

2003

## In Employers We Trust The Federal Right Of Contribution Under Internal Revenue Code Section 6672

Kenneth Ryesky

Follow this and additional works at: <https://ir.lawnet.fordham.edu/jcfl>



Part of the [Banking and Finance Law Commons](#), and the [Business Organizations Law Commons](#)

---

### Recommended Citation

Kenneth Ryesky, *In Employers We Trust The Federal Right Of Contribution Under Internal Revenue Code Section 6672*, 9 Fordham J. Corp. & Fin. L. 191 (2003).

Available at: <https://ir.lawnet.fordham.edu/jcfl/vol9/iss1/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Journal of Corporate & Financial Law by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# "IN EMPLOYERS WE TRUST": THE FEDERAL RIGHT OF CONTRIBUTION UNDER INTERNAL REVENUE CODE SECTION 6672

*Kenneth H. Ryesky\**

The secret wealth of commerce, and the precarious profits of art or labour, are susceptible only of a discretionary valuation, which is seldom disadvantageous to the interest of the treasury; and as the person of the trader supplies the want of a visible and permanent security, the payment of the imposition, which, in the case of a land-tax, may be obtained by the seizure of property, can rarely be extorted by any other means than those of corporal punishments.<sup>1</sup>

## INTRODUCTION

The Internal Revenue Code<sup>2</sup> (hereinafter I.R.C.) requires employers to withhold various taxes from the pay of their

---

\* B.B.A. 1977, J.D. 1986, Temple University; M.B.A., La Salle University, 1982; M.L.S., Queens College CUNY, 1999. Member of the Bar, New York, New Jersey and Pennsylvania; currently a solo practitioner attorney in East Northport, New York, and Adjunct Assistant Professor, Department of Accounting & Information Systems, Queens College CUNY, Flushing, New York; formerly Attorney, Internal Revenue Service, Manhattan District.

1. 1 EDWARD GIBBON, HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 493 (J. B. Bury, ed., Heritage Press 1946) (1788), *also available at* <http://www.earthops.org/gibbons/2dfre10.html> (last visited June 16, 2003).

2. Unless noted otherwise, all section references in this Article are to the Internal Revenue Code (I.R.C.) of 1986, as amended. The Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2095 (1986), redesignated the Internal Revenue Code of 1954 as the Internal Revenue Code of 1986 and provided that except where inappropriate official reference to one shall entail reference to the other.

Though the Internal Revenue Code is codified at Title 26 of the United States Code, this Article will employ the convention, as widely utilized and accepted among tax practitioners and courts, of citing the Internal Revenue Code as "I.R.C." instead of "26 U.S.C." See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, P.5, at 16, and R.12.8.1, at 85 (Columbia L. Rev. Assn., et al., eds.,

employees and to pay over the same to the Government.<sup>3</sup> Pending actual transfer of the collected taxes to the government, the monies thus collected are considered to be held in "a special fund in trust for the United States."<sup>4</sup> Those individuals having the duty or power to collect and remit such taxes may be personally liable for amounts not in fact properly collected or remitted.<sup>5</sup> The personal liability imposed upon the individual taxpayer by I.R.C. § 6672 is "separate and distinct" from the employer entity's liability.<sup>6</sup>

The funds are thus commonly known as "trust funds"<sup>7</sup> and the individual officers or employees of the employer who are responsible for collecting and remitting the taxes are commonly referred to as "responsible persons"<sup>8</sup> or "responsible individuals"<sup>9</sup> by the courts, and the IRS and tax practitioners.<sup>10</sup>

---

17th ed., 2000); ASSOCIATION OF LEGAL WRITING DIRECTORS & DARBY DICKERSON, ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION, pt. 3, § 14.2(b)(3), at 103 (Aspen Law & Business, N.Y., 2000); *see also* Andrea I. Castro, *Overview of the Tax Treatment of Nonprofit Hospitals and Their For-Profit Subsidiaries: A Short-Sighted View Could Be Very Bad Medicine*, 15 PACE L. REV. 501, 501 n. 1 (1995).

