Criminal Tax Manual

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9.00 WILLFUL FAILURE TO COLLECT OR PAY OVER TAX

9.01 STATUTORY LANGUAGE: 26 U.S.C. § 7202

> §7202. ***Willful failure to collect or pay over tax***
>
> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined . . . or imprisoned not more than 5 years, or both, together with the costs of prosecution.[1]

9.02 TAX DIVISION POLICY

Section 7202 is used to prosecute persons who willfully fail to comply with their statutory obligations to collect, account for, and pay over taxes imposed on another person. This includes employment tax crimes, which are regularly prosecuted under § 7202, as well as 26 U.S.C. § 7201 (tax evasion), 26 U.S.C. § 7206(1) (false returns), 26 U.S.C. § 7212(a) (obstruction), and 18 U.S.C. § 371 (conspiracy to defraud).

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[1] For offenses under § 7202, the maximum permissible fine is generally $250,000 for individuals and $500,000 for organizations. 18 U.S.C. §§ 3571(b) & (c). *See* ***United States v. Looney***, 152 Fed.Appx. 849, 859 (11th Cir. 2005) (fine for Title 26 offense determined by § 3571, not the lower fine limit set forth in the offense of conviction). Under the alternative fine provision, § 3571(d), a fine twice the gross gain or loss can be imposed, but only if the gain or loss was determined by a jury beyond a reasonable doubt. *See* CTM 45.01[3]; ***Southern Union Co. v. United States***, 132 S. Ct. 2344, 2350-51 (2012) (the Sixth Amendment requires that where the maximum fine is calculated based on reference to particular facts, including the defendant's gain or the victim's loss, such facts must be found by the jury beyond a reasonable doubt); ***United States v. Pfaff***, 619 F.3d 172 (2d Cir. 2010) (per curiam).

9.03 GENERALLY

Section 7202 applies to "[a]ny person required under [Title 26] to collect, account for, and pay over any tax imposed by [Title 26]." Although the primary focus of § 7202 is on taxes required to be withheld from the gross wages paid to employees, that is not its exclusive purview. The statute applies to any person obligated to collect and pay over to the United States a Title 26 tax imposed on another person.[2] When § 7202 is used outside the employment tax situation, however, care should be taken to confirm that the tax is a collect-and-pay-over tax and not a tax imposed directly on the defendant. *See* CTM 9.04[1].

The Internal Revenue Code imposes four types of tax with respect to wages paid to employees: income tax, Social Security tax, Medicare tax, and federal unemployment tax. Income tax is imposed on employees based upon the amount of wages they receive. 26 U.S.C. § § 1, 61(a)(1). Social Security tax and Medicare tax are imposed by the Federal Insurance Contributions Act, and are collectively referred to as FICA taxes.[3] FICA taxes are separately imposed on employees and on employers. 26 U.S.C. §§ 3101(a) (imposing Social Security tax on employees); 3101(b) (imposing Medicare tax and Additional Medicare tax on employees); 3111(a) (imposing Social Security tax on employers); 3111(b) (imposing Medicare tax on employers). Federal unemployment tax, imposed by the Federal Unemployment Tax Act (FUTA), is imposed solely on employers.[4] 26 U.S.C. § 3301. As explained below, because FUTA and employer FICA

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[2] *See, e.g.*, 26 U.S.C. § 3402(q) (payors of gambling winnings in excess of $1,000 required to collect tax imposed on recipient of winnings); 26 U.S.C. §§ 4261 & 4291 (airlines required to collect certain excise taxes imposed on passengers); 26 U.S.C. § 4251 (providers of "communications services," which includes certain telephone services, required to collect excise tax imposed on users of service).

[3] Section 3101(a), applicable to employees, and Section 3111(a), applicable to employers, impose (subject to annual ceilings) a 6.2% tax for Social Security, which is referred to as "Old-Age, Survivors, and Disability Insurance." Section 3101(b), applicable to employees, and Section 3111(b), applicable to employers, impose a 1.45% tax for Medicare, which is referred to as "Hospital Insurance." Section 3101(b)(2), also applicable to employees, imposes an Additional Medicare tax equal to 0.9% of wages in excess of certain wage limits.

[4] Section 3301 currently imposes (subject to an annual ceiling) a Federal Unemployment Tax in the amount of 6% of wages paid.

are taxes imposed directly on employers, neither is a collect-and-pay-over tax within the purview of § 7202. *See* CTM 9.04[1].

***Note**: Section 7202 applies to the tax required to be withheld from the wages paid to "employees"; it does not apply to payments made to independent contractors. See **United States v. Kahre**, 737 F.3d 554, 580-581 (9th Cir. 2013) (identifying the factors for determining whether a worker is an employee or an independent contractor; court determined the workers were employees and sustained the § 7202 convictions).*

Employers are required to withhold employee FICA and income tax from the wages paid to their employees, and to pay over the withheld amounts to the United States.[5] 26 U.S.C. §§ 3102(a) (imposing on employer duty to collect employee's share of FICA), 3102(b) (imposing on employer duty to pay over employee FICA), 3402 (imposing on employer duty to withhold income taxes from employee's wages), 3403 (imposing on employer duty to pay over income taxes required to be withheld from employee's wages). The employer's duty to pay the United States the amount that is required to be collected exists even if the taxes are not actually withheld from the wages

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[5] With respect to employment taxes, the "employer" is generally the common law employer; that is, the entity or person "for whom an individual performs or performed [the] service ... as the employee of such person." 26 U.S.C. § 3401(d). Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services. *See* 26 C.F.R. §§ 31.3121(d)-1; 31.3306(i)-1; 31.3401(c)-1. Section 3401(d)(1) provides for a very limited exception to the common law employer's obligation to withhold, report, and pay over income taxes, where (1) the common law employer does not have legal control of the payment of the wages; and (2) a third party does have legal control of the payment of wages. *See* ***Cencast Services, L.P. v. United States***, 62 Fed.Cl. 159, 170 (2004) (§ 3401(d)(1) was enacted "to cover certain special cases, such as ... certain types of pension payments."); ***Winstead v. United States***, 109 F.3d 989 (4th Cir. 1997); 26 C.F.R. § 31.3401(d)-1(f). When § 3401(d)(1) applies, it has the effect of transferring the employment tax responsibilities from the common law employer to the third-party who has legal control of the payment of wages. Section 3401(d)(1) does not apply to the contractual relationship that exists between a common law employer and a Professional Employer Organization (PEO), discussed at 9.04[2], if the common law employer provides to the PEO the funds used to make the wage payment to employees. For wages paid for quarters beginning on or after March 31, 2014, however, 26 C.F.R., § 31.3504-2 provides that a PEO and the common law employer are both liable for the common law employer's unpaid employment taxes if the PEO is designated to perform the acts of an employer. *See* 9.04[4].

of the employee. *See, e.g.*, ***United States v. Simkanin***, 420 F.3d 397 (5th Cir. 2005) (responsible person's § 7202 convictions based upon failure to collect).

