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9.00 WILLFUL FAILURE TO COLLECT OR PAY OVER TAX

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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, be fined* not more than \$10,000, or imprisoned not more than five years, or both, together with the costs of prosecution.

* As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623, which increased the maximum permissible fines for misdemeanors and felonies. Where 18 U.S.C. § 3623 [\[FN1\]](#) is applicable, the maximum fine under section 7202 for offenses committed after December 31, 1984, would be at least \$250,000 for individuals and \$500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

9.02 GENERALLY

This statute describes two offenses: (1) a willful failure to collect; and (2) a willful failure to truthfully account for and/or pay over. It was designed primarily to assure compliance by third parties obligated to collect excise taxes or to deduct from wages paid to an employee the employee's share of Federal Insurance Contribution Act (FICA) taxes and the withholding tax on wages applicable to individual income taxes. The withheld sums are commonly referred to as "trust fund taxes." See *Slodov v. United States*, 436 U.S. 238, 242-48 (1978); *United States v. H.J.K. Theatre Corporation*, 236 F.2d 502 (2d Cir. 1956).

9.03 ELEMENTS

To establish a violation of section 7202, the following elements must be proved beyond a reasonable doubt:

1. Duty to collect, and/or to truthfully account for, and/or pay

over;

2. Failure to collect, or truthfully account for, and/or pay over; and

3. Willfulness.

Cases prosecuted under this statute usually involve social security taxes (FICA) and withholding tax. The duty of employers to collect, truthfully account for, and pay over is created by sections 3102(a), 3111(a), and 3402 of the Internal Revenue Code of 1986. See *United States v. Porth*, 426 F.2d 519, 522 (10th Cir.1970). Under section 7202, it is the individual(s) with the duty to collect, truthfully account for, and pay over who is (are) culpable when there is a failure to perform this duty. A person is responsible for collecting, accounting for, and paying over trust fund taxes if he has "the authority required to exercise significant control over the [employer's] financial affairs, regardless of whether [the individual] exercised such control in fact." *United States v. Jones*, 33 F.3d 1137, 1139 (9th Cir. 1994). For examples of the criteria used to determine the individual with the duty to collect, truthfully account for, and pay over, see *United States v. Carrigan*, 31 F.3d 130 (3d Cir. 1994); *Datlof v. United States*, 252 F. Supp. 11, 32 (E.D. Pa.), *aff'd*, 370 F.2d 655 (3d Cir. 1966) (involving a civil penalty under 26 U.S.C. § 6672 for unpaid federal withholding and employment taxes).

The Tax Division's position historically has been that either a willful failure to truthfully account for or a willful failure to pay over is a breach of the obligation to truthfully account for and pay over. Thus, under this theory, 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. This position is supported by *Slodov*, wherein the Court stated that a person could be liable under section 6672, the civil counterpart to section 7202, if he willfully failed to pay over the tax, even if he was not associated with the taxpayer-employer at the time the tax was collected or accounted for. 436 U.S. at 250. In a pre-*Slodov* case, *United States v. Poll*, 521 F.2d 329 (9th Cir. 1975), the Ninth Circuit suggested a contrary reading of the statute, stating that "[w]e continue to regard the crime as requiring two failures to act, willful failure to truthfully account and willful failure to pay over." 521 F.2d at 334-35 n.3 (emphasis in original). Two other circuits that addressed this issue, however, rejected *Poll*. See *United States v. Thayer*, 201 F.3d 214, 220 (3rd Cir. 1999); *United States v. Evangelista*, 122 F. 3d 112 (2d Cir. 1997). Ultimately, the Ninth Circuit itself agreed with *Evangelista* and held that the statement in *Poll* that section 7202 required both a failure to truthfully account for and a failure to pay over was dictum. *United States v. Gilbert*, No. 00-10314, 2001 WL 1111928 (9th Cir. Sept. 24, 2001). *Gilbert* concluded that there is an obligation both to withhold and to pay over the tax, and that an individual who fails to perform one of these required duties is subject to conviction under section 7202. Consequently, the court held that the defendant who had collected and truthfully accounted for the withholding taxes was nevertheless properly convicted under section 7202 for willfully failing to pay over the withheld taxes. Thus, *Gilbert* confirms the Tax Division's position that a person violates section 7202 if he willfully fails to collect the tax, willfully fails to truthfully account for the tax, **or** willfully fails to pay over the tax.

