

Nuts and Bolts of Representing Taxpayers Facing Trust Fund Recovery Penalty Assessments¹

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I. Background

a. What are Trust Fund Recovery Penalty Assessments?

- Under IRC 6672, individuals involved in a business can be held **personally liable** for the **entity's failure** to properly **collect and remit employment taxes**.
- This individual assessment takes the form of a penalty equal to **100% of the unpaid trust fund taxes** for each quarter.
- Several persons may be held jointly and severally liable.

b. Trust Fund Taxes Defined

- Employers are generally required to withhold **Federal Income taxes** and Federal Income Contributions Act (**FICA**) **taxes** from their employees' wages, match the FICA withholding and remit the aggregate amount to the Service quarterly. IRC § 6157.
- The **FICA taxes**, also known as "**employment taxes**," are credited towards future **Social Security** and **Medicare** benefits for employees.
- The **employees' portion of these taxes** as well as any **withheld Federal Income Taxes** are termed "**trust fund taxes**," as the employer is required by law to hold the taxes "in trust" for the United States until it remits them quarterly.

c. IRC § 6672 Statutory Requirements

- In order for an individual involved in the business to be held liable under section 6672, she must be "**responsible**," having the duty to withhold and remit the trust fund taxes, and she must have "**willfully**" failed to collect and pay over the tax due. *Godfrey v. United States*, 748 F.2d 1568 (Fed. Cir. 1984).

d. Who May be Deemed a Responsible Person for Purposes of IRC § 6672 Liability?

- Any officer, employee, or member of an entity who had a duty to withhold and remit the taxes. *See* IRC § 6671(b).

¹ In addition to the author's litigation experience, much of the material for this presentation came from Chapter 16, *Defending the Trust Fund Recovery Penalty— Section 6672* by Larry A. Campagna, Heather M. Pesikoff, and Susan M. Earley from the 5th and 6th (unpublished) editions of EFFECTIVELY REPRESENTING YOUR CLIENT BEFORE THE IRS, an ABA Section of Taxation publication edited by Keith Fogg. Additional resources used were published cases, materials from the State Bar of Texas Tax Section's 2014 Advanced Tax Law CLE, Chapter 17, *Collection From Nontaxpayers—Transferee Liability, Part B Collection of Taxes from Withholding Agents* in IRS PRACTICE & PROCEDURE by Michael I. Saltzman and Leslie Book (2013), and Part 5 Collecting Process, Chapter 7 Trust Fund Compliance of the Internal Revenue Manual (IRM).

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- Essentially, a responsible person is one who had the “status, duty, and authority” to control company decision making and the disbursement of company funds. *See Godfrey*, 748 F.2d at 1576.
- It’s a test of substance, not form; meaning title alone is not determinative of status, duty, and authority. *Cook v. United States*, 52 Fed. Cl. 62 (2002).

Responsible Person Factors

Fact intensive inquiry – Courts have developed many factors to determine whether someone is deemed “responsible” under IRC 6672, including whether the person:

- made financial decisions regarding the company;
- signed company checks;
- prevented the issuance of checks by denying a necessary signature
- controlled disbursement of payroll;
- prepared payroll tax returns/made tax deposits;
- was active in the management of the day-to-day affairs of the company;
- made decisions regarding which debts were paid first;
- was an officer or member of the board of directors;
- owned a share of the company;
- controlled voting stock; and
- had the ability to hire and fire employees. **List is not exhaustive**

e. Willfulness Element

- Liability under IRC § 6672 **also requires** a “willful fail[ure] to collect such tax, or truthfully account for and pay over such tax.”
- A responsible person acts willfully by making a “voluntary, intentional, and conscious decision” not to collect or pay the trust fund taxes. *Godfrey*, 748 F.2d at 1577.
- Does not require malicious intent to defraud government.
- Reckless disregard of duty to collect and remit taxes can satisfy willful prong.
 - More than mere negligence.

