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18.00 OFFENSES WITH RESPECT TO COLLECTED TAXES

18.01 STATUTORY LANGUAGE: 26 U.S.C. §§ 7215 & 7512

Notice: As explained in Section 18.06[1], Section 7512, which makes it a misdemeanor to fail to comply with Section 7215(b), is obsolete, because the IRS no longer issues notices under Section 7212(b) requiring the use of special deposit procedures for collected employment tax. See Internal Revenue Manual (IRM) 3.17.244.4.3. [Edited October 2014.]

§7215. *Offenses with respect to collected taxes*

(a) **Penalty.**--Any person who fails to comply with any provision of section 7512(b) shall, in addition to any other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined . . . or imprisoned not more than one year, or both, together with the costs of prosecution.¹

(b) **Exceptions.**--This section shall not apply--

(1) to any person, if such person shows that there was reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax, and

(2) to any person, if such person shows that the failure to comply with the provisions of section 7512(b) was due to circumstances beyond his control.

For purposes of paragraph (2), a lack of funds existing immediately after the payment of wages (whether or not created by

¹ For the misdemeanor offense set forth in Section 7215, the maximum permissible fine is at least \$100,000 for individuals and \$200,000 for corporations. 18 U.S.C. § 3571(b), (c). Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(d). Before seeking a fine under this provision, prosecutors are advised to read Chapter 45.

the payment of such wages) shall not be considered to be circumstances beyond the control of a person.

§ 7512. *Separate accounting for certain collected taxes, etc.*

(a) **General rule.**--Whenever any person who is required to collect, account for, and pay over any tax imposed by subtitle C, or chapter 33 --

(1) at the time and in the manner prescribed by law or regulations (A) fails to collect, truthfully account for, or pay over such tax, or (B) fails to make deposits, payments, or returns of such tax, and

(2) is notified, by notice delivered in hand to such person, of any such failure,

then all the requirements of subsection (b) shall be complied with. In the case of a corporation, partnership, or trust, notice delivered in hand to an officer, partner, or trustee, shall, for purposes of this section, be deemed to be notice delivered in hand to such corporation, partnership, or trust and to all officers, partners, trustees, and employees thereof.

(b) **Requirements.**-- Any person who is required to collect, account for, and pay over any tax imposed by subtitle C, or chapter 33, if notice has been delivered to such person in accordance with subsection (a), shall collect the taxes imposed by subtitle C, or chapter 33 which become collectible after delivery of such notice, shall (not later than the end of the second banking day after any amount of such taxes is collected) deposit such amount in a separate account in a bank (as defined in section 581), and shall keep the amount of such taxes in such account until payment over to the United States. Any such account shall be designated as a special fund in trust for the United States, payable to the United States by such person as trustee.

(c) **Relief from further compliance with subsection (b).**-- Whenever the Secretary is satisfied, with respect to any notification made under subsection (a), that all requirements of law and regulations with respect to the taxes imposed by subtitle C, or chapter 33, as the case may be, will henceforth be complied with, he may cancel such notification. Such cancellation shall take effect at such time as is specified in the notice of such cancellation.

18.02 TAX DIVISION POLICY

Pursuant to Department of Justice policy, trust fund cases under Section 7215 may be referred directly from the Internal Revenue Service to United States Attorneys. [USAM § 6-4.243](#). However, where felony charges are available, prosecutors should instead seek authorization from the Tax Division to pursue such charges, particularly for employers who are repeat or serial violators.

18.03 GENERALLY

It is a crime under Section 7215 to fail to comply with any provision of instead 7512(b) of the Internal Revenue Code, which requires employers (among others), upon notice, to collect employment taxes and deposit the withheld taxes in a special bank account held in trust for the United States. *United States v. Erne*, 576 F.2d 212, 215 (9th Cir. 1978); *United States v. Paulton*, 540 F.2d 886, 888 (8th Cir. 1976); *United States v. Merriwether*, 329 F. Supp. 1156, 1159 (S.D. Ala. 1971), *aff'd*, 469 F.2d 1406 (5th Cir. 1972).

