

## **Key Issue 30A: What Is the Trust Fund Recovery Penalty?**

The purpose of the Section 6672 trust fund recovery (100%) penalty is to collect taxes from persons who are not directly liable for such taxes but who possess the power to control the liable entity's finances and determine which creditors (including the government) are paid. (Therefore, the penalty is not imposed on the party with primary liability for paying the tax-the employer.) For the penalty to apply, the person must be responsible for collecting, truthfully accounting for, and paying over the tax to the government, and must willfully fail to do so or willfully attempt to evade or defeat the tax or its payment (see Key Issue 30B ) [ IRC Sec. 6672(a) ].

The Code states that a person who can be assessed the penalty includes an officer or employee of a corporation, or a member or employee of a partnership, who is under a duty to collect and pay over tax [ IRC Sec. 6671(b) ]. Therefore, the penalty can be assessed against owners and employees of corporations and partnerships. The penalty should not be assessed against a sole proprietor because they already have primary responsibility for paying over the withheld trust fund taxes.

In CCA 200235023 , the IRS Chief Counsel noted that determining liability for a limited liability company's (LLC's) taxes depends on the LLC's election. If a multi-member LLC elected to be taxed as a corporation, the LLC is liable for the tax, but the members (owners) of the LLC may be liable for the trust fund recovery penalty. If there has been no corporate election, a multi-member LLC is taxed as a partnership. Unlike the typical partnership situation, where the IRS asserts an employment tax liability against the partners (who are liable for the partnership's debts under state law), the IRS will not assert an employment tax liability against the members because they are not liable for debts of the LLC under state law. However, the members may be liable for the trust fund recovery penalty. If a single member LLC elected to be taxed as a corporation, the LLC is liable for the tax, but the single member owner (and others) may be liable for the trust fund recovery penalty. If there has been no corporate election, the LLC is disregarded for federal tax purposes and the single member owner has primary responsibility for liabilities arising from the LLC's business. Therefore, it is not necessary for the IRS to assess the trust fund recovery penalty against single owners because they already have primary responsibility for paying over the withheld trust fund taxes. Additionally, while the IRS cannot look to the LLC's assets to satisfy the single member owner's tax liability, it can take collection action against the member's ownership interest in the LLC, thus achieving the same result indirectly (see also CCA 200338012 ). However, see Key Issue 2B for a discussion of recently issued proposed regulations that when finalized will eliminate disregarded entity status for purposes of federal employment taxes. Under the proposed rules, a single-member LLC disregarded for federal tax purposes will be liable for employment taxes on wages paid to its employees. The LLC will have primary responsibility for the employment taxes, but the single member owner may be liable for the trust fund recovery penalty. See Key Issue 30B for further discussion of LLC members as responsible persons.

Observation: A recent revenue ruling reiterates the IRS Chief Counsel opinion with regard to the liability of members in a multi-member LLC taxed as a partnership. According to Rev. Rul. 2004-41, 2004-18 IRB 845 , if under state law the members of a multi-member LLC are not liable for the LLC's debts, then absent fraudulent transfers or other special circumstances, the IRS cannot collect the LLC's employment tax liability from the members. Therefore, under these conditions, the IRS cannot levy on the property and rights to property of the LLC members. However, depending on the facts of a particular case, a member may be liable for the trust fund recovery penalty.

IRC Sec. 6672 is not a penalty in the true sense of the word because it is an assessment of tax and not an addition to tax. The amount of the assessment equals the amount of tax that should have been paid over to the government. The Supreme Court has ruled that for purposes of determining debts dischargeable in bankruptcy, assessments under IRC Sec. 6672 are a tax and not a penalty thus making the assessments nondischargeable ( Sotelo ). On the other hand, it can be considered to be a penalty because it cannot be deducted by the payer for federal income tax purposes [ IRC Sec. 162(f) ; Patton ].

Note: A district court has held that the IRS may levy on an individual's retirement accounts (IRAs) to satisfy the individual's liability for a trust fund recovery penalty ( Sillavan ).

Practice Tip: Lenders, sureties, and others who provide funds to an employer also can be held personally liable for payment of employment taxes under IRC Sec. 3505 . (See Chapter 2 .) It is not uncommon for the IRS to contend that a lender, etc., is liable under both IRC Secs. 6672 and 3505 .

