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Trust Fund Recovery Penalty (TFRP)


Upcoming Webinars

<p>What's New</p> <p>Tuesday, December 5, 2023 10 AM PST or 1 PM EST</p>	<p>Penalties An IRS Profit Center</p> <p>Thursday, December 14, 2023 10 AM PST or 1 PM EST</p>
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Meet the Team

David, Suzanne & Missi


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CPE Policy 

- Per NASBA regulations you MUST register for webinar and answer three of the four polling questions and be on the line for at least 50 minutes.
- CPE certificates will be emailed to those who qualify by the end of next week

IRS Solutions is registered with the National Association of State Boards of Accountancy (NASBA) as a sponsor of continuing professional education on the National Registry of CPE Sponsors. State boards of accountancy have final authority on the acceptance of individual courses for CPE credit. Complaints regarding registered sponsors may be submitted to the National Registry of CPE Sponsors through its website: www.learningmarket.org.


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Today our webinar will: 

- Review payroll taxes and be able to explain the trust fund recovery penalty to your clients.
- Understand why Congress has made it so easy to pierce the corporate veil.
- Discuss responsible and willful
- Figure out some good defenses to help your clients.

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Polling Question #1 



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**Trust Fund
Recovery Penalty
(TFRP)**

How to get away with murder!

Can you believe that some business owners cannot pay their bills?
Can you believe that some business owners do not pay their taxes?
Can you believe that some business owners do not turn over the funds they take out an employees paycheck to the IRS?

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How to get away with murder!

Have you ever told a client that they should incorporate to protect their personal assets from business liabilities?
If you did, did you remember to warn them of what could happen if they do not pay their payroll taxes?

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Trust Fund Taxes IRS Solutions SOFTWARE

Today we are going to discuss this issue that the IRS considers one of the most serious offences that the IRS deals with.

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Trust Fund Taxes IRS Solutions SOFTWARE

Trust fund taxes include employment tax, income tax withheld from your employees, and excise taxes you have collected. These taxes are called trust fund taxes because you collect them from another person, hold them in trust, and send them to the IRS.

It **does not** include the employer's matching portion of the Social Security and Medicare tax, nor does it include the penalties and interest that have been assessed to the business as part of the total employment tax liability.

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Trust Fund Portion IRS Solutions SOFTWARE

Payroll Taxes

TRUST FUND TAXES	NON-TRUST FUND TAXES
<ul style="list-style-type: none">+ Withheld income taxes+ FICA taxes <small>Federal Insurance Contribution Act</small>+ Railroad retirement taxes+ Collected excise taxes <small>which include taxes on certain communications services, indoor tanning services, certain transportation by air, and FIRPTA taxes. (This is not technically a payroll trust fund tax, but a trust fund recovery penalty can be assessed.)</small>	<ul style="list-style-type: none">+ Employer's share of Medicare taxes+ Employer's share of Social Security taxes <p><small>Note: The TRFP does not apply to an employer's share of Medicare and Social Security taxes because, while payroll taxes, they are considered non-trust fund taxes.</small></p>

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Trust Fund Portion

Employee earns \$85,000 in wages; Employer withholds \$15,000 in federal income tax. The trust-fund (withheld from employee) and non-trust-fund portions of the employment tax are:

Income Tax Withholdings	\$ 15,000.00
Social Security (12.4% wages)	
Employee's Share (6.2% wages)	\$ 5,270.00
Employer's Share (6.2% wages)	\$ 5,270.00
Medicare (2.9% wages)	
Employee's Share (1.45% wages)	\$ 1,232.50
Employer's Share (1.45% wages)	\$ 1,232.50
Total Employment Tax	\$ 28,005.00
Trust Fund Portion (Income Tax + Employee's Share of Medicare & Social Security)	\$ 21,502.50
Non-Trust Fund Portion (Employer's Share of Medicare & Social Security)	\$ 6,502.50

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Trust Fund Portion


Form 941	Total	EE Share
Withholding	\$ 400	\$ 400
SSI	\$ 1,000	\$ 500
Medicare	\$ 200	\$ 100
Trust Fund portion of tax = \$1,000		

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Trust Fund Taxes


If one of your employees gets a tax refund at the end of the year from the IRS, the IRS is obligated to pay your employee that money, even though the IRS never actually received the tax money. The IRS loses a lot of money on the deal, and they are going to go after whoever they can, to collect on this debt.

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Trust Fund Recovery Penalty 

The Trust Fund Recovery Penalty (**TFRP**) originates from a business employment tax liability. It is the portion of the back payroll tax that can be assessed to and collected from the individual persons of the business.


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Trust Fund Recovery Penalty 

The IRS pierces the so called "corporate veil" to reach the individual owners and sometimes non-owner's of the delinquent business.