Employment taxes are based on an employer-employee relationship, and they include the following:

1. Old-Age, Survivors, and Disability Insurance taxes and Hospital Insurance taxes, all commonly known as Social Security or FICA taxes, which are levied as a tax against the wage income of an employee and as an excise tax against the wages paid by an employer. 26 U.S.C. §§ 3101 & 3111. The taxes are to be paid by the employer, who is required to deduct the employee's share of social security taxes from the employee's wages, and add to this amount the employer's share of the tax. 26 U.S.C. § 3102.
2. Federal unemployment taxes, commonly known as FUTA taxes, which are levied as an excise tax against the employer, based on the total wages paid with respect to employment. 26 U.S.C. § 3301. The actual FUTA tax ordinarily is inconsequential because contributions to state unemployment funds are credited against FUTA taxes, up to 90 percent of the FUTA taxes. 26 U.S.C. § 3302.

3. Employees' income taxes deducted by an employer from the wages paid to employees, for payment by the employer to the IRS. 26 U.S.C. §§ 3402, 3403.

Employers are required, under the above-noted provisions of the Internal Revenue Code, to (1) withhold Social Security, unemployment, and income taxes from the wages of employees; (2) make quarterly returns of their withholdings on Form 941; and (3) pay over to the IRS the amounts of taxes withheld. FICA, Social Security, and withholding taxes are referred to as "trust fund" taxes. *See Slodov v. United States*, 436 U.S. 238, 242-248 (1978); *United States v. Evangelista*, 122 F.3d 112, 114 (2d Cir. 1997). In sum, an employer is obliged to collect or withhold the above-referenced taxes in each pay period and pay them to the IRS on a quarterly basis. *United States v. Paulton*, 540 F.2d 886, 888 (8th Cir. 1976). While not required to be segregated or held in a special account before payment to the IRS, the funds are essentially held in trust for the IRS and may not be used as working capital by the employer. *See Cline v. United States*, 997 F.2d 191, 194 (6th Cir. 1993); *Paulton*, 540 F.2d at 888; 26 U.S.C. § 7501. An employee whose taxes are withheld but not paid to the IRS is still credited with payment. *Paulton*, 540 F.2d at 888. The IRS's recourse is against the employer or persons responsible for collecting and paying over to the IRS. *Cline*, 997 F.2d at 194. If an employer is delinquent with respect to the obligations regarding collecting, accounting, and paying over, the IRS may invoke the provisions of Section 7512. *Paulton*, 540 F.2d at 888. Pursuant to Section 7512, an employer or person responsible will have heightened obligations, including the duty to establish a separate account to hold the trust funds and pay the IRS on a monthly, rather than quarterly, basis.

18.04 ELEMENTS OF "TRUST FUND" CASES

To establish a violation of Section 7215, the government must prove the following elements beyond a reasonable doubt:

1. The defendant was a person required to collect, account for, and pay over FICA taxes and withheld income taxes.
2. The defendant was served with the statutory notice prescribed by Section 7512(a);
3. The defendant failed to comply with the notice, while not entertaining a reasonable doubt as to whether the law

required the defendant to do so, and the failure was not due to circumstances beyond the defendant's control.

United States v. Erne, 576 F.2d 212, 213 (9th Cir. 1978) (*per curiam*); *United States v. Polk*, 550 F.2d 566, 567 (9th Cir. 1977). It is important to note, however, that certain courts require a fourth element: the defendant's failure to pay FICA taxes before notice under 26 U.S.C. § 7512(a) was issued. See *United States v. Hemphill*, 544 F.2d 341, 343-44 (8th Cir. 1976); *United States v. McMullen*, 516 F.2d 917, 921 (7th Cir. 1975) (evidence of prior tax deficiencies was "necessary and material" because Section 7512(b) is triggered by defendant's prior failures to properly collect, account for, or pay over taxes).