Willfulness Tests

- 1) Was a responsible person aware that the taxes were unpaid, possessed the power to pay them with company funds and instead used these funds to pay another creditor before the IRS? or

- 2) Was a responsible person's actions (or inactions) "grossly negligent" or in "reckless disregard" of the fact that the taxes were due and would not be paid?

II. TFRP Assessments, Small Businesses & The Great Recession

- From 2007 through 2009, the number of businesses with employees declined from 6,050,000 to 5,904,000—a **loss of 146,000 employer businesses**. Virtually all of the disappearing companies were small businesses because, according to the SBA, small businesses make up 99.7 percent of all employers in this country.³
- Small businesses disproportionately felt the effects of the recession, which negatively impacted their viability, growth, employment, and access to credit. These measurable effects lasted through 2012, well into the economic recovery period.⁴
- When businesses experience financial hardship, their creditors often go unpaid. Accordingly, many struggling companies fail to pay employment taxes, perhaps not fully understanding that such failures, unlike defaulting on other types of business debts, often result in personal liability for unpaid trust fund taxes officers or members of the business, regardless of the structure of the business with respect to limited liability.
- From 2006 – 2011, TFRP assessments were at their highest levels, over 4 million for each of these years.⁵

Example from Construction Industry

- Bob's Home Rehab established by a married couple, Bob and Nancy Smith in 2005 purchased distressed properties, renovated them, and then sold them to individuals or investors. Bob handled the purchasing decisions and oversaw the construction crews. Nancy managed the office with the help of her niece, Liz, who was responsible for most of the business bookkeeping responsibilities, including payroll. All three had check signing authority on the company bank account, but Bob and, sometimes, Nancy made the big financial decisions for the business. In addition, they had a small staff of 5-7 full-time employees as well as numerous independent subcontractors hired for each renovation job.
- When the recession hit, Bob struggled to maintain stable financing for purchasing homes and remodeling supplies. Buyers for the properties they did manage to renovate were scarce. Bob's Home Rehab continued to withhold employment taxes as required but by the time the quarterly payments were due, there was never enough money in the bank account to pay IRS. Other creditors also went unpaid and the business rapidly declined. Hot checks were written to several suppliers and

³ Scott Shane, *The Great Recession's Effect on Entrepreneurship*, FEDERAL RESERVE BANK OF CLEVELAND (Mar. 24, 2011), <http://www.clevelandfed.org/research/commentary/2011/2011-04.cfm>

⁴ Elizabeth Laderman, *Small Businesses Hit Hard by Weak Job Gains*, FEDERAL RESERVE BANK OF SAN FRANCISCO (Sep. 9, 2013), <http://www.frbsf.org/economic-research/publications/economic-letter/2013/september/small-business-job-growth-employment-rate/>

⁵ Internal Revenue Service, *SOI Tax Stats - Civil Penalties Assessed and Abated, by Type of Tax and Type of Penalty - IRS Tax Stats Table 17*, <http://www.irs.gov/uac/SOI-Tax-Stats-Civil-Penalties-Assessed-and-Abated-by-Type-of-Tax-and-Type-of-Penalty-IRS-Tax-Stats-Table-17> (last visited Nov. 8, 2014).

contractors went unpaid, eventually contractors foreclosed materialmen's liens on the remaining homes.

- Bob and Nancy shut down the business in late 2008. The couple was left with no savings and only a few personal assets jointly owned. Bob went to work as a manager for a large retail supply store, and Nancy found a part-time job as a receptionist. Liz went back to community college full-time. The stress resulted in a separation for Bob and Nancy. By this point, almost a year had passed since any employment taxes were paid and the IRS was sending threatening letters. In early 2009, after each was interviewed, the IRS proposed individual TFRP assessments against Bob, Nancy, and Liz of approximately \$23,000 each.
- Who should be held liable for the TFRP?