### **Definition of Trust Fund Taxes**

The most frequent fact pattern involving the assessment of the penalty is when an employer fails to collect and pay over income tax withheld from the employees and the employees' share of Federal Insurance Contribution Act (FICA) taxes or railroad retirement taxes. These taxes-withheld income tax and the employee's share of FICA or railroad retirement taxes-are collectively referred to as the trust fund taxes. (Hence, the IRS's reference to this penalty as the trust fund recovery penalty.) Excluded from this definition are the employer's share of the taxes, federal unemployment (FUTA) taxes, and any penalties or interest assessed against the employer.

When times are bad and creditors are demanding payment, trust fund taxes are a tempting source of cash. The temptation is heightened because the IRS cannot immediately detect nonpayment, and thus there is a delay in forced collection action. Often, the employer does not intend to defraud either the government or its employees and fully expects to later make up the shortfall.

It is important to note that the failure to pay over trust fund taxes will not harm the employee. The employee is given full credit for the amounts that should have been turned over to the government. In short, the government and not the employee is left holding the bag. Furthermore, when an employer goes out of business owing taxes, the government

often is still a loser even if it collects the full amount of trust fund taxes from one or more responsible persons. In such a situation, it may not be able to collect the taxes directly owed by the employer-FUTA taxes and the employer's share of the FICA taxes.

#### Taxpayer Bill of Rights 2 and IRS Restructuring and Reform Act Provisions

Due to the severity of the trust fund recovery penalty, Congress has instituted several statutory safeguards in favor of the taxpayer. The 1996 Taxpayer Bill of Rights 2 (TBOR2) and the 1998 IRS Restructuring and Reform Act (the IRS Reform Act) contain several of those safeguards as summarized below:

The IRS must send a notice to an individual [it has] determined to be a responsible person with respect to unpaid trust fund taxes at least 60 days prior to issuing a notice and demand for the penalty. The notice need not be provided if collection of the penalty is in jeopardy, and the limitations period for assessing the penalty (see Key Issue 30D ) will not expire before 90 days after the date the notice is mailed. The notice may be delivered by mail or in person to the responsible person.

If requested in writing by one considered to be a responsible person (or by an attorney in fact who provides the IRS with written authorization from the responsible person), the IRS must disclose in writing the name of any other person determined to be a responsible person for the same tax liability. It must also disclose whether it has attempted to collect this penalty from other responsible persons, the general nature of those collection activities, and the amount (if any) collected. In the past, the IRS did not disclose to a responsible person its efforts to collect unpaid trust fund taxes from other persons who may also be liable for the penalty.

Note: According to IRM 11.3.2.4.13, disclosure can be made only upon receipt of a written request. Disclosure is limited to the specific tax periods associated with the requester's penalty (i.e., not all responsible officers receiving the penalty are assessed for the same periods). It will include (1) the name and amount collected from each individual assessed the penalty; (2) the current collection status (e.g., installment agreement, suspended); and (3) if suspended, the reason (e.g., unable to locate, hardship). Information that will not be disclosed includes (1) the other responsible person's location or telephone number; (2) any information about the other responsible person's employment, income, or assets; (3) information about any person who has not been assessed with the penalty, and (4) income level at which a currently not collectible account will be reactivated.

Observation: This provision has been interpreted to allow an employee of a third party that provided accounting services to a defunct corporation to be told of the IRS's collection actions against that corporation and an alleged successor in interest (even though such entities technically are not responsible persons), including the existence of any repayment agreement between these entities and the IRS ( U.S. v. New York State Division of the Lottery ).

A responsible person has a right to contribution under federal law to recover part of the amount paid from other responsible persons who have not yet paid their proportionate share of liability under IRC Sec. 6672 . Congress felt undue hardship was created where the IRS pursued a responsible person from whom it could collect most easily. Therefore, if more than one person is liable for this penalty, each one who pays is entitled to recover from other liable persons the excess of the amount paid over the person's proportionate share of the penalty. (See Key Issue 30D for more information.)