18.05 PERSON REQUIRED TO COLLECT, ACCOUNT FOR, AND PAY OVER

18.05[1] Person Required -- "Employer"

Although the cases often use the term "employer," Section 7215 specifically refers to "person" and does not use the term "employer." In fact, 26 U.S.C. § 7343 defines "person" for purposes of Section 7215 as, *inter alia*, "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." 26 U.S.C. 7343; *United States v. McMullen*, 516 F.2d 917, 921 (7th Cir. 1975); *United States v. Stevenson*, 540 F. Supp. 93, 95-96 (D. Del. 1982) (holding that the section defining "person" for purposes of Section 7215 is Section 7343); see also *United States v. Neal*, 93 F.3d 219, 222-24 (6th Cir. 1996) (relying on definition of "person" under 26 U.S.C. § 7343 in failure to file case under Section 7203); but see *United States v. Merriwether*, 329 F. Supp. 1156, 1159 (S.D. Ala. 1971) (rejecting government's argument that, for purposes of Section 7215, "person" is defined under Section 7343 and instead relying on general definition of "person" under 26 U.S.C. § 7701), *aff'd*, 469 F.2d 1406 (5th Cir. 1972).

The Seventh Circuit stated in *McMullen*, 516 F.2d at 921, that the term "person" includes individuals "with significant control over the financial decision-making process within such a corporation." Thus, if a defendant has such control, he or she is a person who has the legal duty to collect, truthfully account for, and pay over the withholding taxes. Moreover, in *McMullen*, the fact that the defendant's signature did not appear on some payroll checks was not conclusive on whether the defendant was a "responsible

person” and was not a basis to exclude these checks from admission at trial; “responsibility for withholding taxes does not turn on the ministerial act of signing checks but on authority to control the disposition of funds.” *Ibid.*

In *Stevenson*, 540 F. Supp. at 93-94, the defendants, the president and vice-president of a corporation, moved to dismiss the indictment on the grounds that the indictment charged them individually with failing to make the required deposits and did not charge the corporation, which was the actual employer. The court held that by alleging that the defendants, as officers of the corporation, had notice and were obliged to pay taxes withheld from employees’ wages, the indictment was sufficient to charge an offense under Section 7215, even though the corporation itself was not named. *Id.* at 95-96. Of course, the government needed to prove that the defendants were “persons” responsible for such taxes and that the corporation of which they were officers owed the taxes. *Id.* at 96.

In *Merriwether*, 329 F. Supp. at 1159-60, the court took a different approach to the issue of corporation versus officer, but reached the same result on criminal liability. While the district court acknowledged that Section 7343’s definition of person applied to § 7215, the court concluded that the relevant provisions for liability were Sections 7501 and 7512, which are *not* governed by Section 7343’s definition of “person” since neither Section 7501 nor Section 7512 is part of Chapter 75 of the Internal Revenue Code. *Id.* at 1159.² Moreover, the court concluded that Section 7501 does not encompass corporate officers and only imposes an obligation to collect “trust fund” taxes on corporations, not individuals. The corporation was not charged, but the court found the defendant, who was the president and principal officer of the corporation, guilty of violating Section 7215 as an *aider and abettor* to the corporate employer. *Id.* at 1159-60. *It is the Tax Division’s view that the Merriwether court’s analysis is incorrect given its attention on Section 7512 rather than Section 7215, even though we concur with the conviction.*

Section 6672 of Title 26 U.S.C. is the civil corollary to Sections 7202 (felony charge) and 7215 (misdemeanor charge). It imposes penalties on a “person” who fails to “collect, truthfully account for, and pay over” trust fund taxes. A “person” under Section 6672 is defined in 26 U.S.C. § 6671(b) in the same terms used in Section 7343. Accordingly, cases interpreting “responsible persons” under Section 6672 are instructive.

² Section 7343, which is part of Chapter 75 of the Internal Revenue Code, specifically states that it applies only to “this chapter.” Chapter 75 encompasses Sections 7201 through 7344.