III. General Advocacy Tips for Challenging TFRP Assessments

a. Case Planning (*each will be discussed in separate paragraph*)

- *Gather Evidence*
- *Look at Controlling Case Law in Jurisdiction*
- *Analyze Law & Facts*

Evidence Gathering

- Entity Formation Documents
- Written Agreements Among Principals
- Records of Business Income and Expenses (Electronic & Paper)
- Bank Statements
- Federal and State Employee/Payroll Records
- Tax Returns and Other Tax Filings/Records (Personal & Business)
- Loan Documents
- Public Filings with Secretary of State or County
- Filings with any Licensing Agencies
- Credit Reports
- Emails and Other Written Communications Among Principals
- Complete a Preliminary IRS Collection Information Statement
- If Post Assessment Representation, Request all Information Related to Assessment of Client and Other Responsible Persons via a FOIA.

Research Precedent in Various Jurisdictions

- There are almost 4,000 cases that reference IRC § 6672.

- Cases are extremely fact intensive and therefore case law varies greatly – sometimes even within the same jurisdiction.
- Various appellate jurisdictions do not give equal weight to the factors mentioned above.
 - Ex: Under Fifth Circuit precedent, check signing authority alone is essentially dispositive as to the question of whether someone is a “responsible person.” *See, e.g., Howard v. United States*, 711 F.2d 729 (5th Cir. 1983).
- Some jurisdictions permit the taxpayer to utilize reasonable cause arguments as a way to avoid liability, others do not.

Analyze Law & Facts

- Develop Case Theory & Arguments
- Ex: Liz was not a responsible person as defined in IRC § 6672. She was simply the bookkeeper for Bob’s Home Rehab. She has a high school degree and has completed only one year of community college. Her bookkeeping knowledge comes from her training with Nancy. She trusted her aunt and uncle with regard to their business decisions and respected their authority at the office. Despite her ability to sign checks and her responsibility to keep company records and handle payroll, she never exercised any independent judgment over which creditors to pay over others. Liz did what she was told and had no authority to pay any bill, including IRS bills, unless directed to do so. She had no ownership interest in Bob’s Home Rehab and was not involved in hiring, nor firing, employees or contractors.
 - **Practice tip:** Even if main argument is that the taxpayer is not a responsible person, it’s still a good idea to include fact and argument related to willfulness element.
 - Example: *Assuming arguendo* Liz is a responsible person, her actions/inactions were not willful because she had no control over decisions regarding the order in which creditors were paid. Bob as the owner of the business made all such decisions.

b. Potential Arguments Against Client’s Status as “Responsible Person”

- Although client may have paid creditors, handled payroll, and dealt with tax returns/deposits, he/she acted under the direction of a boss or principal decision maker.
- Client was a minority shareholder and did not control voting stock/rights.
- Client was an investor/partner etc. but had no involvement in day-to-day operations.
- Client was not a key player in ultimate financial decisions of the company.
- Client did not control the finances.
- Client may have had check signing authority but never exercised it.
- At the time period at issue, client had lower level of responsibilities/duties.

- Client was consulted about strengths and weaknesses of applicants but did not actually make any hiring or firing decisions.

c. Potential Arguments Against Client’s Status as “Willful”

- Client had no knowledge that the taxes were owed/not paid.
- Client’s actions or inactions were negligent, not reckless.
- Client did not make decisions about which creditors to pay over others.
- There was no money available to pay the IRS when the quarterly employment taxes were due.