The employee FICA and income tax required to be withheld and paid over are commonly referred to as "trust fund taxes," reflecting 26 U.S.C. § 7501(a)'s provision that tax required to be collected or withheld "shall be held to be a special fund in trust for the United States." *See* ***Slodov v. United States***, 436 U.S. 238, 243 (1978). Section 7501(b) states that "[f]or penalties applicable to violations of this section, see sections 6672 and 7202." The statutory text of § 7202 and of § 6672, which imposes a civil penalty equal to 100% of the tax that should have been collected and paid over, largely track each other.[6] Case law construing § 6672 thus is helpful in construing § 7202. *See* ***Slodov***, 436 U.S. at 247-48. Accordingly, except as to § 7202's criminal *mens rea* element, cases construing and applying § 6672 are liberally cited herein.

As noted, § 7202 applies to "[a]ny person required under [Title 26] to collect, account for, and pay over any tax imposed by [Title 26]." Section 7202 is accordingly limited to Title 26 taxes imposed on another that the defendant is statutorily obligated to collect or withhold for payment to the United States. *See* CTM 9.04[1]. Therefore, § 7202 does not apply to the portion of the FICA tax imposed on employers or to the FUTA tax. Nor does § 7202 apply to unpaid corporate income tax. Such non-trust fund taxes do, however, constitute relevant conduct for a § 7202 conviction, increasing the total tax loss to be considered by the sentencing court.

Note*: Prosecutors should remember that restitution ordered on account of a defendant's § 7202 convictions must be limited to not only the quarters of conviction but also the trust fund portion of a specific quarter, unless the defendant agrees to pay restitution in the amount of the relevant conduct tax loss. See, e.g.,* ***United States v. Lord****, 404 Fed.Appx. 773, 2010 WL 5129152 (4th Cir. 2010) (government conceded amount of*

[6] 26 U.S.C. § 6672(a) provides:

> 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 or part II of subchapter A of chapter 68 for any offense to which this section is applicable.

restitution ordered on § 7202 convictions constituted reversible plain error because the amount ordered was not limited to the trust fund tax for the quarters of conviction). As an alternative to charging § 7202, prosecutors may charge violations of the duty to pay with respect to both the employee and employer portions of employment tax; for example, by charging evasion in violation of 26 U.S.C. § 7201.[7] *See generally* ***United States v. McKee***, 506 F.3d 225, 233-34 (3d Cir. 2006); ***United States v. Butler***, 297 F.3d 505, 509 (6th Cir. 2002).

9.03[1] A responsible person can be charged with a personal income tax offense for claiming credit on a Form 1040 for income tax not "actually withheld"

Treasury Regulation (26 C.F.R.) § 1.31-1(a) provides that if income tax is "actually withheld" from an employee, the employee is entitled to a credit for the amount withheld even if the tax is not paid over to the IRS by the employer. Whether funds have been "actually withheld" is determined by "whether the funds functionally left the control of a taxpayer." ***May v. Commissioner***, 137 T.C. 147, 152-154 (2011). The Tax Division has had success in charging responsible persons with a personal income tax offense for claiming credit on a Form 1040 for income tax that was not "actually withheld." *See* ***United States v. May***, 174 Fed. Appx. 877, 2006 WL 890658 (6th Cir. 2006) (also convicted on § 7201 evasion counts); ***United States v. Blanchard***, 618 F.3d 562, 576 (6th Cir. 2010) ("Rather than creating an overly formalistic division between the personal and

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[7] If evasion of payment, in violation of § 7201, is charged, prosecutors should take care to distinguish between the employment tax owed by the employer and the civil trust fund recovery penalty that can be assessed against responsible persons under § 6672. *Cf.* ***United States v. Farr***, 536 F.3d 1174 (10th Cir. 2008) (vacating § 7201 evasion count on the ground the indictment had been constructively amended, where the indictment alleged the defendant evaded employment tax, but further alleged, inaccurately, that the evaded tax was personally owed by the defendant (as opposed to the corporation), and the jury was instructed that the defendant could also be convicted of evading a § 6672 civil trust fund penalty she personally owed); ***United States v. Farr***, 591 F.3d 1322 (10th Cir. 2010) (holding that double jeopardy did not bar retrial); ***United States v. Farr***, 701 F.3d 1274, 1287-88 (10th Cir. 2012) (holding that the defendant could be charged, and was properly convicted, under § 7201, with evading a trust fund recovery penalty (which is treated as a tax, *see* 26 U.S.C. § 6671) assessed under § 6672).

official capacities of an individual operating as both employer and employee, which would permit the corporate form to serve as a shield to individual liability, we find it more consonant with the purposes of § 287 to conduct a functional inquiry into whether funds due the government left the defendant's control and so may be deemed 'actually withheld' from his wages."); ***United States v. Gollapudi***, 130 F.3d 66, 72 (3d Cir. 1997) (defendant convicted on § 7202 counts and also on counts of filing false personal income tax returns, in violation of 26 U.S.C. § 7206(1)).

Prosecutors are cautioned to limit use of a personal income tax offense in this context to cases where the evidence permits the jury to conclude the defendant knew that he was not entitled to claim the credit as a payment on his tax return. ***Cf. May***, 137 T.C. at 153 ("Mr. May had sole check signature authority on Maranatha's corporate bank account, giving him full control of its finances. Even though he was technically subject to tax withholding, we believe Mr. May is more analogous to a person filing a completely falsified Form W–2, given his knowledge and participation in failing to remit the withholdings.").

Note*: The income tax credit which forms the basis for the personal tax offense is typically already counted in the § 7202 tax loss figure. It would constitute impermissible double counting to count it again in computing either tax loss or restitution for the personal tax offense.* ***United States v. May****, 568 F.3d 597, 604-05 (6th Cir. 2009).*

9.04 ELEMENTS

To establish a violation of § 7202, the prosecutor must prove the following elements beyond a reasonable doubt:

(1) Duty to collect, account for, and pay over a tax;[8]
(2) Failure to collect, truthfully account for, or pay over the tax; and
(3) Willfulness.