The requisite element of willfulness under section 7202 is the same as in other offenses under Title 26. See [Section 8.06](#), *supra*. It must be shown that a defendant voluntarily and intentionally acted in violation of a known legal duty. *Cheek v. United States*, 498 U.S. 192 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973). With respect to employment taxes imposed by the Internal Revenue Code, the legal duty enforced by section 7202 is the obligation to withhold those taxes from the gross wages of employees, to truthfully account for those taxes, and to pay over those taxes to the United States Treasury. Under section 6672, the civil counterpart to section 7202, a voluntary, conscious, and intentional act of paying the claims of other creditors, including the wage claims of employees, instead of the trust fund taxes,

constitutes a "willful" violation of the duty to pay over. See *Sorenson v. United States*, 521 F.2d 325, 328 (9th Cir. 1975). Similarly, it is the Tax Division's position that a person willfully fails to pay over tax under section 7202 when, instead of paying the trust fund taxes, he voluntarily and intentionally uses the money to pay the claims of other creditors, including wages to employees, with knowledge that the collected funds are due to be paid over to the United States.

Evil motive or bad purpose is not necessary to establish willfulness under the criminal tax statutes. *Pomponio*, 429 U.S. at 12. In *United States v. Poll*, 521 F.2d at 333, a pre-*Pomponio* case, the Ninth Circuit held that if an employer-taxpayer 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." The Tax Division believes that *Poll*'s requirement that the Government must show a lack of justification for the expenditures that created or caused the lack of funds (a requirement that is grounded on the premise that the criminal element of willfulness requires an evil motive or bad purpose, see *Sorenson*, 521 F.2d at 328 n.3) was abrogated by *Pomponio*. Without mentioning *Poll*, the Ninth Circuit subsequently agreed with the government that the defendant's act of paying net wages to his employees, instead of remitting withholding taxes to the Internal Revenue Service, established a voluntary, intentional violation of section 7202. *United States v. Gilbert*, No. 00-10314, 2001 WL 1111928 (9th Cir. Sept. 24, 2001). To prove a willful failure to pay over, all that the government need show is that payments were voluntarily and intentionally made to creditors other than the United States with knowledge that the withheld funds were due to the United States. There is no separate requirement that the Government prove that the payments were without justification.

For an example of a successful conviction under section 7202, see *United States v. Scharf*, 558 F.2d 498, 501 (8th Cir. 1977), where the court held that evidence that the defendant had altered records was admissible for the purpose of showing, "motive, intent, and willfulness." For a case in which the court had no difficulty in concluding that defendant's conduct was willful in a section 7202 prosecution, see *United States v. Bailey*, 789 F. Supp. 788, 814 (N.D. Tex. 1992) (failure, for almost a decade, to pay over taxes withheld from employees' paychecks found to be willful).

9.03[1] Motor Fuel Excise Tax Prosecutions

Care must be exercised to insure that section 7202 is not applied to those who have the duty to pay the tax at issue. 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 to truthfully account to the government for the collected tax and pay it over.

Often, the one responsible for paying the tax will pass it on to another, by, for example, including it as part of the price of goods. But the fact that the taxpayer "collects" the tax from another in this sense does not mean that he is responsible under the law for collecting the tax and, thus, potentially subject to prosecution under section 7202. The practice of passing on the motor fuel excise tax imposed by section 4081 as part of the purchase price is common in the motor fuel industry. See *Janus Petroleum Co. v. United States*, 915 F. Supp. 556 (E.D.N.Y. 1996); *Cook Oil Co. v. United States*, 919 F. Supp. 1556 (M.D. Ala. 1996), *aff'd*, 108 F.3d 344 (11th Cir. 1997). There is no obligation, within the meaning of section 7202, however, to collect and pay over these taxes. See *United States v. Musacchia*, 955 F.2d 3, 4 (2d Cir. 1991) (vacating defendant's conviction under section 7202 after being advised by Department of Justice that section 7202 "does not apply to the gasoline taxes at issue here"). Consequently, it is the position of the Department of Justice that section 7202 charges are not appropriate in a motor fuel excise tax case.

9.04 VENUE

If a statute does not indicate where Congress considers the place of committing a crime to be, "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). Although no venue cases have been found, venue in a section 7202 prosecution would appear to be proper in the judicial district in which the defendant was required to collect or pay over the tax.

