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IRC § 6672: Trust Fund Recovery Penalty

1. Description: If an entity or person responsible for collecting taxes from a third party and paying them over to the government fails to do so, this section allows the government to assess the amount owed against the person responsible. This is referred to as a trust fund recovery penalty ("TFRP").
2. Purpose: Employees are allowed a credit for taxes withheld regardless of whether the employer actually remits the taxes to the IRS. I.R.C. § 31(a). Because the government would otherwise have no remedy other than against the employer, which may no longer exist, Congress enacted section 6672. Gephart v. United States, 818 F.2d 469 (6th Cir. 1987); United States v. Huckabee Auto Co., 783 F.2d 1546 (11th Cir. 1986).
3. Types of Taxes to which § 6672 applies: Section 6672 applies to taxes collected and paid over by a third party. It does not apply to taxes directly imposed on the person or entity required to pay them. For example, it does not apply to the employer's share of FICA or FUTA. I.R.C. §§ 3101 and 3301. It is normally applied to income tax withholding and FICA withholding, but it is broader than that. It could apply to gambling withholding, interest and dividends subject to backup withholding, certain federal excise taxes and any circumstance where a third-party is required to withhold tax from a taxpayer and pay it over to the IRS. See Rosenberg v. United States, 327 F.2d 362 (2d Cir. 1964); Traveler's Rent-A-Car, Inc. v. United States, 87-1 U.S.T.C. ¶ 9330(D. Haw. 1987).
4. No Requirement to First Attempt Collection from Employer: There is no requirement that the IRS first attempt to collect from the employer before asserting I.R.C. § 6672 liability against the responsible persons. United States v. Huckabee Auto Co., 783 F.2d 1546 (11th Cir. 1986); Hornsby v. Commissioner, 588 F.2d 952 (5th Cir. 1979). See 9. f. below, however.
5. Prerequisites for liability:
Liability under I.R.C. § 6672 attaches if an individual meets two requirements:
 - a) he or she must be a responsible person; and

b) he or she must willfully fail to pay over to the government the amount of taxes otherwise due. Cline v. United States, 997 F.2d 191 (6th Cir. 1993); McGlothin v. United States, 720 F.2d 6 (6th Cir. 1983).

6. Who is a responsible person?: This determination is made based on the individual's status, duty and authority in the context of the business which has not paid over the trust fund taxes. Thiboudeau v. United States, 828 F.2d 1499 (11th Cir. 1987), cert. denied, 506 U.S. 1050 (1993); George v. United States, 819 F.2d 1008 (11th Cir. 1987). A person need not actually be directly responsible for collecting and paying over tax to be a responsible person. United States v. Graham, 309 F.2d 210 (9th Cir. 1962); Slodov v. United States, 436 U.S. 238 (1978). It largely depends on control of payment of taxes and the ability to prefer a creditor over the IRS. Factors considered determinative of control include the following:

a. Whether a person has the power to avoid a default in the payment of the tax. Bowlen v. United States, 956 F.2d 723 (7th Cir. 1992); Harrington v. United States, 504 F.2d 1306 (1st Cir. 1974).

b. Whether the person has the power to control the decision making process regarding the allocation of funds to creditors. Gephart v. United States, 818 F.2d 469 (6th Cir. 1987); Haffa v. United States, 516 F.2d 931 (7th Cir. 1975).

c. Whether the person has the ultimate authority over the expenditure of funds. Godfrey v. United States, 748 F.2d 1568 (Fed. Cir. 1984); Bauer v. United States, 543 F.2d 142 (Cl. Ct. 1976).

d. Whether the person controls the corporation's financial decisions. Haffa v. United States, 516 F.2d 931 (7th Cir. 1975); Bauer v. United States, 543 F.2d 142 (Cl. Ct. 1976).

e. Whether the person has the "final word" regarding what bills or creditors are paid. Maggy v. United States, 560 F.2d 1372 (9th Cir. 1977), cert. denied, 439 U.S. 821 (1978); United States v. Graham, 309 F.2d 210 (9th Cir. 1962); Bauer v. United States, 543 F.2d 142 (Cl. Ct. 1976). Even if the person does not have the final word, significant control may be sufficient. Hochstein v. United