IV. TFRP Service Level Procedures & Challenges to Assessment⁶

a. IRS Assessment Procedures & Pre-Assessment Strategies *(each will be discussed in separate paragraph)*

- *Notices to Business*
- *Revenue Office (RO) Investigation of Individuals*
- *Proposed Assessment Letter (60 Day)*
- *IRS Appeal Rights*
- *Assessment*

Notices to Business

- Federal Tax Deposit (FTD) Alerts & Notice: Service has a program to identify businesses delinquent on employment tax deposits or filing requirements and refers the business names to local offices for follow-up.
 - Local office sends the business FTD Alter Notice.
- If unanswered, Revenue Officer (RO) is assigned to business for full investigation into compliance problems. RO attempts to get company into compliance.
 - Form 930 Possibly Sent to Business: directs employer to set-up special trust account for deposit of employment taxes.
 - If business cannot get into compliance, next step is investigation of potentially responsible persons for assessment of individual liability.

RO Investigation of Potentially Responsible Individuals

- RO will examine bank records and other records of the company.
 - May use administrative summons power to get needed records.
- Letter 3586 from RO sent to potential responsible persons (or witnesses) setting a meeting.

⁶ See generally I.R.M. 5.7.

- Informs individual that purpose of meeting is to discuss duties and responsibilities as an officer or employee of business in default for specified tax periods.
- Informs individual that he/she may bring representative.
- Requests individual bring records such as:
 - bank/signature cards
 - Cancelled checks
 - Bank Statements
 - Meeting minutes
 - Other company records
- Included with letter is Notice 784, *Could You Be Personally Liable for Certain Unpaid Federal Taxes* and directs individual where he/she may obtain a copy of IRC 6672.
- Interview of Officers and/or Employees
 - RO will use Form 4181, *Questionnaire Relating to Federal Trust Fund Tax Matters of Employer*, for potential witnesses who have information against parties likely to be assessed TFRP(s).
 - RO will use Form 4180, *Report of Interview with Individual Relative to Trust Fund Recovery Penalty*, during interview of person likely to be assessed a TFRP.
 - This form is very important for both the taxpayer and the government in these cases, thus **great care should be exercised regarding completing the form during the interview, and signing it at the conclusion of the interview.**
 - Representative may advise the taxpayer not to complete the Form 4180 during an interview at IRS office.
 - Depends on the facts of case, relationship with appeals officer, and likely perceptions regarding the specific taxpayer.
 - Representative can offer to complete form with the taxpayer outside presence of RO, although RO may not accept this suggested approach.
 - If completed during interview, the taxpayer will be asked to sign interview form under penalties of perjury.
 - **No requirement to sign.**
 - An authorized representative can attend the interview along with the taxpayer, **or on behalf of the taxpayer.**
 - RO cannot compel client attendance unless administrative summons.

- Representative can provide necessary documents and other information as requested.
- After conclusion of investigation RO will decide whether to proceed with proposed assessment, which requires manager approval.

Proposed Assessment Letter

- RO sends Letter 1153, which proposes assessment of penalty under IRC 6672 for specified tax periods. The letter contains the following information:
 - Individual may agree to assessment by signing an enclosed Form 2751.
 - Individual has IRS Appeal rights if a protest (formal or informal) is filed within **60 days**.
 - Individual has right to have an authorized representative participate in the appeal process.
 - Individual has right to court review with and without a special bond in the event the individual disagrees with the decision reached by IRS Appeals.

IRS Appeal Rights: Challenging the TFRP Pre-Assessment

- **File a protest within the 60 day period** challenging the assessment, which sets out factual and legal arguments against the imposition of the TFRP.
- Include any relevant **documentary evidence that supports your case**, including records and affidavits as warranted.
 - Letter 1153 will have specific directions regarding what information the IRS is looking for in the TFRP protest.
 - **Practice tip:** since the vast majority of these type of assessments will exceed \$25,000, pay special attention that the protest contains all the necessary statements needed in a formal written protest.
- Conference will occur with Appeals Officer
 - Appeals Officer will send Letter 4141 explaining appeals process, which will be followed by another letter setting time, date, and location of conference.
 - Second appeals letter may contain a statement of preliminary findings in response to the protest containing law and fact analysis.
 - Any additional materials for appeals to consider should be sent at least 5 days before the scheduled conference.
 - **Conference is informal** and representative may again decide with taxpayer **whether the taxpayer's presence is a good idea**.
 - During the conference, or soon after, may be an appropriate time to consider submitting a **qualified settlement offer** under IRC § 7430.
- After the conference, appeals will send a letter **either sustaining the original proposed TFRP, accepting the proposed settlement, or offering a hazards of litigation settlement**.

