# Case Finds CFOs Liable for Payroll Taxes
## by Dennis Brager

LOS ANGELES, Oct. 4, 2012 --Failure to pay payroll taxes can trip up even the most conscientious CFOs, company officers, and owners. One notable case, *Jenkins v United States 2012-1 Tax Case (CCH) P50, 394*, puts the CFO squarely in the line of fire for collecting the funds.

The case demonstrates that even those CFOs who do not sign the tax returns themselves may become liable for the signer's failure or inability to pay taxes. In general, responsible corporate officers and counsel who willfully fail to pay payroll taxes become personally liable for the taxes. While many business owners are stuck paying corporate payroll taxes out of their own pockets, a few also wind up going to jail for their failures to pay.

The Jenkins case brings up some important issues over the Trust Fund Recovery Penalty, a punishment the IRS put in place under Internal Revenue Code (IRC) section 6672(a) to collect amounts owed to the Federal Insurance Contribution Act (FICA) (i.e., Social Security), Medicare (i.e., Hospital Insurance) and income taxes. These taxes collectively are known as trust fund taxes because the employer holds the taxes in trust until they are paid to the IRS.

After taking nearly a decade to wind through the U.S. court system, the Jenkins case was only resolved this summer.

How did it all start? In August 1992, Timothy Jenkins and his business partner Gary Puckrein formed Dialogue Diaspora, Inc. (DDI), which published a now-defunct magazine called *American Visions*. Jenkins served as chief executive officer, CFO, majority shareholder, and publisher, while Puckrein served as editor-in-chief, president, and, along with his wife, held the remainder of the company's stock. By 2006, the men were no longer speaking. The former had his individual retirement account and Social Security benefits levied by the IRS, and the latter was in bankruptcy. Their story is all too common.

In 1993, DDI filed federal payroll tax returns. Puckrein signed the returns; however, DDI was unable to pay the IRS all of the taxes owed. In 1995, Jenkins learned that DDI had a tax dispute with the IRS stemming from Puckrein's failure to pay all of the withholding amounts. But Puckrein assured Jenkins that the company had entered into an installment agreement with the IRS.

In June of that year, Jenkins learned that the company was still not compliant with its payroll tax payments. He thus invited an IRS agent to a board meeting, during which Puckrein was removed from his positions at the firm.

In 1998, the IRS assessed Jenkins a penalty of $189,972 under IRC section 6672(a) for failure to pay withheld payroll taxes. The IRS held him personally responsible because of his position within the company and his financial control over it, even though he did not himself fail to pay all of the withholding taxes in 1993, nor did he sign the payroll tax returns. Following tax levies in 2005 and 2006, Jenkins filed a refund claim in the Court of Federal Claims.

In early 2012, in an unpublished decision, the Federal Circuit of Appeals affirmed the Court of Federal Claims' decision that denied Jenkins's claim for a refund of trust fund recovery penalties. The Court found that he was a responsible person who willfully failed to pay the taxes pursuant to IRC section 6672(a).

It is important to note that although referred to as a penalty, IRC section 6672 is used only to collect the amount of unpaid taxes. It does not impose an additional penalty over this amount. Liability under this provision is only imposed when the IRS determines someone is both a "responsible person" and his or her actions are considered "willful."
The courts have held that willfulness exists if the responsible person has knowledge of the unpaid taxes. As the *Jenkins* Court explained: "Willful conduct may also include a reckless disregard of an 'obvious and known risk' that taxes might not be remitted."
Further, the IRS does not have to prove malicious intent or malice. It also does not have to attempt to collect from the employer company first. If someone is determined to be a responsible person, the IRS can seek the penalty against that person.

If the IRS plans to assess the trust fund recovery penalty against that person, however, it will send a notice. The recipient has 60 days from the date of the letter to appeal the proposal. The letter will explain the appeal rights. If the person does not respond to the notice, the IRS will assess the penalty and send a *Notice and Demand for Payment.*

Responsible individuals, according to the penalty, may include corporate officers, directors, shareholders, bookkeepers and even third parties, such as CPAs, or corporate counsel. In exceptional cases, responsible individuals can have criminal tax liability for failure to pay payroll taxes.

Indeed, as the court in another case, *Davis v. United States, 961 F.2d 867, 873 (9th Cir. 1992),* explained, "responsibility is a matter of status, duty or authority." It is not necessary that an individual have the final word on which creditors should be paid in order to be subject to liability under section 6672; a person may be treated as "responsible" for purposes of the statute simply if he or she has significant control over the disbursement of corporate funds. This can also be explained in *United States v. Vespe, 868 F.2d 1328, 1332 (3d Cir. 1989).*

In fact, more than one person can have liability for the trust fund recovery penalty. Some determining factors include corporate bylaws, stock ownership, corporate directorship, financial control and even unexercised authority. A combination of factors is used to determine responsibility.

To be fair, insufficient funds may seem like a logical reason for not paying payroll taxes. But the Ninth Circuit Court of Appeals in another case, *United States v. Easterday, 564 F.3d 1004 ($9^{th}$ Cir. 2009),* determined that Easterday could be convicted of a crime even though he may have been able to prove that his company didn't have enough funds to pay the payroll taxes.

Given the dire consequences of the non-payment of trust fund taxes, such as penalties and jail time, if a company falls substantially behind in remitting payroll taxes, responsible officers should fully consider all of their options.

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