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

9.05 STATUTE OF LIMITATIONS

The statute of limitations for prosecutions under section 7202 is six years UNDER 26 u.s.c. § 6531(4). See *United States v. Gilbert*, No. 00-10314, 2001 WL 1111928 (9th Cir. Sept. 24, 2001); *United States v. Gollapudi*, 130 F.3d 66 (3d Cir. 1997); *United States v. Evangelista*, 122 F.3d 112 (2d Cir. 1997); *United States v. Musacchia*, 900 F.2d 493, 499-500 (2d Cir. 1990), *vacated in part on other grounds*, 955 F.2d 3 (2d Cir. 1991); *United States v. Porth*, 426 F.2d 519, 522 (10th Cir. 1970); *United States v. Anglin*, 999 F. Supp. 1378 (D. Haw. 1998). Be aware, however, that two district courts that have considered the question have concluded that the statute of limitations for section 7202 prosecutions is three years. *United States v. Brennick*, 908 F. Supp. 1004 (D. Mass. 1995); *United States v. Block*, 497 F. Supp. 629, 630-32 (N.D. Ga. 1980), *aff'd*, 660 F.2d 1086 (5th Cir. 1980).

In the *Brennick/Block* view, the omission of the language "collect, account for, and pay over" from the subsections of 26 U.S.C. § 6531, which establish the longer six-year period of limitations, demonstrates that Congress did not intend to make the failure to "pay over" third party taxes subject to the six-year statute of limitations. *Brennick*, 908 F. Supp. at 1019; *Block*, 497 F. Supp. at 630-32. The court also noted in *Block*, 497 F. Supp. at 632, that section 6531(4) was not directed at a class of offenses but rather to "the offense of willfully failing to pay any tax." See Section 7203. The court reasoned that it was "quite clear" that failure to "pay over" third-party taxes was substantively different from a failure to "pay" taxes; thus, the exception contained in section 6531(4) was found not to apply to the failure to pay over third-party taxes. *But see Wilson v. United States*, 250 F. 2d 312, 320 (9th Cir. 1958). Likewise, the district court in *Brennick* concluded that section 7202 does not describe a section 6531(4) exception of failing to make any return. Rather, according to *Brennick*, section 6531(4) "plainly refers only to a single offense ... clearly described by the language of Section 7203." 908 F. Supp. at 1019.

The Second Circuit, in *Musacchia*, reviewed the *Block* decision and concluded that that "court's analysis is not convincing." *Musacchia*, 900 F.2d at 499-500. The *Musacchia* court found that although 26 U.S.C. § 6531(4) does not track the language of section 7202 exactly, the terms "pay" and "pay over" were used interchangeably by the Supreme Court in deciding *Slodov v. United States*, 436 U.S. 238 (1978), and thus the fact that section 6531(4) uses the term "pay" rather than "pay over" is not dispositive.

The *Musacchia* court found persuasive the government's argument that "it would be inconsistent for Congress to have prescribed a six-year limitations period for the misdemeanor offense defined in 26 U.S.C. § 7203 . . . while providing only a three-year limitation period for the felony offense defined in Section 7202." *Musacchia*, 900 F.2d at 500. The court also noted that the language of section 6531(4) supports the conclusion that the six-year limitations period applies in a section 7202 prosecution. *Musacchia*, 900 F.2d at 500.

To resolve any doubt that *Musacchia* is still good law after being vacated in part, the Second Circuit in *Evangelista* explicitly "reaffirm[ed] the holding of the original *Musacchia* opinion that 'a six year statute of limitations applies to the offense defined by 26 U.S.C. §

7202.'" 122 F.3d at 119 (citations omitted). In so doing, the Second Circuit also implicitly rejected *Brennick*, an opinion on which it relies for other propositions. The Third Circuit in *Gollapudi*, 130 F.3d 66, also explicitly rejected *Brennick* and *Block*, choosing to rely on the reasoning in *Musacchia*. To the *Gollapudi* court, it was clear that where Congress intended to limit the applicability of section 6531 exceptions it unambiguously did so by references to specific sections of the code. See §§ 6531(5)-(8). Congress also chose to include exceptions to section 6531 by general descriptions of proscribed conduct. See §§ 6531(1)-(4). Consequently, "'the language of section 6531(4) -- applying the six-year statute of limitations to the 'offense of willfully failing to pay any tax, or make any return . . . at the time or times required by law or regulation' -- suggests that it applied to any of such several sections of the code that define such an offense," and should not be limited, as *Brennick* and *Block* held, to section 7203. *Gollapudi*, 130 F.3d at 70-71 (citations omitted).

It is the view of the Tax Division that *Gilbert*, *Gollapudi*, *Evangelista*, *Musacchia*, *Porth* and *Anglin* are correctly decided and that the six-year statute of limitations provided for in section 6531(4) is applicable to prosecutions under section 7202.

FN 1. Changed to 18 U.S.C. § 3571, commencing November 1, 1986.