IRS Solutions SOFTWARE
A Tax Pro's Best Friend

The IRS is trying to collect my corporate liabilities from ME!

Upcoming Webinars

What's New What's Cool
Tuesday, March 11, 2025
10 AM PST or 1 PM EST

Can Filing Bankruptcy Discharge my Tax Liability?
Thursday, March 27, 2025
10 AM PST or 1 PM EST

Meet the Team

IRS Solutions SOFTWARE

David, Suzanne & Cindy

www.irssolutions.com

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.
- Must answer 3 out of the 4 questions and be on line for at least 50 minutes.

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.

www.irssolutions.com

A Tax Pro's Best Friend

The IRS is trying to collect my corporate liabilities from ME!

After completing this course:

- Identify the scope of the trust fund recovery penalty.
- Know what the IRS is looking for in “responsible person” and “willfulness”.
- Know how to compute the trust fund portion of the taxes.
- Be able to argue defenses to not assess the TFRP against your client.

www.irssolutions.com

Polling Question #1

www.irssolutions.com

Trust Fund Recovery Penalty

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?

www.irssolutions.com

Trust Fund Recovery Penalty

Taxpayers hold the misconception that by operating as a Corporation, their personal assets are protected by the "corporate veil." While this is often accurate in many cases, there is an exception when it comes to Federal (and in most states) payroll and excise taxes.

If a Corporation fails to remit income tax withholding and withheld Social Security taxes, the IRS retains the authority to, and typically does, pursue collection from officers, directors, stockholders, key employees, and any other individuals who may be held liable for the Trust Fund Recovery Penalty (TFRP) under Internal Revenue Code Section 6672(a).

www.irssolutions.com

IRC §6672

IRC §6672 Failure to collect and pay over tax, or attempt to evade or defeat tax

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.

Trust Fund Taxes

Subject to IRC §6672
- Withheld income taxes
- Withheld Social Security and Medicare taxes
- Railroad retirement taxes
- Collected excise taxes

Not Subject to IRC §6672
- Income taxes
- Employer's portion of Social Security and Medicare taxes
- Corporate Income Taxes
- Federal Unemployment taxes

Trust Fund Recovery Penalty

The Trust Fund Recovery Penalty (TFRP) is a powerful IRS collection tool that bypasses traditional business liability protections. When a business fails to pay employment or excise taxes the IRS may collect from the owners, corporate officers or others of a business that has failed to pay the employment taxes.

The TFRP allows the government to reach parties otherwise shielded from corporate liabilities, such as officers, shareholders, employees or a corporation, partnership or LLC, and in some cases, outside entities.

Trust Fund Recovery Penalty

I try to explain this as follows:

As an employer, you serve as a trustee for employee tax withholdings. When you deduct taxes from employee paychecks, you're holding these funds 'in trust' until they're transferred to the IRS. This isn't your money - you're essentially a middleman between your employees and the government.

Failing to remit these trust fund taxes is considered a serious violation.

The IRS must still honor employee tax credits and refunds, even if you never sent in their withholdings

www.irssolutions.com

Trust Fund Recovery Penalty

This creates a double loss for the government:

- They never received the original withholdings
- They must pay out refunds based on those withholdings

This is why the Trust Fund Recovery Penalty is so severe. The IRS can personally assess responsible individuals for 100% of the unpaid trust fund taxes, even piercing the corporate veil to protect government revenue and deter non-compliance.

www.irssolutions.com

Polling Question #2

www.irssolutions.com

IRC §6672 – A person is liable for the TFRP if:

The IRS must prove two key elements to hold someone personally liable for unpaid trust fund taxes:

- 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.

www.irssolutions.com

Responsible Person

Responsibility Test:

- Did this person have the duty and authority to handle payroll taxes?
- Could they make decisions about which bills to pay?
- Did they have control over the company's finances?

Examples of responsibility include:

- Signing tax returns
- Managing payroll
- Authority over bank accounts
- Check-signing power

www.irssolutions.com

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

www.irssolutions.com

Willfulness

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.

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.

Willfulness

- The IRS' view is that willfulness exists where "money withheld from employees as taxes, in lieu of being paid over to the Government, was knowingly and intentionally used to pay the operating expenses of the business, or for other purposes." Revenue Ruling 54-158
- The fact that there are insufficient funds to pay both employees and taxes is not a defense.

Trust Fund Recovery Interviews – Form 4180

IRS Form 4180 "Report of Interview with Individual Relative to Trust Fund Recovery Penalty"

- In person or by phone
- Usually conducted by a Revenue Officer
- Purpose: Determine if the person being interviewed is both responsible and willful and to get them to point fingers at others.

Trust Fund Recovery Interviews – Form 4180

This from asks a lot of yes/no questions and does not allow for explanations. We recommend:

Prepare your own Form 4180 with little written explanations in the little space we have next to the "Yes/No" or on the attached page and mail copies of our version to both the revenue officer and their group manager with a request for them to memorialize this copy of the Form 4180, which contains our client's complete answers to the questions rather than partial "Yes/No" answers.

Polling Question #3

Collect from Whom

The Service may collect trust fund taxes only once, whether from the business, from one or more of its responsible persons, or from the business and one or more responsible persons.