States, 900 F.2d 543 (2d Cir. 1990), cert. denied 504 U.S. 985 (1992); Gephart v. United States, 818 F.2d 469 (6th Cir. 1987); United States v. Rem, 38 F.3d 634 (2^d Cir. 1994).

f. Whether the person has the power to compel or prohibit the allocation of corporate funds. Godfrey v. United States, 748 F.2d 1568 (Fed. Cir. 1984); Haffa v. United States, 516 F.2d 931 (7th Cir. 1975).

g. As a corollary to the above rules, where an individual has no independent decision making authority and acts under the dominion and control of others, they will not be found to be responsible persons. United States v. Rem, 38 F.3d 634 (2^d Cir. 1994); Michaud v. United States, 97-2 U.S.T.C. ¶ 50,972 (Fed. Cl. 1997); IRS Policy Statement P-5-60. Also, see discussion at 9.a. and 9.e.

7. Specific Facts Considered In determining whether a person is responsible, Courts may consider or discuss certain facts, including the following:

a. Contents of corporate by-laws. Sometimes corporate by-laws will lay out the authority of the position of the person in question. Courts will consider this. United States v. Strebler, 313 F.2d 402 (8th Cir. 1963); but see Stewart v. United States, 90-1 U.S.T.C. ¶ 50,002 (Cl. Ct. 1989); Datloff v. United States, 252 F.Supp. 11 (E.D. Pa. 1966), aff'd, 370 F.2d 655 (3d Cir. 1966), cert. denied, 387 U.S. 906 (1967).

b. Stock ownership. Stock ownership may be indicative of responsible person status. See Williams v. United States, 931 F.2d 805 (11th Cir. 1991); McCarty v. United States, 437 F.2d 961 (Ct. Cl. 1971). Although the ownership must be combined with control over the corporation. Winchester v. United States, 686 F. Supp. 605 (E.D. Mich. 1987). A controlling shareholder probably cannot escape liability unless he can demonstrate a lack of knowledge of the tax delinquency. See, e.g., Tsouprake v. United States, 797 F. Supp. 962 (S.D. Fla. 1992).

c. Corporate officers. Being a corporate officer is generally indicative of responsible person status. Bolding v. United States, 565 F.2d 663 (Ct. Cl. 1977); Farris v. United States, 84-1 U.S.T.C. ¶ 9263 (Cl. Ct. 1984). If the

officer can demonstrate that he or she in fact lacked authority or control, the title itself is not determinative. Michaud v. United States, 97-2 U.S.T.C. ¶ 50,972 (Fed. Cl. 1997); De Alto v. United States, 98-1 U.S.T.C. ¶ 50,433 (Fed. Cl. 1998); Stewart v. United States, 90-1 U.S.T.C. ¶ 50,002 (Cl. Ct. 1989). Lack of financial control may be sufficient to escape liability, even if the person has control over other aspects of the corporation. Bernardi v. United States, 74-1 U.S.T.C. ¶ 9170 (N.D. Ill. 1973), aff'd 507 F.2d 682 (7th Cir. 1974), cert. denied, 422 U.S. 1042 (1975) (Vice President of Operations held not to be a responsible person because he had no responsibility for payroll or determining priority of payments, but was in fact in charge of other corporate operations); See, also, Bauer v. United States, 543 F.2d 142 (Cl. Ct. 1976).

d. Corporate Directors. Corporate directors are not necessarily responsible persons. Anderson v. United States, 91-2 U.S.T.C. ¶ 50,503 (S.D. Ohio 1992); Godfrey v. United States, 748 F.2d 1568 (Fed. Cir. 1984). They can be liable if the board possesses the requisite control over the payment of corporate obligations or other factors exist. United States v. Graham, 309 F.2d 210 (9th Cir. 1962). Also note that a person need not be a shareholder, director or officer to be liable for the TFRP.