United States v. Thayer, 201 F.3d 214, 219-21 (3d Cir. 1999); *see also* ***United States v. Simkanin***, 420 F.3d 397, 404-05 (5th Cir. 2005).

Under § 7202, it is the person or persons with the responsibility to collect, account for, and pay over who will be liable when there is a willful failure to perform this duty. The term "person" is "construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1). Section 7343 extends the definition of "person" to include "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."[9]

9.04 [1] Responsibility

"A responsible person is someone who has the status, duty and authority to avoid the [employer's] default in collection or payment of the taxes." ***Ferguson v. United States***, 484 F.3d 1068, 1072 (8th Cir. 2007) (internal quotation and citation omitted). A person is responsible for collecting, accounting for, and paying over trust fund taxes if he or she has "the authority required to exercise *significant* control over the [employer's] financial affairs, regardless of whether [the individual] exercised such control in fact."[10] ***United States v. Jones***, 33 F.3d 1137, 1139 (9th Cir. 1994) (internal quotation omitted)

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[8] Although the duties constitute a unitary obligation, meaning that a responsible person has an obligation to perform all three duties, a person who becomes a responsible person of the employer after tax was collected can still be held accountable for not paying over the collected tax, but only to the extent there were unencumbered funds to do so when he or she became a responsible person. *See* ***Slodov***, 436 U.S. at 259-60.

[9] An identical definition of "person" applies to § 6672. *See* 26 U.S.C. § 6671(b).

(emphasis in original); *see also* ***United States v. DeMuro***, 677 F.3d 550, 561 (3d Cir. 2012) (stating that authority to discharge employees is relevant to whether a defendant had significant control over finances); ***United States v. Armstrong***, 206 Fed.Appx. 618, 620 (8th 2006) ("there is ample evidence from which a jury could conclude that [the defendant] retained significant, even if not exclusive, control over the company's finances"). A non-exhaustive list of the factors used to identify the individual or individuals with the duty to collect, account for, and pay over include the following:

(1) the duties of the person as outlined by the employer's by-laws;
(2) the ability of the individual to sign checks on behalf of the employer or to otherwise determine which creditors to pay and when to pay them;
(3) the signature on the employer's federal employment or other tax returns;
(4) the identity of the employer's officers, directors, and owners (*e.g.*, shareholders, partners);
(5) the identity of the individuals who hired and fired employees; and
(6) the identity of the individuals who were in charge of the financial affairs of the employer.

United States v. Carrigan, 31 F.3d 130, 132-33 (3d Cir. 1994); *see also* ***United States v. McLain***, 646 F.3d 599, 603 (8th Cir. 2011) (officials and officers held responsible under § 7202); ***United States v. Lord***, 404 Fed.Appx. 773, 2010 WL 5129152 (4th Cir. 2010) (the defendant was held to be a responsible person under § 7202 where she exercised authority over finances, was authorized to sign employment tax returns, had the ability to transfer the sums withheld for taxes to an accounting service, and had signature authority over the bank account used to pay bills); ***United States v. Crabbe***, 364 Fed.Appx. 412, 2010 WL 318399 (10th Cir. 2010) (the defendant was held to be a responsible person under § 7202 where he was the vice president; had some control over financial affairs; unilaterally established a corporate bank account; had authority to distribute corporate

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(… continued)

[10] On the other hand, a person who is a corporate officer in name only, without any authorized or actual financial control, is not a responsible person. *See* ***Erwin v. United States***, 591 F.3d 313, 320-21 (4th Cir. 2010); ***Vinick v. United States***, 205 F.3d 1, 8 (1st Cir. 2000); ***Winter v. United States***, 196 F.3d 339, 347 (2d Cir. 1999).

funds, including by signing corporate checks; held a large share of the ownership interests; participated in firing at least one employee; and ostensibly had the authority as vice president to hire or fire others.).

***Note**: Prosecutors should ascertain whether an IRS Form 2751, Proposed Assessment of Trust Fund Recovery Penalty, or an IRS Form 4180, "Report of Interview with Individual Relative to Trust Fund Recovery Penalty or Personal Liability for Excise Taxes," was completed during the civil administrative part of the case, because these documents may contain relevant admissions or statements by the defendant. See **Moore v. United States**, 648 F.3d 634, 636 (8th Cir. 2011) (approved admission of Form 2751 in § 6672 case); **United States v. Thayer**, 201 F.3d 214 (3d Cir. 1999) (in § 7202 case, court noted that the defendant signed a Form 2751, "accepting personal responsibility for unpaid tax liability and civil penalties"); **United States v. Korn**, 2013 WL 2898056 (W.D.N.Y. 2013) (in § 7202 case, Magistrate Judge noted that the Revenue Agent's interview of the defendant was memorialized on a Form 4180).*

Section 7202 expressly applies to "any" responsible person, not just the person primarily responsible for the payment of the taxes; accordingly, more than one person may be liable for a violation of the duty to collect, account for, and pay over the tax. *See* ***Barnett v. I.R.S.***, 988 F.2d 1449, 1455 (5th Cir. 1993) ("There may be—indeed, there usually are—multiple responsible persons in any company."); ***Gephart v. United States***, 818 F.2d 469, 473 (6th Cir. 1987) ("More than one person can be a responsible officer of a corporation. Essentially, liability is predicated upon the existence of significant, as opposed to absolute, control of the corporation's finances."). The key to liability under § 7202 is the person's authority with respect to corporate finances, as opposed to the general management of the business. *See* ***United States v. DeMuro***, 677 F.3d 550, 561 (3d Cir. 2012) (defendant "vehemently argued that she was not responsible for paying [the corporation's] taxes. Given that argument, the evidence of her authority to discharge employees and her control over [the corporation's] finances was highly probative"); ***United States v. Armstrong***, 206 Fed.Appx. 618, 2006 WL 3345281 (8th Cir. 2006) (finding that there was "ample evidence from which a jury could conclude that [the defendant] retained significant, even if not exclusive, control over the company's finances"); ***Hochstein v. United States***, 900 F.2d 543, 547 (2d Cir. 1990) ("The central question, however, is whether the individual has significant control over the enterprise's finances.").

