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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 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]; ***S. 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 on 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 known 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 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*

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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.

***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 has a duty to pay the United States the amount that is required to be collected even if the taxes are not actually withheld from the wages 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).

Nearly all employers are required to file, one month after the conclusion of each calendar quarter, an Employer's Quarterly Federal Tax Return, Form 941 ("Form 941"), setting forth the total amount of income taxes withheld, the total amount of Social Security and Medicare taxes due, and the total tax deposits made. *See* 26 C.F.R. § 31.6011(a)-1(a)(1).[6] Payment is due at the time the return is due for filing. 26 C.F.R. § 31.6151-1(a). As employment tax returns and payments are due quarterly, the

[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 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.

[6] The IRS permits small employers with "an estimated annual employment tax liability . . . . of $1,000 or less" to file Form 944, Employer's Annual Federal Tax Return, in lieu of Form 944. *See* 26 C.F.R. § 31.6011(a)-1(a)(5); Rev. Proc. 2009-51.

government typically charges a separate count of § 7202 for each quarter a defendant has violated the statute with regards to a particular employer.

The employee FICA and income tax required to be withheld and paid over are often called "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.[7] Case law construing § 6672 is thus 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.

Section 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*: Restitution ordered for 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.*

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[7] 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.

Part of this civil statute—"willfully attempts in any manner to evade or defeat any such tax or the payment thereof"—is reflected in the criminal tax evasion statute, 26 U.S.C. § 7201.)

2010) (government conceded amount of 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.[8] *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. Comm'r***, 137 T.C. 147, 152-154 (2011). The government 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 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

[8] 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 (not 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).

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 should charge a personal income tax offense in this context only 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;[9]
(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, the person or persons with the responsibility to collect, account for, and pay over taxes are 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

[9] 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.

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."[10]

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."[11] ***United States v. Jones***, 33 F.3d 1137, 1139 (9th Cir. 1994) (internal quotation omitted) (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 includes:

(1) the individual's duties as outlined by the employer's by-laws;
(2) the individual's ability 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

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

[11] 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).

(6) the identity of the individuals 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 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. IRS***, 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, not 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 because of careless wording.*

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) ("[T]he 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 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 with both ***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 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.*[12] ***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).*

[12] 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).

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 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."[13] ***Easterday***, 564 F.3d at 1005.

Note*: Because a defendant's ability to pay the tax on the date the tax is due is not an element of the offense, 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* not *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 that the defendant paid net wages to employees, or debts to creditors, knowing there were insufficient funds left over to pay the withholding taxes.*

[13] ***Poll*** was decided one year before ***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***.

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, rather than 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 employment tax claims of the United States.[14] ***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 willful failure to collect and pay over under § 6672"). The government 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 on 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).

[14] 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.

***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. 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 nonpayment of the known trust fund tax liability was 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 despite 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 does not apply to those who have the duty to pay, rather than the duty to collect and pay over, the tax at issue. Thus, 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. v. United States***, 915 F. Supp. 556,

557 (E.D.N.Y. 1996); ***Cook Oil Co. 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 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. But the mere fact that a PEO holds itself out as the employer to a client's employees does not make it responsible for collection and payment of the client's employment taxes. A PEO only becomes responsible for a client's employment taxes if it takes on that liability in one of two ways:

(1) by entering into a qualifying "service agreement" with the client as defined in 26 C.F.R. § 31.3504-2, or (2) by becoming a certified PEO in accordance with 26 U.S.C. §§ 3511 and 7705 and implementing regulations. Absent this, it is the government's position that the PEO's client remains the "employer" responsible for employment taxes imposed by Title 26 because a PEO usually does not meet the requirements to be the common-law employer or a statutory employer under § 3401(d)(1) (*see* note 5). *See* 26 U.S.C. § 3401(d); 9.03, note 2; *see also* 26 C.F.R. §§ 31.3504-2(a) & (d)(4).

When a PEO and a client have a service agreement meeting the terms of 26 C.F.R. § 31.3504-2, both the PEO and the common-law employer can be liable for the common-law employer's unpaid employment taxes. Section 3504 of the Internal Revenue Code provides that the IRS, through regulation, can "designate" a "fiduciary, agent, or other person" to "perform such acts as are required of employers under this title." And 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 meeting the definition in subsection (b)(2),[15] the IRS has designated 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.[16] 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.

