual*:

DOJ is well aware of the substantial similarity between the traditional civil remedy, § 6672 and its criminal counterpart, § 7202.

"Under section 6672, the civil counterpart to section 7202, a voluntary, conscious, and intentional act of paying the claims of other creditors … constitutes a "willful" violation of the duty to pay over. . . . Similarly, it is the Tax Division's position that a person willfully fails to pay over tax under section 7202 when, instead of paying the trust fund taxes, he voluntarily and intentionally uses the money to pay the claims of other creditors."

Department of Justice, Tax Division, *Criminal Tax Manual*:

DOJ is also well aware of the potential interplay between the civil and criminal functions:

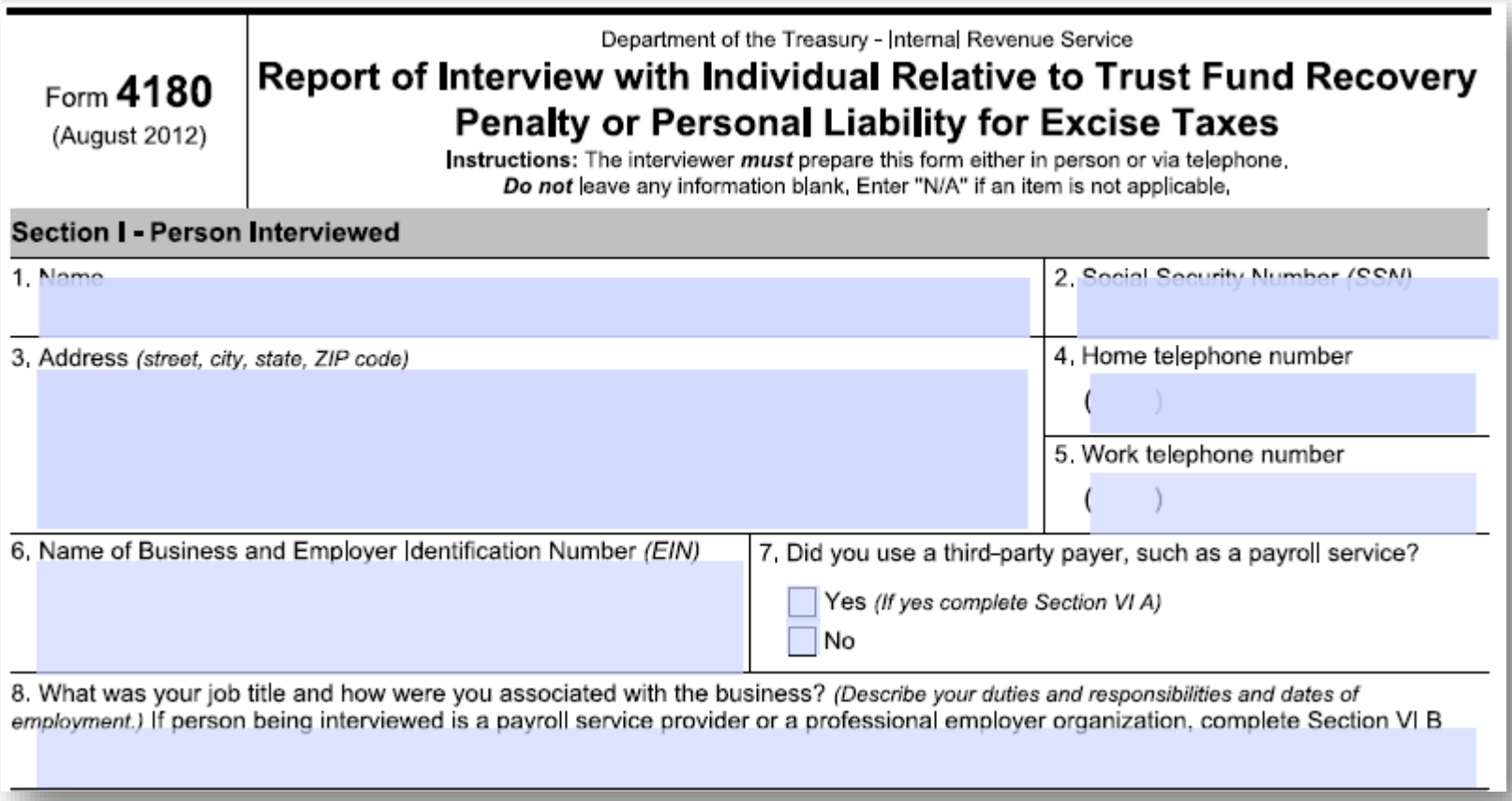
"Prosecutors should ascertain whether an IRS Form 2751, Proposed Assessment of Trust Fund Recovery Penalty, or an IRS Form 4180, "Report of Interview with Individual Relative to Trust Fund Recovery Penalty or Personal Liability for Excise Taxes," was completed during the civil administrative part of the case, because these documents may contain relevant admissions or statements by the defendant."