Even though somewhat redundant of IRS Policy Statement P-5-60, Congress explicitly stated that the penalty will not be imposed on volunteer, unpaid members of the board of trustees or directors of a tax-exempt organization to the extent they do not participate in the day-to-day or financial activities of the organization and do not have actual knowledge of the nonpayment.

Observation: This provision may be less helpful than it appears because the TBOR2 Joint Committee Report adds that it "cannot operate in such a way as to eliminate all responsible persons from responsibility." The IRS interprets this to mean that the TBOR2 exception from the penalty for certain volunteer board members will not apply if it results in there being no person responsible for the trust fund recovery penalty (IRM 5.7.3.3.1.1). (See Key Issue 30B .)

### **IRS Early Intervention Programs**

The IRS has developed several specific programs designed to intervene with employers to help prevent or reduce employment tax delinquencies.

Federal Tax Deposit (FTD) Alerts. FTD alerts are used to determine an employer's compliance with employment tax deposit requirements for the quarter of alert issuance, and for subsequent quarters until the taxpayer is brought into full compliance. Pursuant to IRM 5.7.1.2, FTD alerts are issued on taxpayers who are classified as semiweekly depositors and who have not made FTDs during the current quarter or who have made them in substantially reduced amounts. (An employer is a semiweekly depositor if total employment taxes reported for a previous one-year "lookback" period exceed \$50,000. Semiweekly depositors must deposit accumulated employment taxes on or before the following Friday or Wednesday depending on the payroll's payment date. See Chapter 17.)

FTD alerts on delinquent taxpayers provide an early opportunity to assist taxpayers before their liability pyramids and the growing debt becomes more difficult to resolve (IRM 5.7.1.7). The Revenue Officer is to ensure that the taxpayer understands the deposit requirements, the cost of failing to deposit taxes on time, and the consequence of continued noncompliance. The officer should discuss the levy and seizure provisions, the monthly filing and special bank deposit provisions found in IRC Sec. 7512 , and, when applicable, the trust fund recovery penalty. Then, the officer is to monitor the taxpayer's compliance with deposits for the current and subsequent quarters until the account is resolved. If the taxpayer cannot satisfy past due deposits while meeting current deposits, the taxpayer can make current deposits first while working to resolve past due deposits.

The Repeater Trust Fund Program. The IRS has also instituted a program to identify employers who repeatedly accrue employment tax liabilities, and to take appropriate action to bring them into compliance (IRM 5.7.8). To be targeted, an employer must be in business, not current with federal tax deposits, and have three trust fund modules assigned to Collection Field function (Cff).

When a taxpayer is identified as a potential repeater, the Revenue Officer is to "attempt initial contact within 30 days . . . [and make] a determination of the taxpayer's ability to pay current and delinquent taxes without delay" (IRM 5.7.8.3). The officer is told that "pyramiding must be stopped immediately." To accomplish this, the Revenue Officer should obtain sufficient financial information during the initial contact so that enforcement action can be taken, when appropriate, if pyramiding occurs. Because they are not in compliance, installment agreements are not appropriate for taxpayers who continue to accrue tax liabilities after the initial contact. Rather, cases involving repeater taxpayers will often require enforcement action (e.g., levying upon available sources).

**Practice Tip:** If representing a targeted employer, the practitioner's immediate objective is to have the employer begin making its federal tax deposits after contact. Once the employer resumes making deposits it will no longer be considered a repeater and the practitioner can attempt to negotiate an installment agreement that is economically sound so the employer can stay current (and so avoid the pyramiding of unpaid taxes), pay other creditors, and remain in business. Long term, the practitioner should work with the employer to determine the cause of the delinquency to prevent a recurrence.

Taxpayers with ongoing business operations may want to consider submitting an offer in compromise (OIC) instead of negotiating an installment agreement. An installment agreement is often used where the employer cannot pay its tax liability in a lump sum and has no equity in assets against which to borrow, but has sufficient income to pay the amount over a period of time. Alternatively, an OIC is used if there is little hope of paying the tax liability in full, or if there is doubt as to the employer's liability for the tax. For example, an OIC can be used where the employer's income can satisfy its current tax liability but cannot satisfy a separate (often old and large) tax liability. Taxpayers with ongoing business operations who want to submit an OIC must demonstrate compliance by timely filing and timely depositing taxes in the preceding two quarters (IRM 5.7.8.3.2). All federal tax deposits due in the quarter in which the offer is submitted must also be paid on time. IRM 5.8.3 addresses offer processability while IRM 5.8.7.6 addresses offer rejection. Also see PPC's Guide to Dealing with the IRS for more on preparing OICs.

