Payroll Tax Train Wreck

Resolving Your Client’s Payroll Tax Nightmare

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GREEN & SKLARZ LLC
The focus of Attorney Noelle Geiger’s practice is taxpayer representation before the Internal Revenue Service, New York State Department of Taxation and Finance, Connecticut Department of Revenue Services and other state taxing authorities. Attorney Geiger has extensive experience handling state and city Residency Audits which examine domicile, statutory residency, allocation of income, and situations involving potential dual residency. She advises clients on matters involving domicile planning. Other common controversy cases she deals with are sales tax examinations, the taxation of information services, nexus and responsible person assessments. Attorney Geiger represents clients seeking innocent spouse relief, including separation of liability and equitable relief. She handles all types of federal and state audits and appeals for income tax, corporate tax, partnership tax and estate tax. She assists non-filers with voluntary disclosures to bring taxpayers back into compliance. Attorney Geiger negotiates the release and withdrawal of liens, levies, and warrants. She assists clients who may need installment payment agreements or have collection issues, which also involves the negotiation of penalty abatements.

Attorney Geiger is a admitted to practice in New York and Connecticut and is a member of the United States Tax Court Bar.
Eric is a managing partner in Green & Sklarz LLC, a boutique tax firm with offices in Connecticut and New York. The focus of Attorney Eric L. Green’s practice is civil and criminal taxpayer representation before the Department of Justice Tax Division, Internal Revenue Service and state Departments of Revenue Services. He is a frequent lecturer on tax topics for many national organizations, including Insightful Accountant, CCH, the NAEA, the NATP, the ABA Tax Section and the Connecticut Society of CPAs. Attorney Green has served as adjunct faculty at the University of Connecticut School of Law. He was the author and lecturer of the CCH IRS Representation Certificate Program, and has served as a columnist for CCH’s Journal of Practice & Procedure. He is the founder of Tax Rep LLC which coaches accountants and attorneys on building their own IRS Representation practices, and is the host of the weekly Tax Rep Network Podcast.

Mr. Green is the author of The Accountant’s Guide to IRS Collection and The Accountant’s Guide to Resolving Tax Debts. Attorney Green is the past Chair of the Executive Committee of the Connecticut Bar Association’s Tax Section. Eric is a Fellow of the American College of Tax Counsel (“ACTC”).
Eric is the host of the weekly Tax Rep Network Podcast, available in ITunes, Apple Podcasts and Google Podcasts.

Eric is the founder of Tax Rep Network, an online community designed to help tax professionals build their IRS Representation Practice.

Introduction

• Assessment and Collection procedures against the business
• The IRC Section 6672 Trust Fund Recovery Penalty
• Third-Party Liability under IRC Section 3505
• The procedure for IRS assessment of and collection against responsible individuals
• Strategies for minimizing personal liability
• Criminal Tax Aspects of Unpaid Payroll Taxes
Enforcement

• IRS has become much more aggressive

• Part of the tax gap

• TFRP is now mandatory

• Upswing in criminal employment tax prosecutions
IRC §6672 allows the Internal Revenue Service to recover “trust funds” withheld from employee’s pay from “any person required to collect, truthfully account for and pay over any tax imposed” and “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”
What Are ‘Trust Funds’

• Federal income tax withheld
• 6.2% Social Security withheld from employees
• 1.45% Medicare withheld from employees
What ‘Trust Funds’ Are Not

- Employer’s match of the Social Security and Medicare taxes
- Federal unemployment
Trust Funds

• The employer is deemed to be holding these funds in trust for the U.S. Government

• The penalty is a 100% penalty
Who Is Responsible?

- The term “responsible person” is broad
- Encompassing anyone responsible for collecting, accounting and paying over taxes to the government
- Responsibility is a matter of status, duty and authority
- Functional Test
Indicators of Responsibility

- Holding corporate office
- Ownership
- Authority in the bylaws
- Hiring and firing authority
- Check signing authority
- The authority to sign and file payroll returns
Responsibility

• The IRS can pursue any or all responsible persons

• Anyone responsible is joint and severally liable for the tax

• They each have a right of contribution from the other responsible parties
Check Signing Authority

- Check signing authority alone is not sufficient to establish responsible person status
  - Mechanical
  - Convenience
Willfulness

- Person was, or should have been, aware of the outstanding taxes and either intentionally disregarded the law or was indifferent to the consequences

- Insufficient funds is not a defense

- Obeying a superior’s orders is not a defense—See *Hochstein v. United States*
Assessment

• The IRS Revenue Officer will seek interviews from all potential responsible people he/she can locate

• Interview Form 4180 – NEVER DO THIS!

• Assess all responsible persons—Letter 1153

• Form 2751 to waive
### Form 4180 – TFRP

#### Interview

**Why you do this yourself!**

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**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.

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

Our efforts to collect the federal employment or excise taxes due from the business named above have not resulted in full payment of the liability. We therefore propose to assess a penalty against you as a person required to collect, account for, and pay over withheld taxes for the above business.

Under the provisions of Internal Revenue Code section 6672, individuals who were required to collect, account for, and pay over these taxes for the business may be personally liable for a penalty if the business doesn't pay the taxes. These taxes, described in the enclosed Form 2751, consist of employment taxes you withheld (or should have withheld) from the employees' wages (and didn't pay) or excise taxes you collected (or should have collected) from patrons (and didn't pay), and are commonly referred to as "trust fund taxes."
Assessment

• Once assessed, the individual assessed against will have 60 days to file their protest and obtain an appeals hearing

• The taxpayer and/or their representative should seek to obtain copies of the interview forms
Disqualified Employment Tax Levy

• Authorized for years but not used
• If TP has had a CDP hearing for payroll taxes within last 2 years, instant levy
• CDP Notice sent but no 45 day wait
• Collection being urged to expand its use of DETL
Dear:

Our records show that you haven't deposited federal employment taxes as required by law (Treasury Regulation Section 31.6302). If you do not bring your account current with the required deposits within 30 days of the date of this letter, we will consider stricter civil or criminal enforcement procedures.

We may:

- File a Notice of Federal Tax Lien (NFTL) to protect the government’s interest

By filing this notice, we are making a legal claim to your property as security for the payment of your tax debt. An NFTL is a public notice to your creditors that we have a claim against all your property, including 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.
Permanent Injunction and Judgment

The United States seeks a permanent injunction against defendants Nurse Staffing Solutions Home Care and Dawda Sowe under 26 U.S.C. § 7402 requiring defendants to timely file employment tax returns and to pay employment tax when due. The United
Strategies

• Challenge Responsibility (Protest within 60 days, DATL or Refund Suit if after assessment)

• Shut Down the Company (Lien Issue/Alter-Ego)

• Rev Proc 2002-26 – send voluntary payments and specify to TFRP
Questions?

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