Similarly, regulations issued by the Treasury Department pursuant to the Internal Revenue Code will be cited as "Treas. Reg." instead of "26 C.F.R."

3. I.R.C. §§ 3102, 3403 (2003).

4. I.R.C. § 7501(a) (2003).

5. I.R.C. § 6672(a) (2003). Though not commonly invoked, there are also criminal penalties on the books for failing to remit withheld taxes. *See* I.R.C. §§ 7202, 7215 (2003).

6. *See* *Datlof v. United States*, 370 F.2d 655, 656 (3d Cir. 1966).

7. *Slodov v. United States*, 436 U.S. 238, 243 (1978); *see also* *Fran Corp. v. United States*, 164 F.3d 814, 817 (2d Cir. 1999) (stating "the taxes an employer withholds from and pays on behalf of its employees are often called 'trust fund taxes.'").

8. *Slodov*, 436 U.S. at 246 n7.

9. *United States v. Energy Res. Co.*, 495 U.S. 545, 547 (1990) (citing *Slodov*, 436 U.S. 238 (1978)).

10. Section 6672 does not use the term "responsible person" or "responsible party"; indeed, the statutory section is totally devoid of any form of the word "responsible." *See* I.R.C. § 6672 (2003); *cf.*, *e.g.*, 42 U.S.C. § 9604(a) (2003) (referring to "potentially responsible parties" in connection with toxic waste clean-up statutes).

Many states have similar or substantially verbatim statutes,<sup>11</sup> which are construed by the respective state courts according to the Federal courts' constructions of Federal trust fund statutes.<sup>12</sup>

The list of who may be a "responsible person" under I.R.C. § 6672 (and the state statutes) is broadly inclusive.<sup>13</sup> There may be

11. CONN. GEN. STAT. § 12-736 (2003); N.Y. TAX LAW § 685(g) (Consol. 2003); OHIO REV. CODE § 5739.33 (Anderson 2002). Some local municipalities, including New York City, have their own trust fund statutes. See N.Y.C. Admin. Code §§ 11-1913, 11-1927, 11-2016 (1996). The state and local statutes can apply to sales taxes as well as income taxes. See, e.g., Matter of Harshad Shah, Nos. DTA 814588 & 814589, 1999 N.Y. Tax LEXIS 54, at \*16-\*18 (N.Y. Feb. 25, 1999), also available at <http://www.nysdta.org/Decisions/814588.dec.htm> (last visited June 29, 2003).

Some state statutes, such as Minnesota Statute § 270.101, are broader than section 6672(a) because they do not require willfulness on the part of the person in question in order to impose liability. See Minn. Stat. § 270.101 (2002); Igel v. Comm'r, 566 N.W.2d 706, 709 (Minn. 1997) (stating that the state statute, unlike the federal statute, does not require willfulness).

12. See, e.g., Breck v. State, 862 P.2d 854, 856-857 (Alaska 1993) (stating that the federal construction of liability which considers the defendant's power over the funds is persuasive); State v. Cook, No. CR93-441268S, 1993 Conn. Super. LEXIS 2286, at \*9-\*11 (Conn. Super. Ct. 1993) (using federal court constructions of similar federal statutes to determine liability); Brumby v. Brooks, 216 S.E.2d 288, 292 (Ga. 1975) (stating that "the Federal statute is sufficiently similar in language and purpose to aid in construing the present Georgia statute"); Branson v. Dep't of Revenue, 659 N.E.2d 961, 965 (Ill. 1995) (noting that the court had previously referred to federal courts' constructions of similar federal statutes); Dep't of Revenue v. Safayan, 654 N.E.2d 270, 274-275 (Ind. 1995) ("Our analysis of Safayan's liability is not unique. A number of federal circuit courts have held officers personally liable in similar circumstances under equivalent provisions of the federal withholding tax."); Rosenblatt v. N.Y. State Tax Comm'n, 498 N.Y.S.2d 529, 532 (N.Y. App. Div. 1986) (using federal constructions of similar statutes to guide them in their decision), *rev'd on other grounds*, 498 N.E.2d 148 (N.Y. 1986).