- Usually given approximately one week to decide whether to accept appeals settlement offer.
- If Appeals does not receive a response or no agreement can be reached, the case will be returned to the Collection Area Director for assessment.
- Appeals Officer will send a final letter informing the taxpayer of the assessment decision and advising full payment.
 - The letter also outlines claim for refund procedures and options for court review (with or without payment of bond).
- **Practice Tip:** Mediation may be available while case is still in Appeals if settlement discussions are unsuccessful. *See* Rev. Proc. 2014-63. A written request for mediation must be sent to the appropriate Appeals Team Manager. *Id.*
- Note – interest will not begin to accrue on any TFRP amounts until the formal assessment occurs, so exercising appeal rights has the benefit of postponing interest charges.

Assessment

- The taxpayer is notified of the assessment when he/she receives the first bill for the unpaid penalty, which indicates the Employer Identification Number (EIN) associated with the unpaid taxes, tax form (941), tax period, and amount due.
- If more than one tax period is assessed, a separate bill will likely be sent for each tax period.
- If the bill goes unpaid after approximately 20 days, interest will begin to accrue.

b. Challenging the TFRP Post-Assessment (*each will be discussed in separate paragraph*)

- *IRS Appeals*
- *Traditional Collection Alternatives*
- *Administrative Refund Claims*

IRS Appeals

- If appeals rights were not exercised pre-assessment, taxpayer will still likely have opportunity to go to IRS Appeals post-assessment by filing a refund claim.
- Appeals is an important step for exhausting administrative remedies.

Traditional Collection Alternatives

- **Offers In Compromise (OICs), Installment Agreements (IAs), Partial Payment Installment Agreements (PPIAs)** and even **Currently Not Collectible (CNC)** may be suitable in certain cases.
 - Most appropriate if taxpayer is low-moderate income with limited to no assets.

- Ultimately, these options be most time/cost efficient method for handling TFRP assessments.
- If taxpayer still wishes to address issue of underlying liability but appeal rights have passed, consider the option of an **OIC Doubt as to Liability**.
 - If unsuccessful, taxpayer does have administrative appeal rights and, also, may generally still file a refund claim/suit.
 - But keep in mind that the passage of time tends to have a negative effect on the preservation of evidence and availability of witnesses.

Administrative Refund Claims⁷

- Administrative refund claim is a prerequisite to court review. **Two step process for taxpayer:**
 - 1) Taxpayer must first pay a “divisible” amount of the penalty for each assessed quarter to IRS.
 - 2) Taxpayer requests a refund of amount(s) paid and abatement of the TFRP assessment(s).
- Service may either respond with a Notice of Disallowance or take no action.
- Upon receipt of Notice of Disallowance or the passage of 6 months with no response, refund suit can filed.
- Refund SOL requires the refund suit to be filed within 2 years of payment.
- **Practice Tip:** Any payments made should include specific instructions to the IRS regarding how the payment(s) should be credited.

d. Divisible Tax Doctrine

- A TFRP assessment represents a cumulation of separate employee assessments, thus any portion of the TRFP assessment attributable to the failed remittance for a single employee is considered a divisible tax.
- Under this doctrine, taxpayer may pay a **portion of the withholding taxes attributed to a single employee** to form the basis of a refund suit. *See Steele v. United States*, 280 F.2d 89 (8th Cir. 1960); *Boynton v. United States*, 566 F.2d 50 (9th Cir. 1977).
- Exception to the *Flora* full payment rule for refund suits.
- **Practice Tip:** This divisible portion should be paid for each quarter assessed to mitigate potential challenges later to jurisdiction and forum choice.