**Note:** The American Jobs Creation Act of 2004 modifies IRC Sec. 6159 to allow the IRS to enter into partial payment installment agreements to gradually settle tax liabilities. Prior to the change the IRS would only enter into an installment agreement if the tax liability was to be paid in full. This change will likely reduce the number of taxpayers submitting offers in compromise.

HILDEBRAND, JR. v. U.S., Cite as 52 AFTR 2d 83-5467 (563 F.Supp. 1259),  
05/16/1983 , Code Sec(s) 6672

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William HILDEBRAND, JR., Martin Bressler, and Heman Adams, PLAINTIFFS v.  
U.S., DEFENDANT v. Levin West, Counterclaim Defendant.

Case Information:

Code Sec(s): 6672

Court Name: U.S. District Court, Dist. of New Jersey,

Docket No.: Civil No. 82-435,

Date Decided: 05/16/1983

Tax Year(s): Years 1973, 1974, 1975.

Disposition: Decision for Govt.

Cites: 52 AFTR 2d 83-5467, 563 F Supp 1259, 83-2 USTC P 9570.

#### HEADNOTE

1. ADDITIONS TO TAX AND PENALTIES-Assessable penalties-100% penalty-failure to collect or pay over tax-Factors of determination-duties and authority of persons involved. Summary judgment denied taxpayers for refund of assessments for failure to withhold and pay over taxes for corp. Fact questions existed as to whether taxpayers controlled corp.'s finances, acted willfully, acted with reasonable cause and received due process. Attorney's fees denied; taxpayers hadn't prevailed.

Reference(s): ¶37,367.30(25); 37,367.20(30); 38,850(30). Code Sec. 6672 .

#### OPINION

Martin Bressler, 475 Longview Rd., S. Orange, N.J., Atty. for Plaintiffs.

U.S. Atty. for Defendant.

Larry A. Stempler, 405 Northfield Ave., Westfield, N.J., Atty. for Counterclaim Defendant.

Judge: SAROKIN, District Judge:

#### Opinion

In a democratic society, the laws must be enforced uniformly. Selective enforcement is contrary to the equality of treatment that is guaranteed to all persons. However, these principles do not prohibit the reasoned exercise of discretion in determining who shall be and who shall not be prosecuted and what claims shall and shall not be pursued.

This matter portrays the government at its heartless, rigid, and Orwellian bureaucratic worst. The plaintiffs in this action were engaged in selfless, dedicated charitable activity. They gave of their time and themselves to assist those in need. They received no personal gain other than the satisfaction derived from their charitable endeavors.

The compassionate federal government, and particularly the well-known, warmhearted Internal Revenue Service, has chosen to reward them with personal liability for the nonpayment of withholding taxes. In addition to the primary claim for the substantial taxes due, plaintiffs have been required to incur and to pay substantial amounts for legal fees to reverse the liability imposed upon them for such taxes.

On September 15, 1980 a delegate of the Secretary of the Treasury made assessments, pursuant to Section 6672 of the Internal Revenue Code of 1954, and issued notices of assessments to, and made demands for payment upon William Hildebrand, Heman Adams and Martin Bressler. These assessments resulted from the alleged nonpayment of withholding taxes by the Friends of Clinton Hill (FCH) for a period in the 1970's when it was operating [pg. 83-5468] a neighborhood health center, a community center, and a day care center in Newark. Plaintiffs are three suburbanites who were members of FCH, a tax-exempt charitable corporation. They participated in the organization, devoting time, money, and business expertise, out of a desire to help the community improve its quality of life.

The IRS has assessed plaintiffs Hildebrand and Adams the sum of \$55,081.25 each for withholding taxes purportedly unpaid for the third and fourth quarters of 1973, all of 1974, and the first three quarters of 1975. Plaintiff Bressler has been assessed for the first three quarters of 1975 in the amount of \$12,468.48, plus interest. The assessments were based on a determination by the United States that they were persons responsible for collecting, accounting for and paying over the withholding taxes and FICA taxes for FCH during the periods of assessment, who willfully failed to collect, account for and pay over such taxes.