Note:** The scope of the statute is not limited to corporate insiders; a person who is not an officer, director, employee, or shareholder of the delinquent employer may have* *sufficient control over the finances of the delinquent employer to be held accountable as a "responsible person."* ***Neckles v. United States*, 579 F.2d 938, 940 (5th Cir. 1978) (power and authority to pay creditors sufficient; official position not required). Best practice dictates use of the term "responsible person," not "responsible officer," lest a case be lost due to careless verbiage.*

The statute describes three ways it can be violated: (1) a willful failure to collect; (2) a willful failure to truthfully account for; or (3) a willful failure to pay over. *See* ***Slodov***, 436 U.S. at 244. A willful failure to pay over after the filing of a return making a truthful accounting leaves the duty as a whole unfulfilled and the responsible person subject to prosecution. In ***Slodov***, the Supreme Court held that a person could be liable under § 6672 if the person willfully failed to pay over the tax, even if he or she was not associated with the employer at the time the tax was collected or accounted for, assuming there were unencumbered funds available to pay the trust fund taxes at the time the person became associated with the employer. 436 U.S. at 259-60. Following ***Slodov***, appellate courts have held that either a willful failure to truthfully account for trust fund taxes or a willful failure to pay over trust fund taxes is sufficient to violate § 7202. *See* ***United States v. Evangelista,*** 122 F.3d 112, 121-22 (2d Cir. 1997) ("We agree with the government that the plain language of the disputed passage in § 7202 creates a dual obligation-to 'truthfully account for and pay over' trust fund taxes-that is satisfied only by fulfilling *both* separate requirements. Accordingly, the command of the statute is violated by one 'who willfully fails' *either* to 'account for' *or* to 'pay over' the necessary funds."); ***Thayer,*** 201 F.3d at 220-21 (agreeing both with ***Evangelista***'s analysis and its observation that a contrary interpretation "would result in a greater penalty for one who simply failed to collect trust fund taxes than for one who collect[ed] them and, as is charged here, used them for his own selfish purposes ..., so long as he notified the IRS that he had collected the tax." (internal quotation omitted)). In ***United States v. Gilbert***, 266 F.3d 1180, 1183-85 (9th Cir. 2001), the Ninth Circuit rejected as dicta its prior statement in ***United States v. Poll,*** 521 F.2d 329, 334-35 n.3 (1975), that § 7202 requires two failures to act, both a willful failure to truthfully account *and* a willful failure to pay over, and instead followed ***Evangelista*** and ***Thayer*** in holding that a person violates § 7202 if he or she willfully fails to collect the tax, willfully fails to truthfully account for the tax, *or* willfully fails to pay over the tax.

Note*:* ***Slodov*** *involved the situation of an individual becoming a responsible person after the trust fund tax had been collected. In that limited circumstance, the Supreme Court held that the responsible person was obligated to pay the delinquent tax* *only to the extent there existed unencumbered funds at the time he became a responsible person. In contrast, an individual who was a responsible person when the trust fund tax was collected is obligated to use after-acquired unencumbered funds to pay the delinquent trust fund tax even as to the taxes which accrued prior to his knowing of the delinquency.*[11] ***Honey v. United States****, 963 F.2d 1083, 1090 (8th Cir. 1992);* ***Barnett v. IRS****, 988 F.2d 1449, 1458 (5th Cir. 1993);* ***Erwin v. United States****, 591 F.3d 326 (4th Cir. 2010) ("following the lead of every other circuit to consider the question, we adopt the rule that when a responsible person learns that withholding taxes have gone unpaid in past quarters for which he was responsible, he has a duty to use all current and future unencumbered funds available to the corporation to pay those back taxes");* ***Nakano v. United States****, 742 F.3d 1208, 1212 (9th Cir. 2014) ("Every other circuit to have considered the question agrees with the Eighth Circuit's analysis and definition."); see also* ***Mazo v. United States****, 591 F.2d 1151, 1154 (5th Cir. 1979). (responsibility for the collection, reporting, and payment of trust fund employment taxes is a "matter of status, duty and authority, not knowledge" of the delinquent taxes).*

9.04 [2] Willfulness

The element of willfulness under § 7202 is the same as in other criminal offenses under Title 26. *See* Section 8.08, *supra*. The government must show that a defendant voluntarily and intentionally violated a known legal duty. ***Cheek v. United States***, 498 U.S. 192, 200 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973). Evil motive or bad purpose is not necessary to establish willfulness under the criminal tax statutes. ***Pomponio***, 429 U.S. at 12. In ***Gilbert***, *supra*, a post-***Pomponio*** case, the Ninth Circuit rejected the defendant's argument that "his failure to pay over the withholding tax was not willful because [the company] did not have the funds to pay the taxes," holding that the evidence of the defendant's willfulness was sufficient because it showed that he "voluntarily and intentionally paid net wages to his employees with knowledge that withholding taxes were not being remitted to the

[11] Funds are considered encumbered, and thus unavailable to pay the delinquent trust fund tax, only if the employer is "legally obligated to use the funds for a purpose other than satisfying the preexisting employment tax liability and if that legal obligation is superior to the interest of the IRS in the funds." ***Honey v. United States***, 963 F.2d 1083, 1090 (8th Cir. 1992).

IRS." 266 F.3d at 1185. And in ***United States v. Easterday***, 564 F.3d 1004 (9th Cir. 2009), the Ninth Circuit cited ***Pomponio*** to reject a defendant's reliance on its pre-***Pomponio*** decision in ***Poll*** – which held if an employer lacked the resources to pay the tax at the time it was due, the government had the burden of proving "that the lack of sufficient funds on such date was created by (or was the result of) a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer," 521 F.2d at 333 – stating that ***Poll*** "was premised on a definition of willfulness that included some element of evil motive."[12] ***Easterday***, 564 F.3d at 1005.