13. Section 6671(b), which sets forth definitions applicable to section 6672, reads: "The term 'person,' as used in this subchapter, includes 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." I.R.C. §§ 6671(b), 6672 (2003). The sweep of section 6671(b), and *ergo* section 6672, is very broad, and the examples set forth in section 6671(b) are illustrative rather than qualificatory. See United States v. Graham, 309 F.2d 210, 212 (9th Cir. 1962). The statutes "must be construed to include all those so connected with a corporation as to be responsible for the

more than one "responsible person," and the existence of other responsible persons does not absolve a responsible person of his or her trust fund liability for the entire amount of taxes in question.<sup>14</sup> Though not directly specified in the statute, the total trust fund liability is collected only once, whether from the employer entity itself or one or more responsible persons; to the extent that any one responsible person pays trust fund liability, the liability of all others is accordingly discharged.<sup>15</sup>

The Internal Revenue Service ("IRS") may choose the responsible person or persons from whom it will collect, and may proceed against any or all such responsible persons in any order of its choosing until the entire amount due is collected.<sup>16</sup> The availability of other responsible persons having collectable assets

---

performance of the act in respect of which the violation occurred." *Id.*; see also *Baily v. United States*, 355 F. Supp. 325, 330 (E.D. Pa. 1973).

This Article leaves to others the task of specifying and cataloging those persons who have been or may be tarred by the broad statutory brush of section 6672. See, e.g., Mary A. Bedikian, *The Pernicious Reach of 26 U.S.C. § 6672*, 13 VA. TAX REV. 225 (1993); Corrie Lynn Lyle, *The Wrath of I.R.C. § 6672: The Renewed Call for Change – Is Anyone Listening? If You Are a Corporate Official, You Had Better Be*, 74 S. CAL. L. REV. 1133, 1140 (2001).

14. See, e.g., *Thosteson v. United States*, 304 F.3d 1312, 1318, 1320 (11th Cir. 2002) (stating that although there were other responsible parties, who were perhaps even more responsible, that did not absolve the plaintiff of liability), *aff'g* 182 F. Supp. 2d 1189 (M.D. Ala. 2001).

15. See, e.g., *United States v. Sotelo*, 436 U.S. 268, 280 n.12 (1978) (citing Comptroller General's Opinion B-137762 (May, 3 1977)); *United States v. Pomponio*, 635 F.2d 293, 298 n.6 (4th Cir. 1980) (stating that, as a policy, the IRS will only collect the amount owed once); IRS, *Policy Statement, Trust Fund Recovery Penalty Assessments* (Feb. 2, 1993), 1993 TAX NOTES TODAY 27-17 (Feb. 5, 1993).

16. *Pomponio*, 635 F.2d at 298 (4th Cir. 1980) (explaining that the Government is permitted to collect from any party in the order of its choosing); *Kelly v. Lethert*, 362 F.2d 629, 635 (8th Cir. 1966) (stating the Government can take action against responsible parties as well as the corporation itself "in the order best suited in its judgment to collect the unpaid tax"); see also *Abramson v. United States*, 39 B.R. 237, 239 (Bankr. E.D.N.Y. 1984) (stating that case law has held that the Government can pursue any party in any order of its choosing).

does not impose upon the IRS any duty to pursue or refrain from pursuing any particular responsible person.<sup>17</sup>

In 1996, as part of the Taxpayer Bill of Rights 2 (hereinafter referred to as "TBOR2"), Congress enacted a statutory right of contribution in favor of responsible persons who actually pay more than their proportionate share of trust fund penalties against other responsible persons.<sup>18</sup> This article will discuss the right of contribution under I.R.C. § 6672.

## I. HISTORY OF THE TRUST FUND STATUTE AND THE RIGHT OF CONTRIBUTION

### A. Statutory Background

The prospect of tax collectors misappropriating sovereign property by commingling it with personal property was apparently a royal concern in the days of King Hammurabi.<sup>19</sup>

---

17. See, e.g., *Hornsby v. United States*, 588 F.2d 952, 954 (5th Cir. 1979) (finding that it is within the Commissioner's discretion in pursuing some, but not all of the entities that are liable).