e. Authority to sign checks. Where an individual has **independent** check writing authority, they will generally be found to be a responsible person. Gephart v. United States, 818 F.2d 469 (6th Cir. 1987); Burack v. United States, 461 F.2d 1282 (Ct. Cl. 1972); Whiteside v. United States, 92-2 U.S.T.C. ¶ 50,436 (Ct. Cl. 1992). However, signing checks where a superior directs who the checks are issued to will not create responsibility. In re DeMarco, 99-1 U.S.T.C. ¶ 50,213 (Bankr. M.D. Fla. 1999); Michaud v. United States, 97-2 U.S.T.C. ¶ 50,972 (Fed. Cl. 1997). The lack of this authority does not preclude a finding of responsible person if other factors are present. United States v. Graham, 309 F.2d 210 (9th Cir. 1962).

f. Day to day management. Day to day management of a corporation is indicative of responsible person status. Gephart v. United States, 818 F.2d 469 (6th Cir. 1987); Haffa v. United States, 516 F.2d 931 (7th Cir. 1975). It is

not determinative by itself, however. Brown v. United States, 130 B.R. 456 (W.D. Pa. 1991); United States v. Bloom, 92-2 U.S.T.C. ¶ 50,377 (D. Haw. 1992). In both Brown and Bloom, the individual lacked the ability to determine priority of payments to creditors. Similarly, the absence of day-to-day management responsibility does not preclude responsible person status where the individual has the authority to see that taxes are paid. Bowlen v. United States, 956 F.2d 723 (7th Cir. 1992); Stettler v. United States, 98-1 U.S.T.C. ¶ 50,136 (10th Cir. 1998).

g. Hiring and firing. Hiring and firing authority has been cited as a factor. George v. United States, 819 F.2d 1008 (11th Cir. 1987). Again, this authority is not dispositive and must be held in connection with other powers.

h. Authority to sign tax returns. The authority to sign and file tax returns is also a factor. Datloff v. United States, 252 F.Supp. 11 (E.D. Pa. 1966), aff'd, 370 F.2d 655 (3d Cir. 1966), cert. denied, 387 U.S. 906 (1967); United States v. Strebler, 313 F.2d 402 (8th Cir. 1963). The signer of a return will not be a responsible person where he or she had no independent authority over the corporation's finances. Bernardi v. United States, 74-1 U.S.T.C. ¶ 9170 (N.D. Ill. 1973), aff'd 507 F.2d 682 (7th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

i. Unexercised authority. Some courts have held individuals to be responsible persons, because they had the authority to control the corporation, even if they did not exercise it. Larson v. United States, 76 F. Supp. 2d 1092 (E.D. Wash. 2000); Wetzel v. United States, 92-1 U.S.T.C. ¶ 50,217 (S.D. Miss. 1992). This is a minority view. Most courts believe that the power must be exercised. In re Premo, 90-2 U.S.T.C. ¶ 50,396 (Bankr. E.D. Mich. 1990). Although it seems more to go to willfulness, Courts do seem to find a person responsible who has unexercised authority, found out about tax delinquencies, and did nothing. Wetzel v. United States, 92-1 U.S.T.C. ¶ 50,217 (S.D. Miss. 1992); Schweitzer v. United States, 61-1 U.S.T.C. ¶ 9285 (D. Neb. 1961); See also 8.c.

j. Knowledge. Knowledge of unpaid taxes, without status, duty or authority, will not cause a person to take on the

status of being "responsible." Davis v. United States, 961 F.2d 867 (9th Cir. 1992). Thiboudeau v. United States, 828 F.2d 1499 (11th Cir. 1987), cert. denied, 506 U.S. 1050 (1993).

k. Family relationships. Courts will take into consideration family relationships, where a family member dominated another family member who might, on paper, appear to have otherwise had control. Barrett v. United States, 580 F.2d 449 (Ct. Cl. 1978).

8. Willfulness: Section 6672 requires that the responsible person "willfully" failed to account for and pay over the required taxes. Willfulness does not require specific criminal intent or evil motive. Thomas v. United States, 41 F.3d 1109 (7th Cir. 1994). Willfulness will be found in three circumstances:

a. Deliberate choice. Willfulness exists where the responsible person makes the deliberate choice to pay withholding taxes to other creditors, instead of paying the taxes over to the government. See Howard v. United States, 711 F.2d 729 (5th Cir. 1983); Mazo v. United States, 591 F.2d 1151 (5th Cir. 1979).