Note*: As stated above, a defendant's ability to pay the tax on the date the tax is due is not an element of the offense. Accordingly, a defendant is not entitled to a jury instruction requiring the government to prove an ability to pay on the date the tax is due. But just as evidence of an ability to pay is relevant to willfulness – see* **United States v. Blanchard***, 618 F.3d 562, 572 (6th Cir. 2010) ("[i]f a defendant has made discretionary purchases in lieu of meeting his tax obligations, that is probative of his guilt") – so is evidence of an inability to pay. Accordingly, prosecutors should* <u>*not*</u> *seek to exclude the defendant's evidence of an inability to pay. Rather, prosecutors should counter that evidence with evidence of discretionary expenditures, as in* **Blanchard***, or, as explained below, with evidence showing that the defendant paid net wages to employees, or debts to creditors, knowing there were insufficient funds left over to pay the withholding taxes.*

Section 7202 enforces the requirement that employers and "responsible persons" withhold trust fund taxes from the gross wages of employees, truthfully account for those withheld taxes, and pay over those taxes to the United States Treasury. Under § 6672, a voluntary, conscious, and intentional act of paying the claims of other creditors, including the wage claims of employees, instead of paying over the trust fund taxes to the IRS, constitutes a "willful" violation of the duty to pay over. In other words, "[e]mployees to whom wages are owed are but a particular type of creditor," and a person violates his statutory duty to pay over where he pays the wage claims of employees instead of the

[12] ***Poll*** was decided one year prior to ***Pomponio***. The ***Gilbert*** panel ruled consistently with the government's argument that ***Poll***'s definition of willfulness was not good law after ***Pomponio***, but did not cite ***Pomponio*** in the decision. ***Easterday*** made express what was implicitly held in ***Gilbert***.

employment tax claims of the United States.[13] ***Sorenson v. United States***, 521 F.2d 325, 328 (9th Cir. 1975) (holding that "the payment of net wages in circumstances where there are no available funds from which to make withholding is a wilful failure to collect and pay over under § 6672"). The Tax Division has successfully argued in § 7202 cases that repeatedly paying net wages to employees knowing that there are insufficient funds to pay the concomitant withholding taxes constitutes criminal willfulness. *See* ***Gilbert***, 266 F.3d at 1185 (based upon evidence that the defendant repeatedly paid net wages to his employees knowing that withholding taxes were not being remitted to the IRS, the court agreed that the defendant's "act of paying wages to his employees, instead of remitting withholding taxes to the IRS, shows that he voluntarily and intentionally violated § 7202.").

Willfulness in § 7202 cases, as in all tax prosecutions, can be proved by circumstantial evidence. *See* ***United States v. Boccone***, 556 Fed.Appx. 215, 238-39 (4th Cir. 2014) (affirming § 7202 convictions, the court stated that "[t]he intentional preference of other creditors over the United States is sufficient to establish the element of willfulness") (citation omitted); ***United States v. Farr***, 701 F.3d 1274, 1286 (10th Cir. 2012); ***United States v. Lord***, 404 Fed.Appx. 773, 2010 WL 5129152 (4th Cir. 2010) ("paying wages and of satisfying debts to creditors in lieu of remitting employment taxes to the IRS, constitute circumstantial evidence of a voluntary and deliberate violation of § 7202"); ***United States v. Blanchard***, 2008 WL 3915007 (E.D. Mich. 2008) ("Although such evidence is admittedly circumstantial evidence of Defendant's willfulness, circumstantial evidence alone, if substantial and competent, may support a verdict and need not remove every reasonable hypothesis except that of guilt.") (internal quotation marks omitted), *aff'd*, 618 F.3d 562 (6th Cir. 2010) (affirming § 7202 convictions).

Note*: A defendant may argue that she was using the withheld tax to pay current expenses so she could keep the company operating and eventually pay the delinquent tax in the future. Although such facts may affect jury appeal and perhaps how the judge views sentencing, if the government proves the defendant voluntarily and intentionally used unencumbered funds to pay creditors other than the United States, the jury may properly convict even if the intentional non-payment of the known trust fund tax liability was*

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[13] In ***Sorenson***, the court stated that if there are insufficient unencumbered funds to pay both net wages and the tax owed on the gross wages, the employer must pay the employees less than they are otherwise owed and pay over to the IRS the concomitant tax on the reduced gross wages. 521 F.2d at 328-329.

motivated by a desire to keep the business afloat. Cf., ***Collins v. United State****s, 848 F.2d 740, 741–42 (6th Cir. 1988) (in a § 6672 case, the court held that "[i]t is no excuse that, as a matter of sound business judgment, the money was paid to suppliers and for wages in order to keep the corporation operating as a going concern—the government cannot be made an unwilling partner in a floundering business.");****Blanchard****,* ***supra*** *(evidence at trial showed that in spite of the corporation's persistent cash shortages and precarious financial condition, the defendant continued to pay net wages to the employees for five years without paying the concomitant payroll taxes).*

9.04[3] Section 7202 inapplicable to motor fuel excise taxes and other taxes where there is no statutory duty imposed on a person to collect and pay over

Section 7202 applies to a person who is not the taxpayer but is under a duty to collect the tax from the taxpayer and then truthfully account to the government for the collected tax and pay it over. Section 7202 is not applicable to those who have the duty to pay, as opposed to the duty to collect and pay over, the tax at issue. Thus, as previously mentioned, because corporate income tax, employer FICA, and FUTA are taxes imposed directly on employers, they are not a collect-and-pay-over tax within the purview of § 7202.

Sometimes the person on whom the tax is imposed will pass the economic cost of the tax on to another person; for example, by including the amount of the tax as part of the price of goods sold. But the fact that the taxpayer "collects" the tax from another in this economic sense does not mean that the taxpayer is statutorily responsible for collecting the tax and thus potentially subject to prosecution under § 7202. For example, 26 U.S.C. § 4081 imposes an excise tax on the producer of fuel upon removal of the fuel from a terminal. *See* ***Gurley v. Rhoden***, 421 U.S. 200, 205-206 (1975)*;* ***United States v. Pesaturo***, 476 F.3d 60, 65-67 (1st Cir. 2007). There is, however, an industry-wide practice of passing the economic cost of that tax on to the ultimate consumer as part of the purchase price. *See generally* ***Janus Petroleum Co., Inc. v. United States***, 915 F. Supp. 556, 557 (E.D.N.Y. 1996); ***Cook Oil Co., Inc. v. United States***, 919 F. Supp. 1556, 1562 (M.D. Ala. 1996), *aff'd*, 108 F.3d 344 (11th Cir. 1997). Notwithstanding that industry practice, there is no obligation within the meaning of § 7202 for the producer to collect and pay over the taxes imposed by § 4081. *See* ***United States v. Musacchia***, 955 F.2d 3, 4 (2d Cir. 1991) (granting government's motion to vacate § 7202 convictions on the ground the gasoline excise tax at issue was imposed directly on the defendant and was not a collect-and-pay-over tax). Consequently, prosecutors should take care to ensure that only those persons with a duty to collect the tax – not those with the duty to pay the tax – are charged with violations of § 7202.