Hypothetical

Unfortunately, you have a client that is a responsible and willful person regarding unpaid payroll taxes.

- Should you agree to the liability?
- What can you do to lessen the harm?

Form 4180



Form **4180**
(August 2012)

Department of the Treasury - Internal Revenue Service

Report of Interview with Individual Relative to Trust Fund Recovery Penalty or Personal Liability for Excise Taxes

Instructions: The interviewer ***must*** prepare this form either in person or via telephone. ***Do not*** leave any information blank. Enter "N/A" if an item is not applicable.

Section I - Person Interviewed

1. Name

2. Social Security Number (SSN)

3. Address *(street, city, state, ZIP code)*

4. Home telephone number ( )

5. Work telephone number ( )

6. Name of Business and Employer Identification Number *(EIN)*

7. Did you use a third-party payer, such as a payroll service?
- ☐ Yes *(If yes complete Section VI A)*
- ☐ No

8. What was your job title and how were you associated with the business? *(Describe your duties and responsibilities and dates of employment.)* If person being interviewed is a payroll service provider or a professional employer organization, complete Section VI B

Form 4180

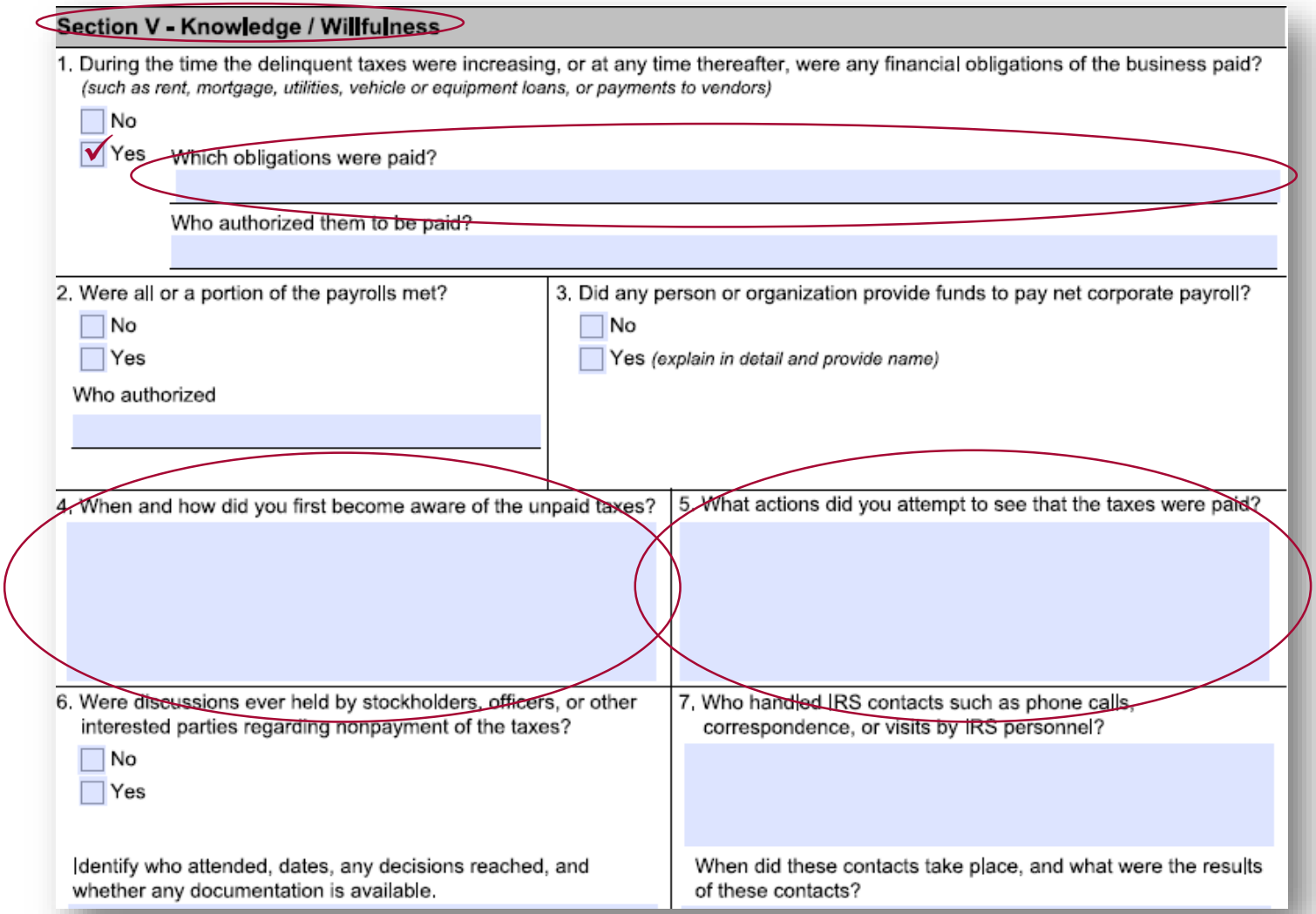
Section II - Responsibilities

1. State whether you performed any of the duties / functions listed below for the business and the time periods during which you performed these duties.

Did you...	Yes	No	Dates From	Dates To
a. Determine financial policy for the business?	✓			
b. Direct or authorize payments of bills/creditors?	✓			
c. Prepare, review, sign, or authorize transmit payroll tax returns?	✓			