V. TFRP Refund Litigation

a. Where to File the Suit

- Two options for refund litigation: ⁸

⁷ See generally I.R.C. § 7422 (Civil Actions for Refund); Treas. Reg. § 301.6402-2 (Claims for Refund).

- 1) Local **United States District Court** where taxpayer resides, or
- 2) **United States Court of Federal Claims**
- Precedent in this area of the law in local appellate jurisdiction vs. federal circuit should be the guiding factor for this decision.

b. Pretrial Issues (*each will be discussed in separate paragraph*)

- *Jurisdiction*
- *Maintaining Choice of Forum*
- *Discovery*
- *Pretrial Briefing*

Jurisdiction

- Government may file Rule 12(b)(1) Motion and challenge subject matter jurisdiction for failure to pay a sufficient divisible tax payment equal to one employee's assessment for the quarters at issue.
- Plaintiff should try and avoid such a challenge by making payments large enough to cover at least one employee's portion of employment taxes and federal income tax withholding for all quarters assessed.
 - Payroll or other evidentiary records
- If, despite diligent attempts, the taxpayer is unable to secure records to establish whether a precise figure paid is sufficient to cover the TFRP assessment(s) attributable to one employee, a court may permit the payment(s) to stand as a representative amount of the divisible tax. *See, e.g., Kaplan v. United States*, 115 Fed. Cl. 491 (2014).
- Challenges to jurisdiction may come at any time.

Maintaining Choice of Forum

- Plaintiff's choice of forum may be challenged, particularly if other responsible persons are assessed and case is filed in the United States Court of Federal Claims.
- The government's most popular vehicle to challenge venue is to move to suspend the proceedings in the court plaintiff filed suit and simultaneously file a separate lawsuit to reduce the TFRP assessments to judgments against plaintiff and another assessed party in the federal district court where the business operated.
 - Main argument is judicial economy.
- Plaintiff may oppose this motion and move for an injunction against this later-filed suit by utilizing IRC § 6331(i)(4)(A). *See Beard v. United States*, 99 Fed. Cl. 147 (Fed. Cl. 2011).

⁸ *See* 28 U.S.C. § 1346.

- Based on recent district court cases in various jurisdictions, plaintiff's chances of success are high, although no appellate circuit has yet weighed in on interpretation of this code provision.
- Taxpayer will also have to file a Rule 12 motion in the second federal district court to prevent litigation from moving forward in that forum.

Discovery

- Once the taxpayer files a complaint, settlement with the Tax Division of the DOJ is not likely until the discovery process is complete.
- Plaintiff should be prepared to respond to, and request, the following:
 - **Rule 26 Disclosures**
 - **Requests for Production**
 - In TFRP cases, an exception to IRC 6103 (disclosure statute) permits all parties assessed to have information pertaining to the assessment and collection of the tax for all individuals deemed responsible as a result of the company's failure to withhold/remit employment taxes.
 - If not previously secured via a FOIA request, plaintiff should request all documents relating to any liability of [names of all persons assessed] under IRC 6672 with respect to any business or entity, including but not limited to [name of entity and EIN].
 - This request should include language similar to the following, "such documents to include any records of IRS investigation, assessment, collection, and specifically to include all records of any payments by or on behalf of [names of all persons assessed] with respect to any such liability."
 - **Interrogatories**
- The government will also likely **depose** plaintiff and others deemed responsible persons for the same TFRP assessments.
 - Plaintiff will have an opportunity to ask the government's deponents questions.
 - Plaintiff might consider deposing the Revenue Officer (RO).
 - **Practice Tip:** Plaintiff should be mindful of the high costs of depositions when deciding whether to depose potential witnesses. Plaintiff is entitled to a copy of his or her own deposition at no cost but not deposition transcripts of other government deponents.