9.04[4] Professional Employer Organizations

A Professional Employer Organization (PEO) is a type of employee leasing company that provides employee benefits and tax services to common law employers at a cost lower than a single employer could provide for itself. A PEO may offer clients a variety of services, including withholding, reporting, and paying employment taxes; providing employee benefits (*e.g*., retirement and health benefits); managing workers' compensation and unemployment insurance claims; and ensuring compliance with various employment-related laws and regulations (*e.g.*, OSHA). With respect to tax services, a typical PEO files employment tax returns, and pays the corresponding employment tax, on behalf of multiple common law employers using its own name and employer identification number (EIN).

Note*: It is important to distinguish between a Professional Employer Organization and a payroll service provider. A PEO typically will file a single Form 941, Employer's Quarterly Federal Tax Return, for all of its clients' workers, using its own employer identification number. In contrast, a payroll service provider typically will file a separate Form 941 on behalf of each client, using the employer identification number of the respective client. See 26 C.F.R. § 31.3504-2.*

Because the services provided by a PEO are conventionally provided by employers, a PEO may represent itself to its clients as the employer for certain purposes, including the collection and payment of employment taxes. It is the government's position, however, that since the PEO usually does not meet the requirements to be the common law employer or a statutory employer under § 3401(d)(1) (*see* note 5), the client of the PEO remains the "employer" responsible for the collection and payment of the employment taxes imposed by Title 26. *See* 26 U.S.C. § 3401(d); 9.03, note 2; *see also* 26 C.F.R. §§ 31.3504-2(a) & (d)(4).

For wages paid for quarters beginning on or after March 31, 2014, a PEO and the common law employer can both be liable for the common law employer's unpaid employment taxes. Specifically, 26 C.F.R. § 31.3504-2 provides that for wages paid by a PEO in quarters beginning on or after March 31, 2014, pursuant to a service agreement between the PEO and the common law employer, the IRS may designate the PEO to "perform the acts required of an employer under each applicable chapter of the [Internal Revenue] Code and the relevant regulations" and that "[a]ll provisions of law (including penalties)" apply. The regulation expressly states that the common law employer remains obligated to collect, report, and pay the taxes.[14] Accordingly, under certain circumstances the principals of a PEO can be directly charged under § 7202 for willfully causing the nonpayment of employment taxes for wages paid for quarters beginning on or after March 31, 2014.

For wages paid for quarters beginning prior to March 31, 2014, the Tax Division typically charges the principals of PEOs with offenses other than § 7202 (*e.g.*, 26 U.S.C. §§ 7201 and 7212(a); 18 U.S.C. §§ 371, 1341, 1342), which is reflective of the fact that prior to the promulgation of Treasury Regulation § 31.3504-2, a PEO's obligation to collect and pay over employment tax was contractual and not imposed by Title 26. Under certain facts and in certain judicial districts, however, 18 U.S.C. § 2(b) might provide a basis for bringing § 7202 charges against the principals of a PEO.

Section 2(b), 18 U.S.C., provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." It is well-settled that under § 2(b) someone can be held criminally liable for causing a principal to commit a crime even if the principal is innocent. ***United States v. Ruffin***, 613 F.2d 408, 413 (2d Cir. 1979). Section 2(b) states that the defendant must "cause an act to be done" and does not specifically provide for liability if the defendant causes the innocent third person to fail to perform a legally imposed duty (*i.e.*, cause an omission). However, the Second Circuit has held that an actor can be "liable as a principal under § 2(b) if he 'willfully caused' another person, who was burdened with such a duty, to fail to discharge that duty." ***United States v. Tannenbaum***, 934 F.2d 8, 14 (2d Cir. 1991) (causing a financial institute to fail to file CTRs); ***United States v. Nersesian***, 824 F.2d 1294, 1312 (2d Cir. 1987) (liability under § 2(b) for willfully causing another to fail to disclose a material fact as obligated by § 1001); ***United States v. Heyman***, 794 F.2d 788, 791 (2d Cir. 1986) (liability under § 2(b) for willfully causing a bank to fail to file a CTR). Other circuits also have held that

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[14] This contrasts with § 3401(d)(1), which, in the limited circumstances to which it applies, transfers the employment tax responsibilities from the common law employer to the third-party who has control of the payment of wages. *See* note 5. Prosecutors should be mindful that the Tax Increase Prevention Act of 2014 (H.R. 5771), includes statutes (26 U.S.C. §§ 3511 and 7705), requiring the IRS to create a voluntary certification program for PEOs. Under the forthcoming program, a certified PEO will, if certain conditions are met, be *solely* liable for the collection and payment of the federal payroll taxes.

causing another to fail to perform a legal duty may result in criminal liability under § 2(b). *See* ***United States v. Tobon-Builes***, 706 F.2d 1092, 1101 (11th Cir. 1983); ***United States v. Thompson***, 603 F.2d 1200, 1203-04 (5th Cir. 1979).

To be liable under a § 2(b) theory, the defendant must have "caused" the innocent party's failure to discharge his obligation, and done so "willfully." *Cf.* ***United States. v. Apollo Energies, Inc.***, 611 F.3d 679, 687 (10th Cir. 2010) ("criminalizing acts which the defendant does not cause is unconstitutional, as is criminalizing acts based on the defendant's status"); ***Tannenbaum***, 934 F.2d at 14 ("If the defendant 'willfully causes' someone who has the legal capacity to commit the substantive offense, the defendant may be convicted under § 2(b); if the defendant 'aids and abets' the commission of the substantive offense by another who possesses the legal capacity to commit the substantive crime, the defendant may be convicted under § 2(a)."). Where the facts permit the government to prove that the common law employer's breach of its obligation to pay over was caused by an affirmative and willful act of a PEO – for example, a PEO's collecting funds from the common law employer with the contemporaneous intention of not paying over those funds to the IRS – charging the PEO's principals with § 7202 and § 2(b) may be possible, depending on the governing law in the applicable judicial district.