b. Knowledge of nonpayment of taxes. Willfulness exists if the responsible person obtains knowledge of a withholding tax delinquency and continues to permit payments to be made to other creditors. Gephart v. United States, 818 F.2d 469 (6th Cir. 1987); Stettler v. United States, 98-1 U.S.T.C. ¶ 50,136 (10th Cir. 1998); Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), cert. denied 400 U.S. 821 (1970).

c. Reckless disregard. Willfulness exists where the responsible person acts with a reckless disregard of a known or obvious risk that withholding taxes will not be remitted, including failing to investigate or correct mismanagement after being notified that withholding taxes have not been paid. George v. United States, 819 F.2d 1008 (11th Cir. 1987); Denbo v. United States, 988 F.2d 1029 (10th Cir. 1993); Honey v. United States, 963 F.2d 1083 (8th Cir. 1992), cert. denied, 506 U.S. 1028 (1992); Godfrey v. United States, 748 F.2d 1568 (Fed. Cir. 1984); Mazo v. United States, 591 F.2d 1151 (5th Cir. 1979), cert. denied

sub. nom Lattimore v. United States, 444 U.S. 842 (1979); Kielisch v. United States, 86-2 U.S.T.C. ¶ 9631 (E.D. Wis. 1986). Note this requires more than mere negligence. Bauer v. United States, 543 F.2d 142 (Cl. Ct. 1976); Holley v. United States, 89-1 U.S.T.C. ¶ 9196 (E.D. Wis. 1989).

I. Further comments on recklessness. Recklessness will be found where the responsible person has knowledge of the company's past history of not paying taxes and awareness of continuing financial difficulties. Wright v. United States, 809 F.2d 425 (7th Cir. 1987). Also, reliance on the statement of an individual that trust fund taxes are being paid where the responsible person knew the other person was unreliable. Denbo v. United States, 988 F.2d 1029 (10th Cir. 1993).

d. Expectation of repayment. Paying net wages with the expectation that the taxes will be paid when the company becomes successful satisfies the willfulness requirement. Greenberg v. United States, 46 F.3d 239 (3d Cir. 1994); Wall v. United States, 592 F.2d 154 (3d Cir. 1979). The financial condition of the company and the demands of other creditors are not factors weighing against willfulness. Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), cert. denied 400 U.S. 821 (1970); but see Holley v. United States, 89-1 U.S.T.C. ¶ 9196 (E.D. Wis. 1989) (Responsible person not willful, where net wages paid in expectation of late receipt of funds due to change in funding mechanism).

e. Superiors orders. Willfulness is not negated because the action is taken based on the orders of a superior. Thomas v. United States, 41 F.3d 1109 (7th Cir. 1994); Howard v. United States, 711 F.2d 729 (5th Cir. 1983); Roth v. United States, 779 F.2d 1567 (11th Cir. 1986). This is true even if the person would be fired if they paid taxes. United States v. Rem, 38 F.3d 634 (2^d Cir. 1994); Howard v. United States, 711 F.2d 729 (5th Cir. 1983). The willfulness here, however, must be coupled with sufficient authority to be classified as a responsible person. Schroeder v. United States, 89-2 U.S.T.C. ¶ 9474 (N.D. 1989).

f. Creditor's Coercion. Willfulness is not negated by a creditor's coercion. Even if a creditor threatens to close down a business if taxes are paid, a responsible person's actions will still be willful. United States v. Davidson, 558 F. Supp. 1048 (W.D. Mich. 1983); Kalb v. United States, 505 F.2d 506 (2d Cir. 1974), cert. denied, 421 U.S. 979 (1975).

g. Reclassification Cases: I.R.C. § 6672 has limited applicability to reclassification cases. Generally in a reclassification case, the employer who misclassifies the workers does so believing the characterization is proper. Therefore, the requisite willfulness would be lacking. See, e.g., Crowd Management Services, Inc. v. United States, 889 F. Supp. 1313 (D. Ore. 1995). See also discussion in IRM 4.23.16.11.