See, e.g., *Pacific National Insurance v. United States*, 422 F.2d 26, 29-32 (9th Cir. 1970), see also *United States v. Carrigan*, 31 F.3d 130 (3d Cir. 1994); [Section 9.04](#), *supra*.

18.05[2] Employees

To establish the requirement for withholding taxes, the government must prove that the taxes in issue relate to employees of the defendant or the defendant's business. On this issue, the jury can consider all of the circumstances surrounding the relationship between the defendant and those individuals considered to be employees. The analysis is the common law test of the employer's right to control the workers. "The right to control must include control of the activity of the workers, not only with regard to the result accomplished but also with regard to the means by which this result is accomplished." *United States v. Polk*, 550 F.2d 566, 567 (9th Cir. 1977) (*per curiam*); see *Lifetime Siding, Inc. v. United States*, 359 F.2d 657, 660 (2d Cir. 1966). Essentially, the government must prove that the workers were employees and not independent contractors.

18.06 REQUIREMENTS OF SECTION 7512(b)

18.06[1] Notice of Failure to Collect, Account For, and Pay Over

Obsolescence of Section 7215: Section 7215(a) makes it a misdemeanor offense to fail to comply with any provision of Section 7512(b). Section 7512 provides that upon receipt of special notice from the IRS, an employer is required to, among other things, deposit collected employment tax in a separate bank account and to pay over to the IRS the funds in that bank account. Accordingly, one of the elements of an offense under Section 7215(a) is the IRS's issuing the Section 7512(b) notice. The Tax Division has been informed that due to the wide availability of electronic methods of transferring funds, the IRS has determined, among other things, that the "special deposit procedures [of Section 7512] are no longer applicable. See IRM 3.17.244.4.3. Accordingly, effective January 1, 2012, the IRS will no longer issue notices under Section 7512. As a result, the government will be not be able to prove one or more of the essential elements of the misdemeanor described in Section 7215(a). Accordingly, the Tax Division no longer expects the IRS to refer cases recommending misdemeanor charges under Section 7215(a). [Edited October 2014.]

In order to establish a violation of Section 7215(a), the IRS first must have notified the employer of his or her failure to collect, truthfully account for, or pay over the covered taxes, or to make deposits, payments, or returns of such taxes, “by notice delivered in hand” 26 U.S.C. § 7512(a)(2). Thus, personal service of the notice is required. In the case of a formal business or legal entity, however, service on any corporate officer will suffice as notice to all other officers. *United States v. McMullen*, 516 F.2d 917, 920 (7th Cir. 1975); *United States v. Stevenson*, 540 F. Supp. 93, 96 (D. Del. 1982).

The IRS uses Form 2481, Notice to Make Special Deposits of Taxes, as the formal notice served pursuant to Section 7512. See *United States v. Stevenson*, 540 F. Supp. 93, 96 (D. Del. 1982). The recipient signs this form as proof of having received notice. A defendant can be prosecuted, however, even if he or she refuses to sign Form 2481 as long as it is shown that the defendant actually received the form. See *McMullen*, 516 F.2d at 919.³

Form 2481 informs the recipient of his or her statutory obligation to open a special trust account in a bank for the benefit of the United States and deposit in that account all taxes withheld from wages within two banking days after the taxes are collected. 26 U.S.C. § 7512(b). Furthermore, the employer must pay over the taxes monthly, instead of quarterly, with the filing of Form 720, Quarterly Federal Excise Tax Return, or Form 941-M, Employer’s Monthly Federal Tax Return. The requirements set forth in Form 2481 cannot be waived and remain in effect until the employer receives written notice from the IRS canceling these obligations. See *United States v. Gay*, 576 F.2d 1134, 1137 (5th Cir. 1978); Treas. Reg. §§ 31.6011(a)-5(a)(2), 301.7512-1(e).