Note*: The law concerning the liability of PEOs and of common law employers which contract with PEOs is evolving. Prosecutors with cases involving a PEO should not only confirm what law applies to their case, but also give due consideration as to which theory of liability (and which statutory offenses) best advances the government's interests generally and their case specifically. Although § 7202 might be available for a particular case, sometimes § 7201, § 7206(1), § 7212(a), or § 371 is a better fit or better advances the government's interests. Prosecutors with cases involving PEOs are encouraged to contact the Criminal Appeals & Tax Enforcement Policy Section to discuss these factors.*

9.05 VENUE

In the ordinary case, venue for a § 7202 offense will lie in the district where the individual who is required to account for and pay over the taxes resides, the district where the employer has its principal place of business or principal office, and in the judicial district containing the service center with which the employment tax returns accounting for the trust fund taxes are to be filed.

The Constitution provides criminal defendants the right to be tried in "the state and district wherein the crime shall have been committed." U.S. Const., Amend. VI.

Where, as with § 7202, Congress has not specified in a statute 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). When the crime is one of omission, as is typical with a § 7202 offense, the location of the crime is where the omitted acts should have been performed. ***Johnston v. United States***, 351 U.S. 215, 220 (1956). *See* **United States v. Ross**, 135 F. Supp. 842 (D. Md. 1955) (prosecution under predecessor to § 7202; venue was proper in the District of Maryland because, at the time, "the District of Columbia [was] a part of the Revenue Collection District of Maryland.").[15] Although there is no circuit authority directly on point addressing venue in a § 7202 case, the circuit courts that have addressed the issue of venue for violations of 26 U.S.C. § 7203 – which, analogously to § 7202, proscribes willful failures to file returns and willful failures to pay tax – have similarly looked to the location or locations at which filing could have taken place. *See* **United States v. Rice**, 659 F.2d 524, 526 (5th Cir. 1981); ***United States v. Quimby***, 636 F.2d 86, 89-90 (5th Cir. 1981) (per curiam); ***United States v. Calhoun***, 566 F.2d 969, 973-74 (5th Cir. 1978); ***United States v. Garman***, 748 F.2d 218, 219-21 (4th Cir. 1984).

For a general discussion of venue, *see* Section 6.00, *supra*.

9.06 STATUTE OF LIMITATIONS

26 U.S.C. § 6531(4) provides that a six-year statute of limitations applies to, *inter alia*, "the offense of willfully failing to pay any tax, or make any return . . . at the time or times required by law or regulations." Under this section, there is a six-year statute of limitations period for prosecutions under § 7202. *See* **United States v. Blanchard**, 618 F.3d 562, 568-69 (6th Cir. 2010); ***United States v. Adam***, 296 F.3d 327, 331-32 (5th Cir. 2002); ***United States v. Gilbert***, 266 F.3d 1180, 1186 (9th Cir. 2001); ***United States v. Gollapudi,*** 130 F.3d 66, 70 (3d Cir. 1997); ***United States v. Evangelista,*** 122 F.3d 112,

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[15] Internal revenue districts were abolished pursuant to the Internal Revenue Service Restructuring and Reform Act of 1998. In response, the IRS promulgated amended regulations that deleted references to internal revenue districts and district directors, and permitted hand-carried returns to instead be filed with "the local Internal Revenue Service Office that serves" the taxpayer. *See* Internal Revenue Bulletin 2004-42, T.D. 9156 (October 18, 2004).

119 (2d Cir. 1997) (reaffirming prior holding in ***United States v. Musacchia***, 900 F.2d 493, 499-500 (2d Cir. 1990), *vacated in part on other grounds*, 955 F.2d 3, 4 (2d Cir. 1991)); ***United States v. Porth***, 426 F.2d 519, 522 (10th Cir. 1970).

9.06[1] Date limitations period commences dependent upon whether return is filed

Section 6531 provides that the limitations period begins "after the commission of the offense." Section 6531 further provides, however, that "[f]or the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable." As applied to § 7202 prosecutions, this provision means that when a defendant filed an employment tax return for a quarter prior to April 15 of the succeeding calendar year, the 6-year statute of limitations for that quarter does not begin to run until April 15. But, as explained below, if no quarterly return was filed by April 15, the limitations period for that quarter begins when the return should have been filed.

Section 6513(c), entitled "Return and Payment of Social Security Taxes and Income Tax Withholding," provides, *inter alia*, that, "for purposes of Section 6511 . . . (1) [i]f a return for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such succeeding calendar year." Thus, pursuant to § 6513(c)(1), an employment tax return filed prior to April 15 of the calendar year following the year to which the return pertains is deemed filed on April 15 of the following year. *See* ***In Re Becker***, 407 F.3d 89, 96 (2d Cir. 2005) (where returns are filed, limitations period for § 6672 civil trust fund penalty begins on April 15 of the following year); ***Henderson v. United States***, 95 F. Supp. 2d 995, 1001 n.15 (E.D. Wis. 2000) ("Since the employment tax returns for 1992 were all filed before April 15, 1993, they are, under section 6501(b)(2), deemed filed on April 15, 1993"); ***Lesher v. United States***, 440 F. Supp. 372, 375 (N.D. Ind. 1977).

In ***United States v. Whatley***, 105 A.F.T.R.2d 2010-1741, 2010 WL 1236401 (D. Utah Mar. 29, 2010), the district court applied §§ 6513(c) and 6531(4) to hold that an indictment was timely even though the quarterly employment tax return was filed more than six years before the indictment. The ***Whatley*** defendant was indicted on July 22, 2009, on five counts of willful failure to pay over taxes; one count charged him with failing to pay over taxes for the quarter ended June 30, 2003. 2010 WL 1236401, at *2. The court, observing that § 6531 provides that § 6513 applies "'[f]or purposes of determining the periods of limitation on criminal prosecutions," held that the statute of limitations for this count did not begin to run until April 15, 2004. ***Id.*** This is so, the

Whatley court explained, because "Section 6513(c) . . . provides that an employment tax return is deemed filed on April 15 of the succeeding calendar year." *Id*.

In ***United States v. Habig***, 390 U.S. 222 (1968), the Supreme Court addressed the interplay of Sections 6531 and 6513, and confirmed that these sections can delay the commencement of the limitations period under § 6531 when a return is filed before April 15. In ***Habig***, the defendants were charged with attempting to evade individual income taxes by filing a false income tax return, and with aiding in the preparation and presentation of a false income tax return. The false returns were filed, on extension, after the April 15 statutory deadline. *Id.* at 222-23. Though the indictment was brought within six years after the filing of the false returns, the defendants argued that the indictment was untimely because it was brought more than six years after the original statutory deadline. The ***Habig*** Court rejected the defendants' argument, and held that the indictment was timely filed within the applicable six-year limitations period. 390 U.S. at 224-26.