IRM §5.17.7.1(5)

Court Cases – Losing Arguments

United States v. Hartman (2023)
- Court upheld TFRP assessment against CEO who claimed he delegated tax responsibilities
- Key finding: Delegation of duties doesn't eliminate responsibility if person retained authority and control

Laflamme v. United States (2023)
- Company owner held liable despite claiming economic hardship
- Court reinforced that using available funds for other business expenses instead of taxes constitutes "willfulness"

Court Cases – Losing Arguments

United States v. Lakeview Consulting (2022)
- Outside consultant held liable for TFRP
- Demonstrated that non-employees can be "responsible persons" if they have sufficient control over finances

Court Cases – Possible Winner

Romano-Murphy v. Commissioner (2021)
- IRS required to give notice and pre-assessment hearing.

Facts
- Letter 1153 issued and TP filed a timely protest with appeals.
- IRS's Office of Appeals did not hold a conference with P. Nor did the IRS make a final administrative determination with respect to the protest.
- On 10/15/2007, the IRS assessed the trust-fund-recovery penalty against P.

Court remanded Office of Appeals
- The assessment of the trust-fund-recovery penalty is invalid and we do not sustain the determination of the Office of Appeals.

152 T.C. No. 16 Docket No. 27236-09L

Sole Proprietor / Partnership LLC

A sole proprietor with a single-member LLC can be assessed the trust fund recovery penalty.

Although the LLC is disregarded for federal income tax purposes (insofar as it has not elected to be taxed as a corporation), it is a regarded entity for payroll tax purposes, meaning that only the LLC is liable for any past-due payroll taxes.

In this case, then, the IRS would have an incentive to assess the trust fund recovery penalty against the sole member of the LLC, and it often does in such cases.

Statute of Limitations to Assess the TFRP

- The IRS has three years from the later of the April 15 following the quarter in question or the actual date the payroll tax return was filed to assess the trust fund recovery penalty (ASED).
- The three years does not start ticking from the actual quarterly due dates for the 941s; the due date for trust fund recovery penalty statute of limitations purposes is the April 15 following the year for the quarters in question.

Statute to assess the TFRP

- Extenders
  - Form 2750 “Waiver Extending Statutory Period for Assessment…”
  - Bankruptcy of the responsible person
  - Issuance of a Letter 1153: 60-day notice of the proposed assessment and the right to request an appeal (the statute will not expire before the later of 90 days from mailing, or 30 days after the “final administrative determination” is issued).

Do NOT Lend Money 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

McClendon v. US

www.irssolutions.com

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, 900 F.2d 543 (2d Cir. 1990)

www.irssolutions.com

Since this is a penalty NO Tax Evasion

Defendant's argument was simple. Tax evasion requires a tax to be evaded (or, in the language of the statute attempted to be evaded). The TFRP, as stated in § 6672, is a "penalty" rather than a tax. Therefore, a person evading the TFRP is not evading tax and thus outside the scope of tax evasion.

United States v. Prelogar, 2018

www.irssolutions.com

But I was on Drugs

Petitioner began using cocaine in 1982. By 1983, his use became an addiction. He nonetheless continued to act as CEO of his company. Acting in that capacity during 1984, he sought financing and negotiated contracts on behalf of the company and took numerous business trips to attract new clients.

Judgment in the government's favor on its claim against petitioner. The court held that "voluntary intoxication may not as a matter of law negate an assertion that a person was responsible within the meaning of Section 6672, no matter the extent of that intoxication"

Robert Landau v. US, 1998

www.irssolutions.com

A WINNER – Non Payment 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

www.irssolutions.com

Voluntary Board Members of Tax-Exempt Org

No penalty shall be imposed by subsection (a) on any unpaid, volunteer member of any board of trustees or directors of an organization exempt from tax under subtitle A if such member

- is solely serving in an honorary capacity,
- does not participate in the day-to-day or financial operations of the organization, and
- does not have actual knowledge of the failure on which such penalty is imposed.

The preceding sentence shall not apply if it results in no person being liable for the penalty imposed by subsection (a).

IRC §6672(e)

www.irssolutions.com

Last Known Address

Envelope shows letter 1153 was sent to street address "5B" when the taxpayer actually lived at "58".

TP never received the notice giving him his appeal rights. If the judge agrees, IRS would need to send new 1153 and the statute has expired.

Other issues are involved (Bond posted but not treated as a bond)

Ahmed v. Commissioner, No. 22-10191 (3rd Cir. 2023)

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

Criminal

IRC §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, shall be fined not more than$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

IRC §7202 v. IRC §6672

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.

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

Trust Fund Recovery Penalty

- Yes, you can do an offer in compromise on a TFRP.
- Each responsible party is personally liable for the entire debt. The debt is paid off by one or multiple parties, then that settles the matter for everyone at that point; the aggregate amount of trust fund recovery penalty collected by the IRS cannot exceed the unpaid trust fund taxes because the trust fund recovery penalty is simply a mirrored assessment of the unpaid trust fund taxes at the entity level. If someone (or the business) pays the trust fund taxes everyone's off the hook at that point.

941 Tax Return Transcript

- IRS Newest transcript

Polling Question #4