h. Reasonable cause. Where a responsible person has been advised by an accountant and an IRS tax collector that tax are not due, courts have found "reasonable cause." Gray Line Co. v. Granquist, 237 F.2d 390 (9th Cir. 1956), cert. denied, 353 U.S. 911 (1956); See also Slodov v. United States, 436 U.S. 238 (1978)(this case does not necessarily recognize reasonable cause, but holds that the responsible person must be "at fault"). The statute does not contain a reasonable cause exception and there is some dispute as to whether a reasonable cause exception should be recognized. The reasonable cause cases could be explained based on a lack of willfulness. However, a situation where the responsible person claims not to know that a return is necessary does require a good faith attempt to ascertain whether taxes are due. Sorenson v. United States, 521 F.2d 325 (9th Cir. 1975).

i. Evidence to be secured. For a listing of types of evidence regarding willfulness and responsibility that should be secured by the Revenue Officer, see IRM 5.7.4.2.4.

9. Common Defenses: Common defenses include lack of authority, resignation, lack of knowledge, delegation of authority, direction from others, a failure of the IRS to collect from the corporation, and illness. Here are some comments on the merits of each of these defenses.

a. Lack of authority. If a person lacks the requisite authority, then they cannot be a responsible person and are not liable for the TFRP penalty.

b. Resignation. Resignation will eliminate liability for trust fund taxes collected and not paid over after the date of resignation. Maggy v. United States, 560 F.2d 1372 (9th Cir. 1977), cert. denied, 439 U.S. 821 (1978); Cohen v. United States, 93-1 U.S.T.C. ¶ 50,350 (S.D. Cal. 1993). It is possible to wait too long to resign, however. Thomas v. United States, 41 F.3d 1109 (7th Cir. 1994). In addition, a responsible person may not be able to escape liability by resigning before the taxes are required to be paid over. Seaton v. United States, 254 F. Supp. 161 (D. Mo. 1966); but see Cellura v. United States, 245 F. Supp. 379 (N.D. Ohio 1965); Running v. United States, 7 F.3d 1293 (7th Cir. 1993).

c. Lack of knowledge. Lack of knowledge may negate willfulness unless it is the result of a reckless disregard of the situation. See, e.g., Fowler v. United States, 820 F. Supp. 1390 (D. Wyo. 1993); Running v. United States, 7 F.3d 1293 (7th Cir. 1993).

d. Delegation. A person normally cannot escape liability by delegating authority. United States v. Charlton, 2 F.3d 237 (7th Cir. 1993); White v. United States, 372 F.2d 513 (Ct. Cl. 1967). There are two exceptions. If the individual, by delegating, retains no authority he will not be a responsible person. See, e.g., Brennan v. United States, 85-1 U.S.T.C. ¶ 9113 (N.D. Ohio 1984); Stewart v. United States, 90-1 U.S.T.C. ¶ 50,002 (Cl. Ct. 1989). This generally occurs in the context of an owner of a business delegating authority to employees. Similarly, where the delegation results in the individual not knowing about the tax liability, this may negate willfulness. See, e.g., Levy v. United States, 140 F. Supp. 834 (D. La. 1956).

e. Directions from others. Taking directions from a supervisor generally is not a defense to willfulness. Thomas v. United States, 41 F.3d 1109 (7th Cir. 1994); Howard v. United States, 711 F.2d 729 (5th Cir. 1983). It may go to whether the person has sufficient authority to be

responsible, however. United States v. Gekas, 94-2 U.S.T.C. ¶ 50,494 (M.D. Pa. 1994).

f. Collection of tax against corporation. The IRS is not required to first attempt to collect the tax from the corporation. Hornsby v. Commissioner, 588 F.2d 952 (5th Cir. 1979). However, some courts have held that where the government's conduct has led to a failure to collect the taxes, the IRS may be precluded from collection the trust fund penalty. Mangieri v. United States, 657 F. Supp. 726 (D. Md. 1986); Tozier v. United States, 65-2 U.S. Tax Cas. ¶ 9621 (W.D. Wash. 1965). This appears to be a minority position, however. See Howard v. United States, 711 F.2d 729 (5th Cir. 1983); Davel v. United States, 669 F. Supp. 924 (E.D. Wis. 1987); United States v. Huckabee Auto Co., 783 F.2d 1546 (11th Cir. 1986).

g. Illness. Drug addiction or alcoholism are not defenses to a TFRP assessment. They do not negate willfulness. United States v. Landau, 155 F. 3d 93 (2^d Cir. 1998). A physical illness is viewed differently from alcoholism or drug addiction, because it is viewed more like an involuntary condition. It may serve as a defense during the period that the person is incapacitated. Sherwood v. United States, 246 F. Supp. 502 (E.D. N.Y. 1965). Incapacity may be limited to the periods of hospitalization, however. In re Keith, 78-1 U.S.T.C. ¶ 9264 (E.D. Va. 1978).