Habig underscores that § 6531's incorporation of the rules of § 6513 is limited to situations where a return has been filed by April 15. The ***Habig*** Court rejected the defendants' argument that § 6531's "reference to 'the rules of section 6513'" was intended to "expand[] the effect and operation of [§ 6513] beyond its own terms so as to make it applicable to situations other than those involving early filing or advance payment." 390 U.S. at 225. Like § 6513(a), § 6513(c) applies to delay commencement of the limitations period for trust fund taxes only "[i]f a return for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year," 26 U.S.C. § 6513(c)(1), or if tax "is paid before April 15 of the succeeding calendar year," 26 U.S.C. § 6513(c)(2). Thus, § 6531's incorporation of § 6513(c)'s rules does not delay the commencement of the limitations period until April 15 of the succeeding year when no quarterly employment tax return has been filed or tax paid. In that circumstance, the six-year limitations for the quarterly period commences, pursuant to § 6531, "after the commission of the offense," which is the date the quarterly employment tax return and accompanying tax was due; *i.e.*, one month after the conclusion of each quarter. *See* 26 U.S.C. §§ 6011(a); 6151 (tax due when return is due); 26 C.F.R. §§ 31.6011(a)-1; 6011(a)-4; 31.6071(a)-1(a)(1), (4). *See also* **United States v. Quinn**, 566 Fed.Appx. 659, 664-665 (10th 2014) (unpublished) (rejected defendant's argument that § 7202 does not contain a payment deadline and that her payment after indictment meant she could no longer be prosecuted).

***Note**: A Form 941 tardily filed after the quarterly due date but prior to April 15 of the following year is within the purview of § 6513(c); accordingly, the limitations period for a § 7202 offense with that factual scenario would commence on April 15th. In contrast, a Form 941 tardily filed after April 15 of the following calendar year is not within the purview of § 6513(c); accordingly the limitations period for a § 7202 offense with that factual scenario would still commence on the quarterly due date notwithstanding the filing of the return. But if the tardily filed return is false, its filing could constitute a separate crime (e.g., 26 U.S.C. §§ 7206(1), 7201).*

9.07 SENTENCING

The Sentencing Guidelines provision applicable to offenses under 26 U.S.C. § 7202 is USSG §2T1.6.[16] USSG § 2T1.6 directs that the base offense level for § 7202 is determined by the USSG §2T4.1 Tax Table; §2T1.6 does not contain any enhancements for specific offense characteristics. USSG §2T1.6(b) does contain a cross reference indicating that the base offense level is to be determined by USSG §2B1.1 (Theft, Property Destruction, and Fraud) "[w]here the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it," if the resulting offense level is greater.

9.07[1] USSG §3B1.3 abuse-of-position-of-trust enhancement in § 7202 cases

USSG §3B1.3, entitled "Abuse of Position of Trust of Use of Special Skill," provides, in pertinent part, that: "If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristics."

There is an inter-circuit conflict as to whether a defendant must occupy a position of trust vis-à-vis the victim of the count of conviction, or whether the §3B1.3 enhancement

[16] The background to §2T1.6's Application Note states that § 7202 is "infrequently prosecuted." USSG §2T1.6, comment. (backg'd.). Since that application note was originally written, however, the number of § 7202 prosecutions has increased substantially, as reflected in the use of § 2T1.6 increasing from 3 cases in 2002 to 50 cases in 2013. *See* Guidelines Application Frequencies, United States Sentencing Commission. As a result, the comment on the number of prosecutions using USSG §2T1.6 no longer is factually accurate and any current reliance upon it by defense counsel and courts handling § 7202 sentencings would not be appropriate. In addition to inaccurately describing the current number of prosecutions under § 7202 (compared to other criminal tax offenses), the "infrequently prosecuted" statement in the background note may also give the misleading impression that employment tax offenses, in general, are infrequently prosecuted, which is not the case. Employment tax crimes regularly are prosecuted not only under § 7202, but also 26 U.S.C. § 7101 (tax evasion), 26 U.S.C. § 7206(1) (false returns), 26 U.S.C. § 7212(a) (obstruction), and 18 U.S.C. § 371 (conspiracy to defraud).

may be applied where the abuse of trust occurred with respect to relevant conduct that significantly facilitated the count of conviction. *See* ***United States v. Friedberg***, 558 F.3d 131, 133-35 (2d Cir. 2009) (identifying conflict). In at least two cases, courts of appeals have reversed the imposition of the §3B1.3 abuse-of-trust enhancement in a § 7202 trust fund case on the ground the defendant did not occupy a position of trust vis-à-vis the IRS. In ***United States v. May***, 568 F.3d 597 (6th Cir. 2009), the court held that the enhancement can be applied only where the defendant abused a position of trust vis-à-vis the victim, that the IRS is the victim of a § 7202 offense, and that the defendant did not hold a position of trust vis-à-vis the IRS. In ***United States v. DeMuro***, 677 F.3d 550 (3d Cir. 2012), the court similarly held that the defendants were not in positions of trust vis-à-vis the IRS where the defendants had been required by 26 U.S.C. § 7512 to establish a segregated bank account for withheld taxes.[17] In those circuits limiting the enhancement to situations where the defendant held a position of trust vis-à-vis the victim of the count of conviction, prosecutors should not assert that the defendant held a position of trust vis-à-vis the IRS.

In those circuits that allow relevant conduct to be the basis for the §3B1.3 enhancement, the employees in a § 7202 prosecution might be considered the "victims" of the defendant's embezzlement, as contemplated by USSG §2T1.6(b), but the force of that position is undermined by the fact that employees automatically receive credit for taxes that are "actually withheld" even if the monies are not paid over to the government. 26 C.F.R. § 1.31-1(a). And although the definition of a "responsible person" for § 7202 is broader than the position-of-trust definition used in USSG §3B1.3 – meaning that the enhancement does not apply to all § 7202 cases – defendants are sure to argue that an abuse of trust is already included in the base offense level for a § 7202 "trust fund" offense. *See* USSG §3B1.3 ("This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristics.").

In sum, there is significant litigation risk in seeking the USSG § 3B1.3 abuse-of-position-of-trust enhancement in § 7202 cases and the Tax Division recommends against it. In a § 7202 prosecution where a defendant's egregious abuse of a position of trust is

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

clearly not adequately reflected in the offense level, prosecutors should seek a variance under § 3553(a) as opposed to the USSG §3B1.3 enhancement.