When a PEO has been certified by the IRS, it can assume sole responsibility for the collection and payment of its clients' employment taxes. The Tax Increase Prevention Act of 2014, Pub. L. 113-295, included statutes (26 U.S.C. §§ 3511 and 7705), requiring the IRS to create a voluntary certification program for PEOs. The IRS began this program

[15] This definition requires an agreement under which the PEO "(A) Asserts it is the employer (or 'co-employer') of the individual(s) performing services for the client; (B) Pays wages or compensation to the individual(s) for services the individual(s) perform for the client; and (C) Assumes responsibility to collect, report, and pay, or assumes liability for, any taxes applicable under subtitle C of the Code with respect to the wages or compensation paid by the payor to the individual(s) performing services for the client." 26 C.F.R. § 31.3504-2(b)(2)(i). The regulation also provides that a PEO can "implicitly" assert that it is the employer under specified circumstances. ***Id.*** § 31.3504-2(b)(2)(ii).

[16] 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.

in 2016, when it published temporary regulations, now finalized, and procedures governing the certification process. *See* Internal Revenue Bulletin 2016-21, at pp. 991-1007; 26 C.F.R. §§ 301.7705-1 & 301.7705-2.[17] A certified PEO, unlike a non-certified PEO, is *solely* liable for the collection and payment of the federal payroll taxes of its clients' common-law employees if certain conditions are met. *See* 26 U.S.C. § 3511(a) (certified PEO treated as sole employer of "work site employee[s]" of client); 26 C.F.R. § 31.3511-1(a)(2); 26 C.F.R. § 301.7705-1(b)(17) (defining "work site employee"). Thus, when a PEO is certified and these conditions are met, Section 7202 charges should typically be brought only against the PEO's principals, not those of the common-law employer.

***Note**: 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 advance 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.*

9.05 LESSER INCLUDED OFFENSE CONSIDERATIONS

The law on lesser included offenses is discussed, *supra* § 8.11.

A lesser included offense is an offense that is not charged but that is "necessarily included" in a charged offense. Fed. R. Crim. P. 31(c)(1). In ***Schmuck v. United States***, 489 U.S. 705 (1989), the Supreme Court adopted a strict elements test for applying Rule 31, holding that "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." *Id*. at 716. Accordingly, no lesser included offense instruction should be given "[w]here the lesser offense requires an element not required for the greater offense." *Id*.

There are few cases discussing lesser included offenses in the § 7202 context but courts have held that § 7207 is not a lesser included offense of § 7202. The elements of § 7207 are: (1) the defendant submitted a return, statement, or other document to the IRS; (2) the return, statement, or other document was false or fraudulent as to a material matter;

[17] Section 7705 and these regulations establish detailed procedures that a PEO must meet to obtain and maintain certification. The IRS maintains a current list of certified PEOs on its website. *See* *https://www.irs.gov/tax-professionals/cpeo-public-listings*.

and (3) willfulness. *See* ***Sansone v. United States***, 380 U.S. 343, 352 (1965). As the Eighth Circuit noted, other than willfulness, Section 7202 and Section 7207 are different statutes. *See* ***United States v. Scharf***, 558 F.2d 498, 503 (8th Cir. 1977). More recently, the Sixth Circuit repeated this point, observing that the "only element those crimes share is willfulness." ***United States v. Cheff*****,** 829 F. App'x 104, 108 (6th Cir. 2020). Put differently, every element of § 7207, except for willfulness, is an element that is not part of a § 7202 offense. Thus, § 7207 is not a lesser included offense of § 7202.

9.06 VENUE

Ordinarily, 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.

Criminal defendants have 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.").[18] 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***

[18] Internal revenue districts were abolished under 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).

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*.

9.07 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, 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).

9.07[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 before 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, under § 6513(c)(1), an employment tax return filed before 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, confirming 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 in which 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, under § 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 Cir. 2014) (unpub.) (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).[19]

Note*: A Form 941 late-filed after the quarterly due date but before 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 late-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 late-filed return is false, its filing could constitute a separate crime (e.g., 26 U.S.C. §§ 7206(1), 7201).*

9.08 SENTENCING

The Sentencing Guidelines provision applicable to offenses under 26 U.S.C. § 7202 is USSG §2T1.6. 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

[19] ***United States v. Ogbazion***, 2016 WL 6070365, at *10-14 (S.D. Ohio Oct. 17, 2016), *appeal dismissed*, No. 16-4298, 2017 WL 5574000 (6th Cir. Feb. 6, 2017), declined to follow ***Whatley*** and ***Hussain*** and "undert[ook] its own analysis" of Section 6513. ***Ogbazion*** was wrongly decided and should not be followed. See e.g., ***United States v. Doll***, 2019 WL 4454415 (D. Neb. Aug. 30, 2019).

employee's earnings and willfully failing to account to the employee for it," if the resulting offense level is greater.