10. Liability may be limited by amount of unencumbered funds. In some circumstances, a responsible person's liability may be limited to the amount of unencumbered funds. Where an individual becomes a responsible person after the liability accrues, his liability for TFRP is limited to the unencumbered funds available at the time he became responsible. In this circumstance, liability does not attach to after acquired funds. In Re Bewley, 96-1 U.S.T.C. ¶ 50,178 (Bankr. N.D. Okla. 1996); See, also, Slodov v. United States, 436 U.S. 238 (1978). Where a responsible person is unaware of a tax delinquency, but subsequently becomes aware of the unpaid taxes, that person is under a duty to use all "unencumbered funds" available to the corporation to pay those back taxes. Garsky v. United States, 600 F.2d 86 (7th Cir. 1979). This duty extends not only to funds available to the corporation at the time the responsible person becomes aware, but also to any unencumbered funds

acquired thereafter (a different rule from someone who became responsible after the delinquency occurred). If the responsible person fails to use such unencumbered funds to satisfy the past unpaid liability, he is deemed personally liable for the taxes that went unpaid in the past while he was responsible. United States v. Kim, 111 F.2d 1351 (7th Cir. 1997).

a. Definition of encumbered/unencumbered funds.

Encumbered funds are money that the taxpayer is legally obligated to use for a purpose other than satisfying the preexisting tax liability. The claim of the other creditor must be superior to the IRS. Honey v. United States, 963 F.2d 1083 (8th Cir. 1992), cert. denied, 506 U.S. 1028 (1992); United States v. Kim, 111 F.2d 1351 (7th Cir. 1997). Thus to be encumbered, the funds must be used to pay a secured creditor and there must be a restriction on the use of the funds. However, if the taxpayer tries to pay the liabilities, but the bank offsets or seizes the funds in account before the IRS can cash the check, willfulness may be negated. Knudsen v. United States, 92-2 U.S.T.C. ¶ 50,332 (2d Cir. 1992); Rykoff v. United States, 93-1 U.S.T.C. ¶ 50,104 (C.D. Cal. 1992), aff'd 40 F.3d 305 (9th Cir. 1994).

11. Charitable Volunteers: Under I.R.C. § 6672(e), an unpaid volunteer member of a board of directors or trustees for a tax exempt organization is not liable for an unpaid trust fund taxes if the member is: (1) solely serving in an honorary capacity, (2) does not participate in the day-to-day financial operations of the organization and (3) does not have actual knowledge of the failure to pay tax on which the penalty would be imposed. This exception does not apply, however, if it would result in there being no responsible person. I.R.C. § 6672(e). This code section is a codification of a policy stated in Policy Statement P-5-60. The policy, however, avoids liability if the person was not involved in financial operations or did not have knowledge of the delinquency. The statutory provision requires both. This policy statement still appears in the IRM, and probably represents the position of the Service, even though it is more liberal than the statute. IRM 1.2.1.

12. Entities liable outside the business: TFRP liability is not limited to those inside of a business. Adams v. United States, 504 F.2d 73 (7th Cir. 1974). It has also been applied to lenders, see Adams v. United States, 504 F.2d 73 (7th Cir. 1974),

creditors, see Walker v. United States, 68-1 U.S.T.C. ¶ 9370 (W.D. Ok. 1968), sureties, see McCarty v. United States, 437 F.2d 961 (Ct. Cl. 1971); accounting firms, Quattrone Accountants, Inc. v. IRS, 895 F.2c 921 (3d Cir. 1990), and entities that advance net payroll to subcontractors, Regan & Co. v. United States, 290 F. Supp. 470 (E.D. N.Y. 1968). Liability will only exist where the entity exercises control over the taxpayer's disbursements.