d. Have knowledge withheld taxes were not paid?	✓			
e. Authorize payroll?	✓			
f. Authorize or make Federal Tax Deposits?	✓			
g. Authorize the assignment of any EFTPS or electronic banking PINS/passwords?	✓			
h. Could other individuals do any of the above? *(Complete Section IV and V)*				
Name / Contact Number				
i. Have signature authority or PIN assignment on business bank accounts?				
Bank Name(s) / Account Number(s)				

Affirmative answers to these questions mean that your client is "responsible".

Form 4180



Section V - Knowledge / Willfulness

1. During the time the delinquent taxes were increasing, or at any time thereafter, were any financial obligations of the business paid?
(such as rent, mortgage, utilities, vehicle or equipment loans, or payments to vendors)

☐ No
☑ Yes — Which obligations were paid?

Who authorized them to be paid?

2. Were all or a portion of the payrolls met?
☐ No
☐ Yes
Who authorized

3. Did any person or organization provide funds to pay net corporate payroll?
☐ No
☐ Yes *(explain in detail and provide name)*

4. When and how did you first become aware of the unpaid taxes?

5. What actions did you attempt to see that the taxes were paid?

6. Were discussions ever held by stockholders, officers, or other interested parties regarding nonpayment of the taxes?
☐ No
☐ Yes

Identify who attended, dates, any decisions reached, and whether any documentation is available.

7. Who handled IRS contacts such as phone calls, correspondence, or visits by IRS personnel?

When did these contacts take place, and what were the results of these contacts?