Piercing the Corporate Veil is a situation in which courts/IRS put aside limited liability and hold a corporation's shareholders or directors personally liable for the corporation's actions or debts. The IRS does this administratively.

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Trust Fund Recovery Penalty 

A Trust Fund Recovery Penalty (TFRP) involves the collecting of employment/excise taxes by the IRS from the owners, corporate officers or others of a business that have failed to pay the employment taxes. The TFRP allows the government to reach parties otherwise shielded from tax liability, such as officers, shareholders, employees or a corporation, partnership or LLC, and in some cases, outside entities.

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Trust Fund Taxes



I try to explain this as follows:
You withhold money from your employee paychecks to pay their taxes to the IRS. You act as the collector of the taxes, and it is your responsibility to turn the money over to the government by certain deadlines. If you fail to do so, the government will view this as just a notch below robbery. You collected their money but didn't actually give to them.

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Sole proprietorship



Note: The TFRP is not needed to assert liability against the owner of a sole proprietorship because the individual owner is personally liable for employment taxes under IRC §§ 3101, 3402, and 3403. However, the TFRP may be needed to assert liability against an employee or other non-owner who exercises control over the finances.

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If the Corporation Can't Pay... Who Does?



- Regardless of a person's corporate title, a person will not be held liable for the TFRP unless he or she has the duty to account for, collect, and pay over the trust fund taxes to the government. Even an officer of the business will not be a responsible person if he or she is an officer in title only and has no substantive duties with the business.
- On the other hand, a person who has no corporate title but has control of financial affairs or controls payment of funds by the business, may be held responsible for the TFRP.
- A determination of liability **must take into account all facts and circumstances.**

IRM 5-17.7.1.1; O'Connor v. United States, 956 F.2d 48 (4th Cir. 1992)

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If the Corporation Can't Pay... Who Does?



Revenue Officers (RO) investigate and determine against whom to assess the TFRP.

They will assess this against all persons that they can show are both **responsible and willful**.

More than one person may be held responsible, not just the most responsible person.

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

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Polling Question #2



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Trust Fund Taxes



The Revenue Officer will:

- Attempt to collect full pay
- Compute the TFRP portion of tax
- Decide whom to assess against

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A person is liable for the TFRP if:



A person is liable for the TFRP if two statutory requirements are met:

- The person is "responsible" — had the duty to account for, collect, and pay over the trust fund taxes to the government; and
- The person "willfully" failed to collect or pay over trust fund taxes to the government.

IRM §5.17.7.1(4)

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TFRP is based on IRC §6672(a)



"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 on 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. No penalty shall be imposed under section 6653 or part II of subchapter A of chapter 68 for any offense to which this section is applicable."

IRM 5.17.7.1

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The TFRP serves three purposes



- It encourages prompt payment of income and employment taxes withheld from employees and other collected taxes;
- It makes the responsible person liable for 100% of the unpaid trust fund taxes; and
- It facilitates collection of trust fund taxes from secondary sources.

IRM §5.17.7.1(3)

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If the Corporation Can't Pay... Who Does?



The responsible person may be one or more of, but not limited to, the following:

- Officer or employee of a corporation
- Partner or employee of a partnership
- Employee of a sole proprietorship
- Corporate director
- Shareholder
- Another corporation
- Surety lender
- Limited Liability Company (LLC) member, manager, or employee
- Other person(s) or entity outside the delinquent business

• **Accountant!!!**

IRM 5-17.7.1.1

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Responsible Persons (TRP)



In general, the IRS is going to look for who had control over the finances, check signing authority, who decided which bills were paid and not paid, and who collected the taxes.

A "responsible person" is one 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.

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Responsible Persons (TRP)



Under § 6671(b), a responsible person "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 pay over taxes withheld.

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


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Letter 3586 

Letter 3586 is a letter used by IRS revenue officers to schedule a meeting with an individual for a Trust Fund Recovery Penalty (TFRP) interview. The key points about Letter 3586 are:

1. It is used specifically to schedule an appointment to conduct a TFRP interview using Form 4180.
2. The purpose of the interview is to gather information to determine if the individual meets the criteria for personal liability under IRC 6672 - meaning they had a duty to collect, account for, and pay over the trust fund taxes, and willfully failed to do so.
3. The interview covers topics like the individual's role in the business, their knowledge of the unpaid taxes, and their decision-making authority regarding financial matters and preference to other creditors.
4. The questions on Form 4180 will help establish responsibility and willfulness criteria needed to assert the TFRP against the individual.
5. Letter 3586 allows the revenue officer to formally schedule the required TFRP interview appointment in advance.

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Form 4180 Interview 

The Form 4180 is designed to help the Revenue Officer find out who may be assessed the TFRP (to get people to point fingers at each other).