9.08[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."

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.[20] In those circuits limiting the enhancement to situations in which 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.

The Fourth Circuit, however, declined to follow ***May*** in ***United States v. Barringer***, 25 F.4th 239 (4th Cir. 2022), and upheld imposition of an abuse-of-trust enhancement based on the defendant's relationship with the IRS. That court concluded that Barringer, who "basically ran the company," occupied a position of trust "related to the delinquent payroll taxes" because of the "wide discretion accorded" to her to decide who to pay and when. ***Id***. at 255-56. The ***Barringer*** court found ***May*** "unpersuasive," criticizing its conclusion as "a *non sequitur* given the facts of the case," which showed that "May possessed significant discretionary authority, including the sole right to sign checks for the company." ***Id.*** at 256.

[20] 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.

The court also rejected Barringer's argument that applying the abuse-of-trust enhancement represented impermissible double-counting, reasoning that a hypothetical defendant could be a responsible party for § 7202 while still having minimal or limited discretion in the role. ***Id***. at 258 ("While it is true that many responsible persons under § 7202 will also occupy positions of trust, being a responsible person does not ipso facto equate to holding a position of trust for USSG §3B1.3 purposes.").

There is a related but separate 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 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); *see also infra*, Section 43.04[4] (discussing this conflict). In 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). However, an argument that employees are victims of a defendant's relevant conduct might be viable in these circuits when the defendant withheld trust fund taxes but failed to report wages to the Social Security Administration, thereby potentially depriving unwitting employees of future Social Security benefits, or when the defendant also embezzled funds that were withheld from employees' wages for other purposes, such as employee retirement plans. 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, prosecutors should exercise caution in seeking the USSG § 3B1.3 abuse-of-position-of-trust enhancement in § 7202 cases. Arguments based on ***Barringer*** may find traction in circuits that have not ruled definitively against the enhancement in employment tax cases, but the likelihood of success will depend both on the particular facts and the prevailing circuit law. In a § 7202 prosecution where a defendant's egregious abuse of a position of trust is clearly not adequately reflected in the offense

level, prosecutors should seek a variance under § 3553(a) instead of the USSG §3B1.3 enhancement.

9.09 SECTION 7202 AND THE CVRA

IRS regulations require the IRS to credit employees with payroll taxes that are "actually withheld" from their paychecks even if their employer did not pay those taxes over to the IRS. 26 C.F.R. § 1.31-1(a); *see also* 26 U.S.C. § 6513(b); *Slodov v. United States*, 436 U.S. 238, 243 (1978); *Cook v. United States*, 52 Fed. Cl. 62, 67-68 (2002); *Weisman v. Comm'r*, 103 F. Supp. 2d 621-630-31 (E.D.N.Y. 2000).

Thus, employees who are paid "net wages," where the tax is actually withheld, ordinarily do not suffer financial harm because the IRS credits them with the amount of the withheld taxes. *Wetzel v. United States*, 802 F. Supp. 1451, 1455 (S.D. Miss. 1992); *Kinnie v. United States*, 771 F. Supp. 842, 848 (E.D. Mich. 1991), *aff'd*, 994 F.2d 279 (6th Cir. 1993). And because such employees have not suffered direct harm as a result of their employer's offense, they are not victims under the CVRA and the Attorney General's Guidelines for Victim and Witness Assistance, AG Guidelines III.B.1, C.1. Employees who are paid their "gross wages," without tax withheld, are generally not victims — not because of the regulation, which does not apply, but because they are knowing participants in the criminal transaction. AG Guidelines III.D.1, comment., III.F, comment.

There could exist unusual circumstances in which an employee ultimately credited for withheld taxes under the regulation is nonetheless harmed due to delay in receiving that credit; for example, if a retired employee is unable to timely receive Social Security benefits needed to pay for medical expenses. Such cases are expected to be rare.