Honest answers to these may prove that your client is "willful".

Form 4180

Section III - Signatures	
I declare that I have examined the information given in this interview and to the best of my knowledge and belief, it is true, correct, and complete.	
Signature of person interviewed	Date
Signature of Interviewer	Date

Space for signing the "confession".

Hypothetical

Revenue Officer comes to your office and says he needs to do an interview with your client to determine TRFP?

- Should you let agent do interview?
- If you refuse, are you going to make agent mad?
- What are other approaches?

Direct Comparison of § 6672 to § 7202

Sec. 6672 - Failure to collect and pay over tax, or attempt to evade or defeat tax.

1. **Any person required to collect, truthfully account for, and pay over any tax imposed by this title** who

Direct Comparison of § 6672 to § 7202

Sec. 7202 - Willful failure to collect or pay over tax.

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

Direct Comparison of § 6672 to § 7202

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1. **Any person required to collect, truthfully account for, and pay over any tax imposed by this title** who
2. **willfully**

Direct Comparison of § 6672 to § 7202

Sec. 7202 - Willful failure to collect or pay over tax.

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

Direct Comparison of § 6672 to § 7202

Sec. 6672 - Failure to collect and pay over tax, or attempt to evade or defeat tax.

1. **Any person required to collect, truthfully account for, and pay over any tax imposed by this title** who
2. **willfully**
3. **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.

Direct Comparison of § 6672 to § 7202

Sec. 7202 - Willful failure to collect or pay over tax.

1. **Any person required under this title to collect, account for, and pay over any tax imposed by this title** who
2. **willfully**
3. **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 costs of prosecution.

So….what's the difference between a routine delinquent payroll tax case and a § 7202 criminal proceeding?

According to the government, only one thing: Burden of Proof

In § 6672 cases, the IRS' assessment is presumed correct; and the taxpayer has the burden of proof of rebutting it by a preponderance of evidence.

In § 7202 cases – as in all criminal cases – the government has the burden to prove all elements of the crime beyond a reasonable doubt.

TIGTA Report on § 7202

March 21, 2017 – TIGTA released a new report titled:

A More Focused Strategy Is Needed to Effectively Address Egregious Employment Tax Crimes

TIGTA Report on § 7202

Synopsis or Report:

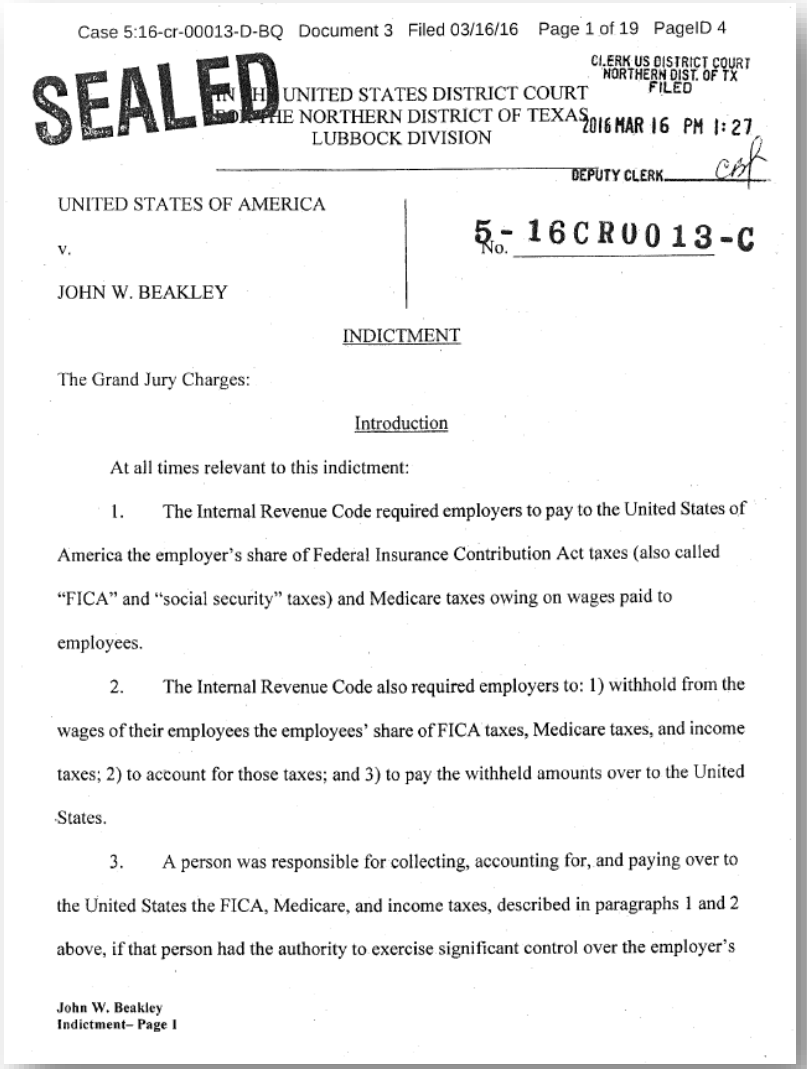
- Employment tax noncompliance is a serious crime.
- When employers willfully fail to account for and deposit employment taxes … they are in effect stealing from the Government.
- In order to promote compliance, § 7202 needs to be used more often.