This form is in the software under the individual that is being interviewed. The RO is supposed to conduct this interview.

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Polling Question #3 




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Ministerial Acts? 

IRM 1.2.1.6.3, Policy Statement 5-14 (Formerly P-5-60), Trust Fund Recovery Penalty Assessments states individuals performing ministerial acts without exercising independent judgment will not be deemed responsible. In general, non-owner employees who act solely under the dominion and control of others, and who are not in a position to make independent decisions on behalf of the business entity, will not be assessed the TFRP. Non-owner employees are those who do not own any stock, interest, or other entrepreneurial stake in the company that employs them.

IRM 5.7.3.4.1.2

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Ministerial Acts? 

Ministerial acts are performed under the supervision of someone else and do not require independent judgment or decision-making ability.

Example: The bookkeeper of a company is not an owner and is not related to an owner. They have check signing authority and pay all of the bills the treasurer gives them. They are not permitted to pay any other bills, and when there are not sufficient funds in the bank account to pay all of the bills, they must ask the treasurer which bills to pay. The bookkeeper is performing a ministerial act and should generally not be held responsible for the TFRP.


IRM 5.7.3.4.1.2

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Willful Persons (TFRP) 

Once the IRS determines that the individual is a responsible person, the next step is to determine whether the individual was “willful” in failing to pay the taxes to the IRS. Willful means that the responsible person **chose to pay other creditors instead of the IRS**, even though the individual knew, or recklessly disregarded, that the business was not paying the taxes. Willfulness **does not require evil intent or bad faith**.


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Willful Persons (TRFP) 

It is difficult to show that he or she should not have been aware of the tax issues or that the business was paying other creditors instead of the IRS.

The responsible person has limited defenses for a failure to pay.


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Not Enough Money 

If funds are not available to cover both wages and withholding taxes, a responsible person has a duty to prorate the available funds between the United States and the employees so that the taxes are fully paid on the amount of wages paid.

Hochstein v. United States, 1991 U.S. Dist. LEXIS 5317


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Don't Lend \$\$\$ to Cover Payroll 

Gail McClendon Plaintiff–Appellant, v. US
Appeal decided: June 14, 2018
Accountant embezzled \$10 million and did not pay quarterly tax for 21 quarters before the office learned about it.
Dr. McClendon loaned the company \$100k to cover payroll.
Dr McClendon & accountant were assessed \$4.3 million in TFRP


<https://caselaw.findlaw.com/us-5th-circuit/1898635.html>

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Time Frame (ASED) to Assess 


Assuming Forms 941, Employer’s Quarterly Federal Tax Return , or comparable returns were timely filed, the IRS has **three years to assess the TFRP from the April 15 that succeeded the return’s due date** (IRM §5.7.3.5). If the business’s return was filed after the due date, the statute of limitation begins to run from either the April 15 that succeeded the return’s due date or three years from when the return was actually filed, whichever is later.

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Time Frame (ASED) to Assess 


There is no ASED however if false or fraudulent returns and returns prepared by the IRS under Sec. 6020(b)(1) do not start the running of the statute.

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Time Frame (ASED) to Assess 

Form	Quarter	Due Date	Presumptive Filing Date	Filed	ASED
Form 941	2019-06	7/31/2019	4/15/2020	7/31/2019	4/15/2023
Form 941	2022-09	10/31/2022	4/15/2023	10/15/2023	4/15/2026
Form 941	2022-12	1/31/2023	4/15/2023	8/11/2023	8/11/2023
Form 941	2023-03	4/30/2023	4/15/2024	4/1/2023	4/15/2027
Form 941	2010-06	7/31/2010	4/15/2011	N/A	No ASED


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Time Frame (ASED) to Assess 

Under IRC § 6672(b)(3), the assessment statute may be **extended when the IRS mails or hand delivers the L-1153, Notice of Proposed Trust Fund Recovery Penalty, to the taxpayer.** Specifically, IRC § 6672(b)(3) provides that if the assessment statute is open when the Service mails or delivers in person the L-1153 to a responsible person, the assessment statute shall not expire before the later of the following dates:
The date 90 days after the L-1153 and supporting documents were mailed or hand delivered to the responsible person, or
If the person files a timely protest of the proposed TFRP, the date 30 days after Appeals makes a "final administrative determination " regarding the proposed penalty.

IRM 5.17.7.1.8


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Time Frame (ASED) to Assess 

EXAMPLE: The limitations period for assessing the TFRP against the taxpayer will expire on April 15, 2010. The revenue officer hand delivers the L-1153 to the taxpayer on April 1, 2010. Because the assessment statute was open when the L-1153 was delivered to the taxpayer, the statute is extended to the date that is 90 days after April 1, 2010 (which is June 30, 2010), unless the taxpayer files a timely protest. If the taxpayer files a timely protest, then the assessment statute will not expire until the date that is 30 days after Appeals makes a final determination regarding the proposed penalty, assuming that date is after June 30, 2010.