Plaintiffs Hildebrand and Adams each paid \$900.00 to the IRS; plaintiff Bressler paid \$300.00 to the IRS. Plaintiffs then commenced this action on February 16, 1982 for a refund of the amounts paid, an accounting of all employment taxes owed by FCH and for attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. §2412. The United States filed a counterclaim against the plaintiffs for the balance of the taxes assessed. A counterclaim defendant, Levin West, was added, but is not involved in this motion.

Plaintiffs move for summary judgment alleging that they were not in control of the financial decisions of the corporation, that they did not act willfully, that their actions are supported by reasonable cause, and that they were denied due process. They also seek attorneys' fees. Defendant opposes this motion, contending that there are material issues of fact that preclude the granting of summary judgment.

This court may only grant summary judgment if it appears that there are no genuine issues of material fact, and the party is entitled to judgment as a matter of law. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

Control of the Corporation

The assessments were made pursuant to 26 U.S.C. §6672:

((a)) General rule.-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 or 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 for any offense to which this section is applicable.

The term "person" is defined in section 6671(b):

((b)) Person defined.-The term "person", as used in this subchapter, 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 perform the act in respect of which the violation occurs.

[1] Plaintiffs claim that they are not persons with a duty to account for and pay over the taxes. They argue that they had no control over the actions of the corporation, for the decisions were made by the urban representatives on the corporation's board of trustees. They contend that neither the structure of the corporation, nor the climate of Newark and the community organization would have permitted it. Further, plaintiffs argue that they did not want control of the corporation. They contend that they had no actual control of decisions, although there were "paper formalities" indicating that they did have control, and they did render advice to the corporation.

The cases indicate that responsibility for penalties under section 6672 ("responsible persons") extends broadly to persons who exercised actual substantial control over the financial decisions of the corporation.

Nevertheless, the determination of who is a responsible person and whether the funds are in good faith paid on a preferred security are not matters to be determined either in a partial vacuum, filled only with legal theory, or solely on the basis of the paper relationships controlling stockholders create between themselves and the entities that are subject to their control. If individuals dominate a corporation, that relationship is relevant to whether they are "responsible persons" within the meaning of §6672. We are concerned with actual control and economic reality, not paper facades.

[pg. 83-5469]

First National Bank in Palm Beach v. United States, 591 F.2d 1143, 1149 [ 43 AFTR 2d 79-900] (5th Cir. 1979). "The key to liability under section 6672 is control of finances within the employer corporation: the power to control the decision-making process by which the employer corporation allocates funds to other creditors in preference to its withholding tax obligations." Haffa v. United States, 516 F.2d 931, 936 [ 36 AFTR 2d 75-5056] (7th Cir. 1975).

The Courts have construed the statutory definition of a "person" to include all persons who are so connected with a corporation as to be "responsible" for paying the taxes. The teaching of the cases is that a "responsible person" is one who has or shares the "final

word" as to what bills or creditors should or should not be paid, the word "final" meaning significant rather than exclusive control.

Henderson v. Croom, 403 F.Supp. 665, 666 [ 37 AFTR 2d 76-1366] (N.D. Ala. 1975). Courts have looked to the particular facts of each case to determine whether a person is a "responsible person" within the meaning of the law. The factors considered have included the content of the corporate by-laws, the identities of individuals who held corporate offices, signed corporate tax returns, or had authority to sign checks for the corporation, the payment of other creditors instead of the United States, the identities of the individuals who had authority to hire and discharge employees, and the identities of the individuals who controlled the financial affairs of the corporation in general. Datlof v. United States, 252 F.Supp. 11, 32-3 [ 17 AFTR 2d 680] (E.D. Pa.), aff'd, 370 F.2d 655 [ 19 AFTR 2d 335] (3d Cir.), cert. denied, 387 U.S. 906 (1966).