18. Tax Payers Bill of Rights 2, Pub. L. No. 104-168, § 903, 110 Stat. 1452, 1466 (1996) (codified at I.R.C. § 6672(d)) [hereinafter TBOR2]. The new subsection reads:

(d) Right of contribution where more than one person liable for penalty. If more than one person is liable for the penalty under subsection (a) with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty. Any claim for such a recovery may be made only in a proceeding which is separate from, and is not joined or consolidated with—

(1) an action for collection of such penalty brought by the United States, or  
 (2) a proceeding in which the United States files a counterclaim or third-party complaint for the collection of such penalty.

*Id.*

19. See, e.g., CODE OF HAMMURABI KING OF BABYLON §§ 38-39, at 25 (R. F. Harper transl., Wm. W. Gaunt & Sons, Inc., 1994) (circa 2250 B.C.):

While the Temple stood in Jerusalem, such commingling of the shekels collected from the populace and earmarked for sacerdotal purposes was discouraged not only through fear of the Almighty Himself, but also through surveillances done by mortal humans.<sup>20</sup> Serious penalties for not remitting collected taxes to the government were decreed in the days of the Roman Empire.<sup>21</sup> Following such a rich and ancient tradition of holding the tax collectors and agents accountable for the tax funds they collect and handle, the Revenue Act of 1918 articulated the current American statutory scheme of imposing a personal monetary penalty separate and apart from, but equal to, unremitted third-party tax collections.<sup>22</sup> The 1918 provision persisted, substantially unchanged, in the prevailing Federal tax statutes through 1954.<sup>23</sup>

Meanwhile, the national thrust of waging World War II placed obvious demands upon the public fisc, and certainly affected the financial positions of millions of Americans.<sup>24</sup> Taxpayers who had incurred reductions in their salaries

§ 38

An officer, constable or tax-gatherer shall not deed to his wife or daughter the field, garden or house, which is his business (i.e., which is his by virtue of his office), nor shall he assign them for debt.

§ 39

He may deed to his wife or daughter the field, garden or house which he has purchased and (hence) possesses, or he may assign them for a debt.

*Id.*

20. MAIMONIDES, MISHNEH TORAH: HILCHOT SHEKALIM, ch. 2, ¶ 10 at 95 (Rabbi Eliyahu Touger trans., Moznaim Publ. Co. 1993) ("And they would talk to him [continuously] from the time he entered until the time he departed, so that he could not place [a coin] in his mouth.").

21. See, e.g., CODE JUST. 12.62.3 (Gratins & Valentinian) (c. 380), reprinted in 15 THE CIVIL LAW 319 (S. P. Scott, trans., Central Trust Co.) (photo. reprint, AMS Press 1973) (1932) ("Whenever a collector is accused and convicted of depredations, he must suffer the penalty prescribed by the law, without appealing to Our clemency.").

22. Revenue Act of 1918, ch. 18, § 1308(c), 40 Stat. 1143.

23. Under the Internal Revenue Code of 1939, the successor provisions to Revenue Act of 1918 section 1308(c) were codified in sections that related to the applicable type of third-party collection taxes (e.g., narcotics formerly 26 U. S. C. § 2557(b)(4) (repealed 1954), firearms (formerly 26 U.S.C. § 2707(a) (repealed 1954)).

24. See SHELLEY L. DAVIS, UNBRIDLED POWER 196 (HarperBusiness 1997).

(including those who went into military service at lower remuneration than paid by their civilian jobs) often had difficulty coming up with the funds some months after pay day to cover the taxes that had been imposed upon their wages and salaries.<sup>25</sup> New York Federal Reserve Board member Beardsley Ruml, obviously drawing upon his expertise and experience as a retail department store executive, devised a plan for national withholding of income taxes from wages.<sup>26</sup> Ruml's "pay as you go" plan was enacted into law in 1943, and employers were thus required to withhold income taxes from the paychecks of the American workforce.<sup>27</sup>

The withholding plan thus ameliorated both the Treasury's strained cash flow situation and the problem of the taxpayer's inconvenience in paying the personal income tax.<sup>28</sup> Another advantage to the government, albeit one not commonly discussed as a specific taxation policy rationale, is that in light of the universal resentment held for taxation,<sup>29</sup> the interposing of a

25. *See id.*

26. *See id.*; *Donelan Phelps & Co. v. United States*, 876 F.2d 1373, 1374-1375 (8th Cir. 1989) (explaining the origins of the current system of taxation, where the funds are withheld from the employee's paycheck).