18.06[2] Bank Account for Trust Deposits

The bank account used for the trust deposits must be designated as a special fund in trust for the United States, payable to the United States by the employer as trustee. 26 U.S.C. § 7512(b). The fact that a defendant had three general bank accounts in his own name did not meet this requirement. *United States v. McMullen*, 516 F.2d 917, 920-21 (7th Cir.1975). As a practical matter, however, unless there are unusual circumstances present, an employer probably will not be prosecuted for failing to establish such a

³ In egregious cases of non-compliance the IRS hand delivers a Letter 903 and a Notice 931, Deposit Requirements for Employment Taxes, to the taxpayer.

special account if the employer has paid the required taxes monthly by filing Form 720 or 941-M. In such a situation, the government is receiving its money on a timely basis.

Section 7512(b) requires the employer to make a deposit each pay period, even though the employer does not have to formally pay over the funds to the United States until the end of each month. Thus, for every pay period that the employer fails to deposit the withheld taxes to the trust account, the employer is violating Section 7215. Otherwise stated, where there is a series of failures to deposit over numerous pay periods, each failure is a separate offense and not part of one continuing offense. *United States v. Paulton*, 540 F.2d 886, 893 (8th Cir. 1976); see *United States v. Hemphill*, 544 F.2d 341, 343 (8th Cir. 1976) (separate violation identified for each pay period defendant failed to pay).

It is not necessary for the prosecutor to prove the exact amount of each deposit required. *United States v. Gay*, 576 F.2d 1134, 1138 (5th Cir. 1978). “The essence of the [Section 7215] offense is failing to make a timely deposit” to a trust account. *Id.* If no deposits were made at all, then the government need only prove that a deposit was due, to show noncompliance with Section 7512 and, therefore, a violation of Section 7215. *Ibid.* Similarly, a belated payment is not a defense, “since the focus of section 7512 is not eventual payment, but timely payment, and an offense under section 7215 has nothing directly to do with payment at all, but with failure to comply with mandatory accounting procedures.” *McMullen*, 516 F.2d at 921.

18.06[3] Prior Failures to Pay

As noted, courts have expressed different views on the relevance of a defendant’s failure to pay withholding and FICA taxes for periods before those named in the indictment or information. In *United States v. McMullen*, 516 F.2d 917, 921 (7th Cir. 1975), the Seventh Circuit held that evidence of prior tax deficiencies was “necessary and material” because Section 7512(b) is triggered by a defendant’s prior failures to properly collect, account for, or pay over taxes. See *United States v. Hemphill*, 544 F.2d 341, 343-44 (8th Cir. 1976) (element of offense included defendant’s failure to pay FICA taxes before notice under Section 7212 was issued). Alternatively, in *United States v. Polk*, 550 F.2d 566, 568 (9th Cir. 1977), the Ninth Circuit held that prior failures to pay FICA and Social Security taxes was admissible to show a defendant’s state of mind and intent. The rationale of *Polk* is questionable, however, because intent is not an element of

Section 7215; it is a strict liability offense. See *United States v. Erne*, 576 F.2d 212, 214-16 (9th Cir. 1978), and Section [18.07](#), *infra*.

18.06[4] Dates of Payroll Checks

Questions or slight inconsistencies regarding the dates of employees' checks and the dates that the checks were cashed are not fatal to an indictment or proof of the crime. "It is not material that [payroll] checks may not have been delivered on the exact dates appearing thereon or that particular employees may not have cashed their checks immediately after receiving them." *United States v. Gay*, 576 F.2d 1134, 1138 (5th Cir. 1978) (quoting *United States v. Paulton*, 540 F.2d 886, 891 (8th Cir. 1976)). "[T]he mere fact that some checks were not dated on the paydays listed [in the information] is an inconsequential and harmless variance." *United States v. McMullen*, 516 F.2d 917, 921 (7th Cir. 1975).

18.06[5] Expert Testimony Excluded

The Fifth Circuit has approved the exclusion of expert testimony at trial concerning the requirements of Section 7512. A defendant's legal obligations under this statute are a matter for the court's instructions to the jury on the law and are not properly a subject for testimony by an expert witness. *United States v. Gay*, 576 F.2d 1134, 1137 (5th Cir. 1978).