Plaintiffs have the burden of proving that they could not, as a matter of law, be found to be "responsible persons". Plaintiffs rely upon the fact that they were only three members of a twenty-one member board of trustees, consisting of fourteen urban members and seven suburban members. They argue that their votes did not control the Board of Trustees. Plaintiffs, by affidavit, state that their participation in the FCH was limited to giving advice, fund raising, and contribution of expertise. Their argument is summarized in paragraph 37 of Mr. Bressler's affidavit, as follows:

[I]t can be concluded that these Plaintiffs did not control the corporation during those periods that tax payments may not have been made (whenever that might be) because:  
(A.) The climate of opinion in Newark did not permit such control  
(B.) Plaintiffs did not want control  
(C.) The Friends of Clinton Hill was structured in a manner so as to assure control by the urban community.  
(Bressler Aff. ¶37).

Plaintiffs have also submitted the affidavit of Robert Curvin, a political scientist. They ask the court to take judicial notice of the political climate in Newark during the time periods involved in this case, and to conclude that plaintiffs did not control the FCH. The court cannot take such judicial notice. Mr. Curvin has expressed no personal knowledge of the decision-making process of FCH. Further, Rule 201, Federal Rules of Evidence, limits the use of judicial notice to adjudicative facts that are either generally known within the territorial jurisdiction of this court, or are capable of accurate and ready determination by references to sources whose accuracy cannot be reasonably questioned. The dynamics of decision-making of the FCH fits neither of these requirements.

The government submits that these plaintiffs were officers of the corporation. From May 1973 until October 1974 Bressler was Vice President, Adams was Treasurer, and Hildebrand was Secretary. From October 1974 until October 1975 Bressler was Assistant Treasurer and Adams was Secretary. A person who holds these corporate offices, with the authority to make disbursements, is presumptively a "responsible person" for purposes of section 6672. Bolding v. United States, 565 F.2d 663, 670 [ 40 AFTR 2d

77-6057] (Ct.Cl. 1977). The government further submits that these plaintiffs all had authority to sign checks for the FCH. The government further submits that these plaintiffs participated in financial decisions, including decisions to pay other creditors, budget decisions, and decisions setting salaries. The government also submits that plaintiffs Bressler and Adams participated in discussions with the Internal Revenue Service concerning the tax liability of the FCH.

Plaintiffs have not, in connection with this motion, met the burden of proving that they are not "responsible persons" for [pg. 83-5470] purposes of section 6672. They all had some formal responsibility for the finances of the corporation. As to the argument that they did not have actual control of the finances, the proof submitted is not sufficient to grant summary judgment. Lacking is data describing how the financial decisions were actually made, and what roles plaintiffs actually played in these decisions. There are disputed factual issues to be resolved before a determination can be made regarding the actual control of the corporation's finances. Summary judgment must be denied on this issue.

#### Willfulness

Plaintiffs also argue that they are entitled to summary judgment because they did not act willfully. Section 6672 imposes a penalty upon those who "willfully" fail to pay over taxes withheld from the employees of the corporation. Willfulness, in this context, does not require an evil or improper motive; it requires "only that the failure to pay result from a voluntary, conscious and intentional payment to others before the government." *Wall v. United States*, 592 F.2d 154, 163 [ 43 AFTR 2d 79-502] (3d Cir. 1979). Willfulness can also be found when a person acts recklessly.

The willfulness requirement of section 6672 is satisfied if the responsible person acts with a reckless disregard of a known risk that the trust funds may not be remitted to the Government such as by failing to correct mismanagement after being notified that the withholding taxes have not been duly remitted.

*Garsky v. United States*, 600 F.2d 86, 91 [ 44 AFTR 2d 79-5111] (7th Cir. 1979).

Plaintiffs argue that they cannot be found to have acted willfully because they were not informed by the IRS of the precise amounts due until several years after they left the Board of Trustees of the FCH. They also argue that several depository payments made to a bank, and made to the IRS by the City of Newark were not credited to the FCH account. They further argue that the court should apply a "rule of reason" to find that they did not act "willfully" because a reasonably prudent person would have used any funds to keep the facilities open, and not to pay tax liabilities.