a. Bookkeepers: An individual acting as a bookkeeper, without any independent authority regarding the payment of creditors or dispersal of funds is not a responsible person. Jay v. United States, 865 F.2d 1175 (10th Cir. 1989); Heimark v. United States, 18 Cl. Ct. 15 (1989). However, where the bookkeeper has control, over the dispersal of funds or priority of payments to creditors, he or she is a responsible person. Bax v. United States, 92-2 U.S.T.C. ¶ 50,354 (N.D. Ill. 1992).

b. Leased Employees: In some circumstances, businesses may lease employees from a third-party leasing company. The lessee company receives a payment from the lessor and is responsible for withholding and paying over taxes. It is possible to assert a TFRP against the lessee company if the lessor fails to pay the tax. United States v. Garami, 95-2 U.S.T.C. ¶ 50,520 (M.D. Fla. 1995). Control over payments is still a necessary element. Alexander Drilling, Inc. v. United States, 98-1 U.S.T.C. ¶ 50,225 (W.D. Ark. 1997).

13. Partners: General partners are liable under state law for liabilities incurred by the partnership, although the taxes are not normally assessed directly against them. A section 6672 assessment is normally unnecessary because of this. See, e.g., In re Norton, 158 B.R. 834 (Bankr. M.D. Fla. 1990). It is possible, however, to make a section 6672 assessment against a partner. Livingston v. United States, 92-1 U.S.T.C. § 50,137 (D. Idaho, 1992).

14. Embezzlements. In circumstances where the tax delinquency is blamed on an embezzlement by another employee, the embezzlement may be a factor in determining willfulness. Generally, the responsible person would have to show that all potential available funds were encumbered when other creditors were paid ahead of the IRS. Purcell v. United States, 1 F.3d

932 (9th Cir. 1993); In re Schroeder, 94-2 U.S.T.C. ¶ 50,431 (Bankr. D. Neb. 1994). If the trust funds are embezzled after they are deposited for payment with IRS, willfulness does not exist. Knudsen v. United States, 92-2 U.S.T.C. ¶ 50,332 (2d Cir. 1992); Verdun v. United States, 84-1 U.S.T.C. ¶ 9324 (N.D. Ill. 1984).

15. Multiple responsible persons: More than one person may be determined to be responsible. Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), cert. denied 400 U.S. 821 (1970); Gephart v. United States, 818 F.2d 469 (6th Cir. 1987). Each is jointly and severally liable for the penalty. Brown v. United States, 591 F.2d 1136 (5th Cir. 1979). Responsible persons may seek contribution to allow jointly liable responsible persons to recover a proportionate share from other responsible persons. I.R.C. § 6672(d).

a. Disclosure of collection efforts. If a person who has been determined to be liable as a responsible person makes a request in writing, the IRS must disclose the names of any other person determined to be liable, the general nature of collection attempts and any amounts collected. I.R.C. § 6103(e)(9); United States v. N.Y. State Division of the Lottery, 97-1 U.S.T.C. 50,191 (S.D. N.Y. 1996); See, also, IRM 11.3.40.

16. Burden of Proof. Depending on the type of proceeding, the cases either hold that the person assessed has the burden of establishing that the assessment is wrong, United States v. Strebler, 313 F.2d 402 (8th Cir. 1963), Michaud v. United States, 97-2 U.S.T.C. ¶ 50,972 (Fed. Cl. 1997), or that the government must establish that the person is responsible and then the burden shifts to the person to show that it was not willful. George v. United States, 819 F.2d 1008 (11th Cir. 1987); Williams v. United States, 931 F.2d 805 (11th Cir. 1991). In Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15 (2000), the Supreme Court held that the burden of proof regarding the validity of a tax claim in a bankruptcy case must be determined by looking to the substantive non-bankruptcy law. The Court noted that nothing in the Bankruptcy Code suggest that Congress sought to alter the burdens of production and persuasion with respect to tax claims.

17. Statute of limitations. The statute of limitations on assessment of a TFRP penalty is subject to the 3 year assessment statute of limitations under section 6501. The running of the

statute is triggered by the filing of return for the underlying liability, in most cases the 941. Laukner v. United States, 68 F.3d 69 (3d Cir. 1995), acq. 1996-2 C.B. 1. See, also AOD 1996-006. A substitute for return does not cause the statute of limitations on assessment to begin to run. I.R.C. § 6501(b)(3).