18.07 CIRCUMSTANCES BEYOND CONTROL

Section 7215(b)(2) provides that there is no violation if the defendant "shows" that the failure to collect, account for, or pay over the tax was "due to circumstances beyond his control." Section 7215(b) also provides that a lack of funds existing immediately after the payment of wages, whether or not caused by the payment of the wages, "shall not be considered to be circumstances beyond the control of a person." The scope of this "circumstances beyond his control" exception to the statute "was intended to be narrow." *United States v. Randolph*, 588 F.2d 931, 932-33 (5th Cir. 1979) (*per curiam*).

The legislative history of Section 7215 includes examples of acceptable circumstances beyond an employer's control that would cause a lack of funds after (but not immediately after) the payment of wages. These special circumstances include theft,

embezzlement, destruction of the business from fire or other casualty, and the failure of the bank in which the employer had deposited funds prior to transferring them to the trust account for the government. *Randolph*, 588 F.2d at 933 (citing S. Rep. No. 85-1182 (1958), as reprinted in 1958 U.S.C.C.A.N. 2179, 2191-92). Conversely, a lack of funds caused by the defendant's taking care of other liabilities and paying other creditors is not considered a circumstance beyond a person's control and is not a viable defense. *Ibid.*; *United States v. Plotkin*, 239 F. Supp. 129, 131 (E.D. Wis. 1965).

18.08 INTENT

Section 7215 is a strict criminal liability provision. The government is not required to prove any particular mental state, intent, or willfulness, as it must for other criminal tax violations. *United States v. Erne*, 576 F.2d 212, 213-15 (9th Cir. 1978); *United States v. Paulton*, 540 F.2d 886, 890 (8th Cir. 1976); *United States v. Dreske*, 536 F.2d 188, 196 (7th Cir. 1976); *United States v. Gorden*, 495 F.2d 308, 310 (7th Cir.1974); *United States v. Stevenson*, 540 F. Supp. 93, 97 (D. Del. 1982); see also *United States v. Evangelista*, 122 F. 3d 112, 121-22 (2d Cir. 1997) (recognizing that the felony offense of failing to account for and pay over under Section 7202 entails the element of willfulness, while the misdemeanor under Sections 7215 and 7512 does not).

Because Section 7215 does not require willfulness, but Section 7202 does, and because Section 7215 requires proof of specific notice to defendant, while Section 7202 does not, Section 7215's misdemeanor charge is *not* a lesser included offense of Section 7202. *United States v. Ellis*, No. 06-76-Cr-1, 2007 WL 2316486, at *4 (S.D. Ind. Aug. 2, 2007); see *Erne*, 576 F.2d at 215 (noting differences between Sections 7215 and 7202).

18.09 DEFENSES

18.09[1] Constitutional Contentions

Sections 7215 and 7512 have been upheld in the face of various constitutional challenges. The argument that Section 7512 is unconstitutional because it does not provide for a prior administrative hearing before an employer is required to comply with subsection (b) has been rejected. *United States v. Paulton*, 540 F.2d 886, 889 (8th Cir. 1976); *United States v. Patterson*, 465 F.2d 360, 361 (9th Cir. 1972); *United States v.*

Plotkin, 239 F. Supp. 129, 131-32 (E.D. Wis. 1965). A defendant who believes a notice and obligation are in error may pay the disputed tax and seek a refund. *Paulton*, 540 F.2d at 889.

The Eighth Circuit also stated in *Paulton* that the exceptions appearing in Section 7215(b) do not unconstitutionally place on a defendant the burden of proving his innocence and therefore do not impermissibly infringe on the defendant's privilege against self-incrimination. 540 F.2d at 891-92. Once a defendant presents "sufficient" evidence "to create a real issue" of whether he is entitled to a statutory exception from liability, the burden shifts to the government to prove the exception does not apply. *Id.* at 892.

Finally, the contention that a sentence of imprisonment for violation of Section 7215 is contrary to the Fifth Amendment of the United States Constitution has been rejected. Defendants have been unsuccessful in claiming that they were being imprisoned for debt because they were unable to pay the taxes. *United States v. Gorden*, 495 F.2d 308, 310 (7th Cir. 1974); *United States v. Patterson*, 465 F.2d at 361.