Plaintiffs concede for purposes of this motion that they were aware that some money was due to the IRS. The record shows substantial confusion about the exact sums that were due, and that several efforts were made to obtain this information. In *Brown v. United States*, 51 AFTR 2d (P-H) ¶83-379 (N.D. Ill. 1982) the court rejected the argument that the plaintiff did not act "willfully" because he did not know the extent or seriousness of the delinquency. "It is entirely irrelevant that he may not have known just how large the

deficiencies were." *Id.* at page 83-545. The court found that plaintiff had acted willfully because his disregard of a known risk was reckless.

The record also contains two memorandums of meetings in which it is stated that IRS agents noted the possibility that no sums would be due after the accounts were sorted out. (Exhibits B13, H7). In *Monday v. United States*, 421 F.2d 1210 [ 25 AFTR 2d 70-548] (7th Cir.), cert. denied, 400 U.S. 821 (1970), the court rejected an estoppel argument based on meetings with IRS agents that occurred subsequent to some liability periods. The court found that these meetings furnished no excuse for the earlier failure to collect and pay the taxes. *Id.* at 1217-8. The representations allegedly made by the IRS agents in this case in 1976 occurred after the periods of liability for which the penalties were assessed, and they similarly may provide no excuse for the earlier failure to pay.

Plaintiffs' affidavits indicate that decisions were made to use funds to keep the health center open and to pay creditors other than the United States.

To remain open bills had to be paid to suppliers and the like. The center simply could not be closed so that funds could be garnered to pay withholding taxes, ... (Bressler Aff., ¶33) (emphasis in original). This is sufficient to present a factual question as to whether these plaintiffs acted willfully.

Plaintiffs ask this court to read into the requirement of willfulness a defense of reasonable cause. Several courts have concluded that to act willfully a party must act without reasonable cause. The Third Circuit Court of Appeals has not decided this question. *Wall v. United States*, 592 F.2d 154, 163 [ 43 AFTR 2d 79-502] (3d Cir. 1979). The court there did decide that the failure to pay taxes in the hope that things would improve and the taxes could eventually be paid is not the kind of reasonable cause that the cases refer to. *Id.* The courts that have recognized such a defense have given it a limited scope.

The term "reasonable cause" has been interpreted as advice by counsel under certain circumstances not to pay the [pg. 83-5471] withheld taxes as they became due. *Cash v. Campbell*, 346 F.2d 670, 672-673 [ 15 AFTR 2d 1057] (5 Cir. 1965); advice of non-collection by attorney and tax collector, *Gray Line Co. v. Granquist*, 237 F.2d 390 [ 50 AFTR 288] (9 Cir. 1956); advice by counsel that there was no tax liability, *Cross v. United States*, 204 F.Supp. 644-649 [ 9 AFTR 2d 1993] (E.D. Va. 1962). The following have been held not to constitute "reasonable cause": assumption that government would satisfy its tax claim out of another fund, *Cash v. Campbell*, 346 F.2d 670, 671 [ 15 AFTR 2d 1057] (5 Cir. 1965); mere delegation of responsibility to another, *Lawrence v. United States*, 299 F.Supp. 187, 191 [ 23 AFTR 2d 69-1414] (N.D. Tex. 1969); a presumption that the government will look elsewhere for its taxes, *Spiegel v. United States*, [ 16 AFTR 2d 5667] 65-2 U.S. Tax Cas. ¶9655 (N.D. Ga. 1965); the expectation that financial condition of business will improve, *Paisner v. O'Connell*, 208 F.Supp. 397, 401 [ 10 AFTR 2d 6390] (D.R.I. 1962). See also *Frazier v. United States*, 304 F.2d 528, 530 [ 9 AFTR 2d 1743] (5 Cir. 1962). *Newsome v. United States*, 431 F.2d 742, 748 n.12 [ 26 AFTR 2d 70-5078; 27 AFTR 2d 71-1248] (5th Cir. 1970).