Takeaways

The similarities between Section 7202 and its civil counterpart Section 6672	+	The government's new attitude towards aggressive use of Section 7202 prosecutions	=	There is no longer any such thing as a "routine" payroll tax investigation.

Takeaways

- Every payroll tax delinquency situation - at least in any situation where the facts would arguably justify imposition of the TFRP -- is a *potential* Section 7202 prosecution.



Case 5:16-cr-00013-D-BQ Document 3 Filed 03/16/16 Page 1 of 19 PageID 4

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CLERK US DISTRICT COURT
NORTHERN DIST. OF TX
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

2016 MAR 16 PM 1:27

DEPUTY CLERK

UNITED STATES OF AMERICA

v.

JOHN W. BEAKLEY

No. 5-16CR0013-C

INDICTMENT

The Grand Jury Charges:

Introduction

At all times relevant to this indictment:

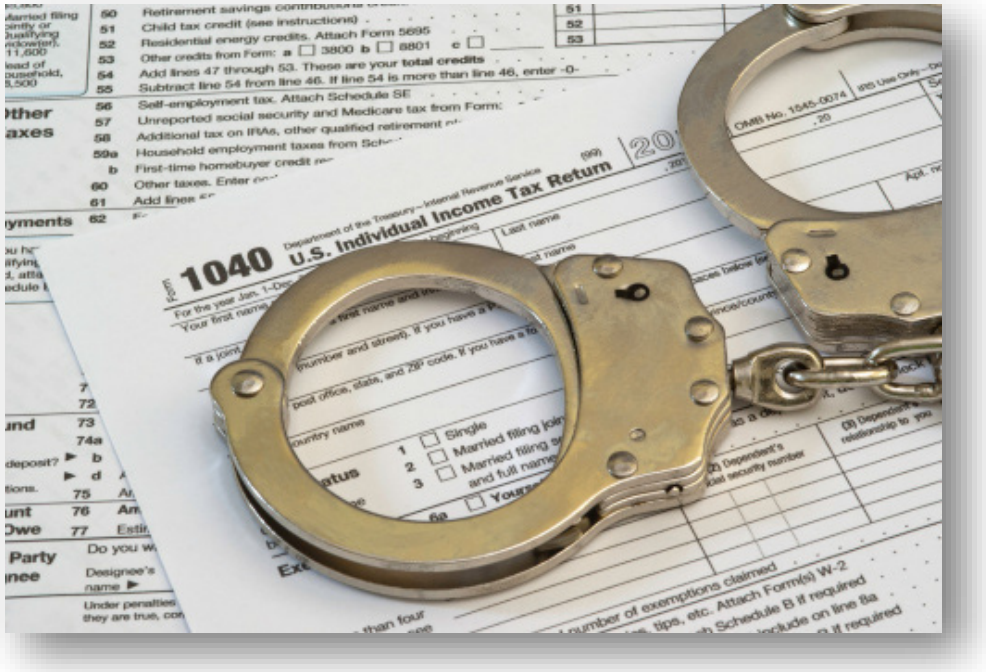
1. The Internal Revenue Code required employers to pay to the United States of America the employer's share of Federal Insurance Contribution Act taxes (also called "FICA" and "social security" taxes) and Medicare taxes owing on wages paid to employees.