18.09[2] Selective Prosecution

Courts also have rejected claims of selective, discriminatory prosecution. *United States v. Erne*, 576 F.2d 212, 216-17 (9th Cir. 1978); *United States v. Stevenson*, 540 F. Supp. 93, 97-98 (D. Del. 1982). These holdings, rather than being based on the nature of the statute, simply rested on the defendants' failure of proof.

18.09[3] Prior Excess Deposits

Making advance deposits into the trust account in excess of withheld amounts for pay periods prior to those charged is not an absolute defense to the failure to make the proper deposits for the pay periods named in the indictment or information. "To ensure collection of withheld taxes, section 7215 imposes strict compliance with the deposit requirements of section 7512 and any deviation from these provisions constitutes an offense." *United States v. Gay*, 576 F.2d 1134, 1137 (5th Cir. 1978). However, evidence of overpayment for prior pay periods may be admissible as proof that the defendant had a reasonable doubt as to his obligation to collect taxes in the charged pay periods because he may already have deposited any taxes due. *Ibid.*

18.09[4] Late Payment of Taxes

Evidence of late payments of withholding taxes is no defense because “the focus of section 7512 is not eventual payment, but timely payment, and an offense under section 7215 has nothing directly to do with payment at all, but with failure to comply with mandatory accounting procedures,” which were designed to avoid late payments. *United States v. McMullen*, 516 F.2d 917, 921 (7th Cir. 1975).

18.09[5] Lack of Funds

Section 7215 specifically rejects “lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages)” as being an exception to the sanctions of the statute. See *United States v. Dreske*, 536 F.2d 188, 195 (7th Cir. 1976) (no error for court to deny admission of evidence of lack of funds prior to or subsequent to payroll due to employer’s failure to receive monies expected from agencies).

18.09[6] Embezzlement

Congress has stated that embezzlement is an example of an acceptable circumstance beyond a person’s control that may excuse a person’s liability under Section 7215. *United States v. Randolph*, 588 F.2d 931, 933 (5th Cir. 1979) (citing S. Rep. No. 85-1182 (1958), as reprinted in 1958 U.S.C.C.A.N. 2187, 2191-92)). In *Randolph*, 588 F.2d at 933, the court held that there was insufficient proof to support the embezzlement defense where the evidence consisted only of involvement of a co-owner of the defendant with a competitor. The court noted that in order to assert a viable embezzlement defense, a defendant must prove that the embezzling co-owner or employee lied to the defendant about the bank balances at the time the payroll checks were drawn, or embezzled the funds after the payroll checks were drawn, leaving insufficient funds to make the trust deposits. *Ibid.* Embezzlement before payroll checks are drawn would not constitute a defense if the defendant knew or should reasonably have known of the embezzlement. *Ibid.*

18.10 VENUE

The Sixth Amendment of the United States Constitution provides that trials shall be in the “State and district wherein the crime shall have been committed” See also

Fed. R. Crim. P. 18. If a statute does not indicate the location of the crime, “the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it.” *United States v. Anderson*, 328 U.S. 699, 703 (1946). In Section 7215 prosecutions, venue is proper in the judicial district in which the employer had his or her place of business or in which he or she maintained his or her special trust bank account, if he or she ever opened such an account.

See also the discussion of venue in Section [6.00](#), *supra*.

18.11 STATUTE OF LIMITATIONS

The statute of limitations for Section 7215 offenses is three years from the date the defendant was required to make the deposit to the trust account and failed to do so. 26 U.S.C. § 6531. According to Section 7512(b), the deposit must be made by the end of the second banking day after the taxes are collected. Where proper deposits have been made but the defendant later withdraws the funds from the trust account and uses them for purposes other than payment to the IRS, then presumably the statute of limitations commences to run from the date the defendant made such withdrawals.

See also the discussion of the statute of limitations in Section [7.00](#), *supra*.