IRM 5.17.7.1.8

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Designated Payments on Payroll Taxes 

The IRS will apply the funds in the governments best interest (which is not always the same as the taxpayer).

We have the ability to make **designated payments if they are voluntary** (tell the IRS how you want these monies applied)

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Designated Payments on Payroll Taxes



To properly make a designated payment, you need to specifically tell the IRS how to earmark it.

1. In the memo portion of your check, insert your tax identification number, the tax form to which your payment relates (i.e., "Form 941") and the tax year and period you want to pay (Year & Quarter), the amount and to apply to Trust Fund Portion Only.
2. A cover letter should accompany your check stating the same information. Keep a copy of the cover letter and your cancelled check as proof of the designation.

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Table 2, Top Ten Civil Penalties Assessed During FY 2003-2005 and Abated as of March 2008¹⁹


	Assessed		Abated		Percent abated	
	Number	Amount (\$1,000s)	Number	Amount (\$1,000s)	Number	Amount
Failure to pay (§ 6651(a)(2), (3))	47,337,508	\$11,001,879	5,877,006	\$3,209,028	12%	29%
Failure to file (§ 6651(a)(1))	14,161,272	\$12,570,853	1,873,190	\$5,108,146	13%	41%
Failure to deposit (§ 6656)	7,742,953	\$12,325,807	1,135,163	\$7,780,072	15%	63%
Estimated tax - individual (§ 6654)	6,066,799	\$1,761,347	388,184	\$383,270	6%	22%
Bad check (§ 6657)	863,262	\$115,642	45,766	\$64,148	5%	55%
Accuracy-related (§ 6662)	729,808	\$2,419,503	82,609	\$906,309	11%	37%
Trust Fund Recovery (§ 6672) ²⁰	628,359	\$6,050,255	313,896	\$2,242,780	50%	37%
Failure to file info. returns (§ 6721) ²¹	416,165	\$7,295,919	162,688	\$6,284,441	39%	86%
Estimated tax - corporate (§ 6655)	251,665	\$382,596	25,243	\$244,161	10%	64%
Daily delinquency (§ 6652(c)) ²²	246,689	\$712,338	179,686	\$599,266	73%	84%
Other	86,879	\$1,821,397	16,251	\$1,206,338	19%	66%

Things to Consider!




The main defense you have for negotiating an assessment of the TFRP against your client is proving that they were not a responsible and/or willful person in trust fund tax evasion. However, this defense is to the detriment of other potentially responsible persons. *Someone has to be found liable*, so if it's not your client, it will be someone else.

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TAX CRIMES: EMPLOYMENT TAXES 

I.R.C. § 7202 - WILLFUL FAILURE TO COLLECT OR PAY OVER TAX 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, **be fined* not more than \$10,000, or imprisoned not more than five years, or both**, together with the costs of prosecution.


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Letter 903 

Cases involving repeater and pyramiding taxpayers will often require enforcement action. According to [Section 7202 of the Internal Revenue Code](#), the willful failure to collect, truthfully account for, or pay employment taxes constitutes a federal crime. This is **punishable by fines of up to \$10,000 or up to five years of imprisonment**. Additionally, those found guilty of this crime may be liable for prosecution expenses.

IRM 5.7.2 Collections: Trust Fund Compliance: Letter 903 Process

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IRC §6672 v IRC §7202 

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.

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Nonpayment Was Not Willful



A district court has found that a nursing home officer's failure to pay withholding taxes was not willful as a matter of law. The officer paid other creditors before the IRS while trying to comply with mandatory federal and state regulations that required him, despite a severe cash flow problem, to keep the nursing homes operating at the existing standard of care.

Preimesberger V. United States (1:19-cv-01441), California Eastern District Court, August 5, 2020

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Currently Not Collectible – Individual



If there is no present or future collection potential after reviewing and verifying the financial information, do not recommend assertion of the TFRP.

Note: Information secured as part of the collectability determination, including the analysis of the factors must be included in the TFRP case file.

IRM 5.7.5.3.1

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Polling Question #4



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Trust Fund Recovery Penalty (TFRP)

The image features a collage of digital content including a laptop displaying the IRS Solutions website, a smartphone showing a social media post, and a document titled 'SOCIAL CALENDAR'.

Upcoming Webinars

What's New	Penalties An IRS Profit Center
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Thank You

The image features a collage of business documents, including a laptop, a smartphone, and various charts and graphs.