2. The Internal Revenue Code also required employers to: 1) withhold from the wages of their employees the employees' share of FICA taxes, Medicare taxes, and income taxes; 2) to account for those taxes; and 3) to pay the withheld amounts over to the United States.

3. A person was responsible for collecting, accounting for, and paying over to the United States the FICA, Medicare, and income taxes, described in paragraphs 1 and 2 above, if that person had the authority to exercise significant control over the employer's

John W. Beakley
Indictment– Page 1

SURPRISE: Traditional “cooperation” with the investigating civil agents can prove to be self-incriminating.



WARNING – DON'T INCRIMINATE YOUR CLIENT

IRS power of attorney grants great power to representatives, specifically:

Acts authorized (you are required to complete this line 3). With the exception of the acts described in line 5b, I authorize my representative(s) to receive and inspect my confidential tax information **and to perform acts that I can perform with respect to the tax matters** described below. For example, my representative(s) shall have the authority to sign any agreements, consents, or similar documents (see instructions for line 5a for authorizing a representative to sign a return).

WARNING – DON'T INCRIMINATE YOUR CLIENT

Hayes v. U.S., 407 F.2d 189, 192 (5th Cir. 1969).

"The [POA's] statement **is admissible** against Haynes as an admission by an authorized agent."

Hypothetical

Your client tells you he has a employment tax problem, so you call the collection officer to try to get a resolution. The collection officer asks you why client has not paid. You say he has had a hard time and paid his rent and net payroll?

- Have you just created a problem?
- Can you have a "casual" or "off the record" conversation with the IRS?

How does a routine civil payroll tax investigation become a criminal matter?

Six danger signs of a potential employment tax fraud investigation

1. Does the client have a previous history of employment tax deficiencies? DANGER
2. Is the current delinquency in excess of $100,000? DANGER
3. Are employment tax deficiencies continuing to accrue on a current basis? DANGER
4. Are the withheld taxes being used in business operations, or are they being paid out to the owners as compensation, dividends or loans? DANGER
5. Do the owners enjoy a luxurious life-style, courtesy of the unpaid trust fund taxes? DANGER
6. Have there been any communications whatsoever with the examining agent that involve misleading statements or falsehoods? DANGER

Here are some ideas to avoid trouble . . . . .

Five ways to help keep an employment tax delinquency examination "civil"

1. Do not continue to allow payroll tax delinquencies to "pyramid".
2. Start making payments towards the past-due employment taxes, the larger the better. Designation to "trust fund portion" is OK.
3. If any of the "danger signs" are present, resist the temptation to agree to extend the statute of limitations for assessment of the Trust Fund Recovery penalty. Force the IRS to make a civil assessment in order to "protect the revenue".
4. If any of the "danger signs" are present, avoid voluntarily providing information (oral or in written form) to the collection officer.
5. If a summons is issued to require a personal interview, consider invoking the Fifth Amendment. (Nothing proves intent like a first-party admission of knowledge and responsibility. An interview can be distorted to indicate misleading statements or falsehoods which also prove intent.)

Hypothetical

You represent a home healthcare company that for a variety of reasons cannot pay its taxes on a timely basis. Prosperity is always around the corner, but the client has now developed quite a history of non-payment or late payment. Client tells you that things just got worse and the problem is going to continue.

What would you advise this client to do?