18. Effect of Bankruptcy of entity on 6672 assessment.

a. Effect of automatic stay. The automatic stay in a corporation's bankruptcy case does not bar the assessment of trust fund recovery penalties against the responsible officers. La Salle v. United States Dept. of Treasury, 832 F.2d 390 (7th Cir. 1987); American Bicycle Ass'n v. United States, 895 F.2d 1277 (9th Cir. 1990); United States v. Prescription Home Health Car, Inc., 316 F3d 542 (5th Cir.2002). The government is not required to attempt to collect from the bankrupt corporation before assessing against the responsible officers. Maguire v. United States, 80-1 U.S.T.C. ¶ 9300 (W.D. NY 1980).

b. Liability of Chapter 7 bankruptcy trustee. When a corporation is in a Chapter 7, its operations are in the hands of a trustee. The trustee controls the operations of the debtor. If the corporation does not pay its current trust fund taxes while in bankruptcy, the trustee is clearly a responsible person. To assess the trust fund recovery penalty, the Service would still be required to show willfulness (although this would probably not be difficult). However, the responsibility of the trustee would not preclude assessment against other persons who are responsible.

c. Liability in Chapter 11 bankruptcy. Where a corporation files a Chapter 11 bankruptcy, it is reorganizing its assets and liabilities. It is considered a "debtor in possession," and there is not outside third party (such as a trustee) put in charge of the business. The same factors as in any other case must be considered to determine who is responsible for purposes of section 6672. See, e.g., In re Brown, 302 B.R. 913 (D. Ore. 2003). The debtor in such a bankruptcy is required to account to the court for its financial operations. Therefore, a check of the court file may be helpful in determining who is liable for the trust fund recovery penalty.

d. Dischargeability of trust fund recovery penalty. If a person who has been assessed a § 6672 penalty files a chapter 7 or 11 bankruptcy, the TFRP is nondischargeable. 11 U.S.C. § 523(a)(1)(A) incorporating 11 U.S.C. § 507(a)(8)(C). The fact that the assessment is denominated a "penalty" does not change its character as taxes that were not paid over. United States v. Sotelo, 436 U.S. 268 (1978).

e. Designation of payments received from corporation. Where a corporation in a Chapter 11 bankruptcy makes payments of back employment taxes, the bankruptcy court has authority to order the IRS to apply tax payments made by the Chapter 11 debtor to the trust fund portion of the tax, if the court determines that it is necessary for the success of the reorganization plan. United States v. Energy Resources, Co., 495 U.S. 545 (1990). There is a split as to whether designation of payments can be made in a Chapter 11 liquidating case. No designation cases: In re Kare Kemical, Inc., 935 F.2d 243, 244 (11th Cir. 1991); United States v. BTJ, Inc., 2006-2 U.S.T.C. ¶ 50,613 (S.D. Fla. 2006); Matter of Visiting Nurse Ass'n, Inc., 128 B.R. 835, 837 (Bankr. M.D. Fla. 1991). Designation allowed in liquidating Chapter 11. In re Deer Park, Inc., 136 B.R. 815 (9th Cir. BAP 1992), aff'd, 10 F.3d 1478, 1481-82 (9th Cir. 1993); In re Flo-Lizer, Inc., 164 B.R.749 (S.D. Ohio 1994). In a Chapter 7, there is no plan of reorganization, so at least one circuit court has held that this does not apply to these cases. United States v. Pepperman, 976 F.2d 123 (3rd Cir. 1992); See also, In re Applied Paging Technologies, Inc., 99-1 U.S.T.C. ¶ 50,323, 83 A.F.T.R.2d ¶ 99-1133 (Bankr. N.J. 1999); aff'd, appeal dismissed, Gessman v. United States, 250 B.R. 496 (D.N.J. 2000). The Energy Resources principal that a bankruptcy court can require allocation of a payment to Chapter 13 cases if it is necessary for the debtor's plan to work, has been applied to Chapter 13. In re Klaska, 152 Bankr. 248 (Bankr. C.D. Ill. 1993).