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## Routine Payroll Tax Delinquencies have become Stepping Stone to Criminal Prosecutions

Tax Alert

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### **Tax Alert: Payroll Delinquencies have become Stepping Stone to Criminal Prosecutions**

*by Tom Rhodus*

**A routine payroll tax investigation may now require a tax lawyer's advice at the earliest stages.**

Everyone knows that failure to collect and pay over payroll taxes is a terrible business decision.

Many lawyers and CPAs have represented clients with respect to “trust fund recovery taxes” under IRC §6672, where the client is saddled with personal liability for the trust fund portion of unpaid payroll taxes.

Some may even be aware that criminal responsibility for failure to collect and pay over payroll taxes is at least a theoretical possibility under IRC §7202.

*But few are aware that prosecution under IRC §7202 (a five-year felony) has jumped from a seldom-used offense reserved for truly egregious cases, to a criminal tool that the Internal Revenue Service is actively encouraged to use in matters that would previously have been viewed as “routine”.*

In the past, the government has relied primarily on the civil trust fund recovery penalty under IRC §6672 to ensure that owners and managers of businesses abide by the obligation to withhold and pay over employment taxes to the IRS. This is no longer the case. Since appointment of a new Acting Assistant Attorney General last fall, the Department of Justice's Tax Division has made criminal enforcement of employment trust fund tax violations through IRC §7202 a top priority. Addressing the Federal Bar Association in March 2016, Acting Assistant Attorney General Caroline D. Ciruolo emphasized that the Tax Division is working closely with both the criminal and civil functions of the IRS in this area.

The Tax Division has recently updated the provisions of its Criminal Tax Manual on §7202. These revisions make clear the Tax Division's position that the requirements for a successful prosecution under IRC §7202 are identical to the requirements to impose civil responsibility under IRC §6672—except that proof “beyond a reasonable doubt” is required

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to secure a criminal conviction. Disturbingly, the revised manual notes that criminal prosecutions under IRC §7202 frequently start as routine civil investigations of payroll tax liabilities, but information gathered in such civil investigations can serve as the basis for obtaining criminal convictions:

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.

So—beware! The IRS and DOJ have decided that the most effective tool to put a stop to the epidemic of payroll tax deficiencies is an avalanche of jail terms! No matter how “routine” a matter involving payroll tax deficiencies may seem, please know that admissions made in an interview to determine possible IRC §6672 liability (and the Form 4180 which the collections officer will fill out and ask the client to sign) can easily become “beyond a reasonable doubt” evidence in a criminal prosecution—a prosecution that might have been avoided if, for example, Fifth Amendment rights to decline the interview had not been waived or ignored.

Even more sadly, no information communicated to the client’s trusted accountant—the person to whom a client would most often turn for assistance in such situations—is privileged when the investigation becomes criminal in nature (See IRC §7525 (a)(2)). Even if an interview requested by the IRS is declined, the accountant may be compelled to repeat everything he or she has been told by the client on the witness stand in front of a jury—more potential building-blocks for the government’s criminal case.

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