Hypothetical

A local daycare has run into problems and has created a payroll tax liability it will never be able to get out of paying. Their business attorney tells them to shut the LLC down and start fresh with a new company. Daycare will be in the same place, with the same name, same children and employees.

Is this a way to avoid IRS problems?

Can it be done legally?

Hypothetical

Client has a business that runs up a lot of payroll tax liability. He decides to change all the employees over to independent contractors so that his payroll problems stop on a going forward basis.

Is this a good idea?

Is he causing other problems?

Can he go to jail for this?

Hmmmm! How about THIS idea? Maybe I can avoid a whole lot of problems if just treat my workers as independent contractors . . . .

The theory is — "If I treat my workers as IC's, good things happen".

1. The employer's obligation to "match" the employees' FICA obligations goes away (the worker is responsible for paying both "halves" through the SE tax).

2. Because there is no withholding of income taxes or FICA, a "trust fund" is never created that has to be paid over to the IRS.

3. Hence, there can be no personal responsibility for payment of such taxes.

Not so fast!

Not so fast …

- The law (both the civil statute §6672 and the criminal statute §7202) imposes liability for willful failure to pay over OR willful failure to *collect.*

- There are numerous *criminal* cases, and countless *civil* cases, where personal liability has been imposed for intentionally treating workers known to be employees as independent contractors.

See, e.g., the following § 7202 *criminal* cases:

- *U.S. v. Crabbe*, 364 Fed. Appx. 412 (10th Cir. 2010)
- *U.S. v. Kahre*, 737 F.3d 554 (9th Cir. 2013)
- *U.S. v. Townsend*, 2014 WL 2115248 (ED Wash, 2014)
- *U.S. v. Tabares*, 2016 WL 11258758 (ND Ga 2016)
- *U.S. v. Crabbe*, 2008 WL 11384125 (D. Colo. 2008)
- *U.S. v. McLane*, 646 F.3d 599 (8th Cir. 2011)

Case 5:16-cr-00013-BG Document 3 Filed 03/16/16 Page 1 of 19 PageID 4

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Case 5:16-cr-00013-D-BQ Document 62 Filed 09/29/17 Page 1 of 2 PageID 241

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

CLERK US DISTRICT COURT
NORTHERN DIST. OF TX
FILED

2017 SEP 29 AM 8:28

DEPUTY CLERK BMG

UNITED STATES OF AMERICA, §
§
Plaintiff, §
§ Criminal No. 5:16-CR-013-D
VS. §
§
JOHN W. BEAKLEY, §
§
Defendant. §

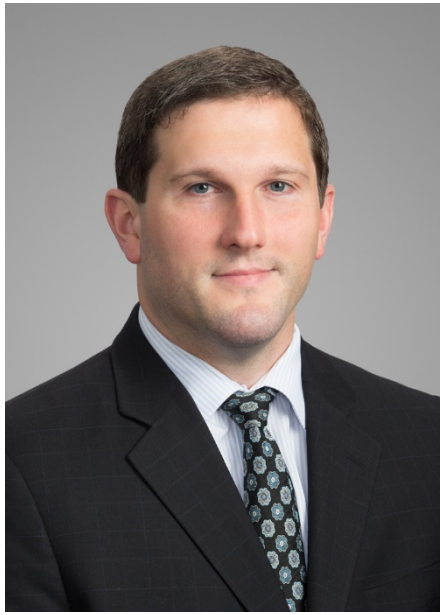
VERDICT

We, the jury in the above-entitled case, find the defendant (answer "Guilty" or "Not Guilty" in the spaces provided):

Not guilty on Count One
Not guilty on Count Two
Not guilty on Count Three
Not guilty on Count Four
Not guilty on Count Five
Not guilty on Count Six
Not guilty on Count Seven
Not guilty on Count Eight
Not guilty on Count Nine
Not guilty on Count Ten
Not guilty on Count Eleven
Not guilty on Count Twelve

Thank you!

Tom Rhodus, JD
trhodus@grayreed.com



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