Plaintiffs cite *United States v. Slattery*, 224 F.Supp. 214 [ 12 AFTR 2d 5973] (E.D. Pa. 1963), *aff'd per curiam*, 333 F.2d 844 [ 14 AFTR 2d 5024] (3d Cir. 1964). In that case the court found that a corporate officer did not willfully fail to pay over taxes. The officer learned of the deficiency ten days before a bankruptcy petition was filed. During the ten days the officer paid only those expenses arising in the normal course of business. Further, the amount of money owed to the IRS was approximately five times the total cash on hand of the corporation. The court found that the government had not sustained its burden of showing that the corporation had sufficient funds to pay the taxes. The court also applied a "reasonable cause" defense. The court distinguished the case from those where "defendants continued to operate their businesses over long periods of time and paid creditors ahead of the Government at times when there were funds sufficient to pay the taxes." The present case includes allegations of continued operations over long periods of time, and thus is unlike *Slattery*. The *Slattery* case preceded *Wall*, so its applicability of a "reasonable cause" defense is questionable.

Plaintiffs contend that they acted reasonably by keeping the health center open to provide needed health services, instead of closing down the center to pay taxes of an uncertain amount. This argument is close to the one rejected in *Wall*. In essence, plaintiffs argue that taxes were not paid but other creditors were paid in the hope that finances would improve and the taxes could eventually be paid. Assuming there is a "reasonable cause" defense to section 6672 liability, whether it should apply to this case and whether these plaintiffs acted willfully within the meaning of the statute must be resolved at trial.

#### Presumption that Assessments are Correct

Plaintiffs argue that the burden of proof of correctness of the assessments is on the IRS; and if the IRS cannot prove the accuracy of the assessments, they are entitled to summary judgment. The rule is that IRS assessments are usually presumed to be correct, and the burden is on the taxpayer to prove their inaccuracy. *Helvering v. Taylor*, 293 U.S. 507 [ 14 AFTR 1194] (1935); *Datlof v. United States*, 252 F.Supp. 11, 32 [ 17 AFTR 2d 680] (E.D. Pa. 1966). Plaintiffs argue that the presumption fails in this case because of IRS confusion about the amounts actually due. A similar argument was rejected in *Goodman v. United States*, 42 AFTR 2d (P-H) ¶78-5145 (D.N.J. 1978). The court rejected the argument that the assessment was not entitled to a presumption of correctness because it was made in an arbitrary and capricious manner. "An assessment which is fairly debatable or even incorrect in light of newly discovered or even withheld evidence does not offend due process where there is sufficient other evidence tending to give probable cause to believe that the person assessed was a responsible person." *Id.* at n.6. Plaintiffs have not presented evidence sufficient to destroy the presumption of correctness of the assessments, and to entitle them to summary judgments.

#### Due Process

Plaintiffs further argue that they were denied due process because they were assessed without prior notice of the sum due. They contend that timely notice of the sums due would have resulted in timely payment by the corporation, and no subsequent liability of

these individuals. Plaintiffs [pg. 83-5472] cite several cases but none of them involve tax assessments.

The government asserts that plaintiffs knew that some taxes were owed, even if they did not know the precise amounts owed. Further, plaintiffs' argument seems to conflict with their earlier position that the health center could not remain open unless monies were used to pay creditors other than the IRS. Plaintiffs have not demonstrated that they were denied due process by the notice that they received sufficiently to grant summary judgment on this ground.

#### Attorneys' Fees

Plaintiffs also move for an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. §2412. Because plaintiffs have not prevailed, they are not entitled to counsel fees at this time. This motion is denied without prejudice.

As stated at the outset, the court denies plaintiffs' motion for summary judgment with great reluctance. Humanitarian concerns should spare these plaintiffs not only the payment of the money claimed by the government, but also the anguish and expense of establishing that they are not and should not be held personally responsible for these debts. Although the law confers upon the government the right to pursue these claims, neither the public conscience nor policy mandates that it do so.

The court recognizes that its failure to grant summary judgment in this matter will add considerably to the financial burdens of the plaintiffs. The trial of this matter will be costly and time-consuming. No matter what the court's views of this litigation may be, it cannot ignore the standards imposed upon it in connection with a motion for summary judgment.

If there were an appropriate way to resolve this matter without the necessity of a trial and the emotional and financial expense incident thereto, the court would have done so. However, the dictates of the summary judgment rule preclude the granting of the relief sought by plaintiffs. It is unfortunate when honest acts of charity are punished and so many illegal acts of greed are not.

Counsel for the government is directed to submit an order in accordance with this opinion to the court.