Pretrial Briefing

- Lots of briefing in refund suits!
- Be prepared to **fully brief challenges to venue** and, potentially, **jurisdiction or summary judgment** motions.

- If trial is scheduled, briefing will include the following pleadings:
 - Joint Stipulation of Facts
 - Joint List of Exhibits
 - Plaintiff's Contested Factual Issues and Contentions of Facts
 - Plaintiff's Proposed Conclusions of Law
 - Plaintiff's Witness List
 - Plaintiff's Exhibit List
 - Objections to Defendant's Witnesses and Exhibits
- **Practice Tip:** If you wish to have example pleadings/briefs, find leading cases in jurisdiction through traditional research and then get on PACER and pull copies of the relevant pleadings filed in the case.
 - Only works for more recent cases, generally 7-10 years back depending on jurisdiction.

c. **Settlement vs. Trial**

- As with most tax litigation, the chances of settlement are fairly high, however; settlement will not likely come until late in the pre-trial litigation process, and DOJ Tax has several levels of bureaucracy concerning approval of settlement offers.
 - Consider filing a qualified settlement offer under IRC § 7430.
- Because TFRP cases are very fact-intensive, a trial before a judge (or jury if case is filed in local U.S. District Court vs. U.S. Court of Federal Claims) may be a more likely avenue for suitable relief than in other types of tax cases.

VI. **Pyramiding & Potential Criminal TFRP Cases**

a. **Pyramiding**

- Term for fraudulent practice where businesses withhold employment taxes from their employees but consistently fail to remit the taxes to the IRS.
- Persons involved in pyramiding businesses may shut down entities owing TFRP liabilities (possibly also file for bankruptcy) and then start new businesses under different names/type of entities and repeat the practice.
- DOJ Tax is filing more enforcement injunctions pursuant to IRC § 7402(a) in these types of cases to force compliance with employment tax laws.

Example Pyramiding Case

U.S. v. Sifuentes, d/b/a Simpson TV-VCR Repair, 2005 WL 3627339 (W.D. Tex).

In 2005, in San Antonio Texas, the government filed suit against Sifuentes, a sole proprietor (d/b/a Simpson TV-VCR Repair) requesting the issuance of a permanent injunction to require the defendant to: "(1) make timely employment tax deposits, (2) file timely federal employment and unemployment tax returns; [and] (3) file delinquent

employment tax returns and pay the taxes, interest, and penalties due on the liabilities shown on those returns. At the time the suit was filed, the Defendant had been delinquent on his quarterly payments of employment taxes since June of 1985, when he first began his business. Prior to this suit, the IRS has used at least five administrative collection and monitoring remedies in an attempt to collect past due taxes and enforce withholding requirements to no avail. The injunction was granted on summary judgment.

b. Criminal TFRP Cases

- Under IRC § 7202, willful failure to collect or pay over trust fund taxes tax can result in a felony charge, and, if convicted, imprisonment and a fine of up to \$10,000.
- Egregious violations of duty to withhold and remit employment taxes.
- Statutory elements are essentially same as IRC § 6702, but government's has to prove case under criminal burden of proof.

Criminal Case Example

U.S. v. Montemayor, 2013 WL 4459056 (S.D. Tex).

In 2013, in Laredo Texas, two owners of a home health care businesses (one a registered nurse) were indicted for failure to pay over to the IRS federal tax withholdings and FICA taxes allegedly withheld from employees' wages in violation of IRC § 7202. Both defendants were also charged with aiding and abetting the failure to pay over federal employment tax in violation of 18 U.S.C. § 2.

The indictment alleges, among other things, that “[d]uring the time period from about 2006 through at least 2011, the defendants . . . [diverted] corporate funds to cover nonbusiness expenses, including trips, entertainment, and the purchase of real estate, while, at the same time failing to pay over to the IRS payroll taxes withheld from . . . [their] employees.”