27. Current Tax Payment Act of 1943, ch. 120, Pub. L. No. 78-68, 57 Stat. 126.

28. *Cf.* ADAM SMITH, *THE WEALTH OF NATIONS* Book V, Ch. II, Pt. II at 778 (Edwin Cannan, ed., Modern Library 1937) (1789) ("[Maxim number] III. Every tax ought to be levied at the time, or in the manner, in which it is most likely to be *convenient* for the contributor to pay it") (emphasis added), *also available at* <http://www.ecn.bris.ac.uk/het/smith/wealbk05> (last visited Aug. 19, 2003).

29. *See, e.g.,* *People v. Coleman*, 4 Cal. 46, 48-49 (1854):

The exactions of Government, by way of tax or assessment, are always met with reluctance; and the citizen, too often forgetting that they are the price of his personal liberty, and the security of his property, is disposed to regard them as arbitrary impositions, from which he may properly escape by any defense or technicality.

*Id.*; *cf.* RALPH WALDO EMERSON, *ESSAYS SECOND SERIES: POLITICS* (1844), *reprinted in* RALPH WALDO EMERSON *ESSAYS & LECTURES* 567 (Joel Porte ed., The Library of America 1983) ("Of all debts, men are least willing to pay the taxes").

When Lawrence Gibbs became the United States Commissioner of Internal Revenue in 1986, he reportedly was asked by his son: "Well, Dad, how do you feel being the most disliked person in America?" Tom Herman, *Tax Report: A*



third-party collection agent places the government out of immediate range of the opprobrium—rational or otherwise—of the taxpayer,<sup>30</sup> thus leaving the shopkeeper to directly deal with the ill will of the customer on account of the imposition of a sales tax,<sup>31</sup> or likewise, having the employer absorb much of the flak from the imposition of a tax on the labor of the working man or woman.<sup>32</sup>

By the time the smoke had cleared from World War II, America's tax statutes and number of people in the work force had, over the course of a half century, definitively shifted the primary base of America's tax receipts from excise to income.<sup>33</sup>

---

*Special Summary of Federal and State Tax Developments*, WALL ST. J., Oct. 26, 1994, at A1.

30. See, e.g., *People v. Brown*, 59 Cal. 345, 350-351 (1881) (affirming capital murder conviction in which defendant and other ex-convicts had conspired "to commit larceny, burglary, and robbery, and particularly, to rob the Tax Collector of [Mendocino] county, and to resist by force any who might attempt to interfere with them or to capture them."); *Commonwealth v. Gearing*, 83 Mass. 595 (1 Allen) (1861) (convicting defendant of assault upon deputy sheriff attempting to collect taxes); *Mendenhall v. United States*, 6 Okla. Crim. 436 (Okla. Crim. App. 1911) (affirming the lower court ruling where defendant was convicted of assault with intent to kill a city marshal in tax collection dispute); *United States v. Sciolino*, 505 F.2d 586, 587 (2d Cir. 1974) (convicting a defendant of threatening an IRS agent); *United States v. Guthrie*, 385 F.2d 410, 410-411 (7th Cir. 1967) (affirming a conviction for assaulting an IRS agent performing official duties); *United States v. Hart*, 545 F. Supp. 470, 473 (D. N.Dak. 1982) (providing declaratory and injunctive relief to plaintiffs where defendant threatened a "posse comitatus" arrest of IRS agents; his actions were deemed to be "substantial interference with the administration and enforcement of the internal revenue laws"), *appeal dismissed and sanctions imposed for frivolity*, 701 F.2d 749 (8th Cir. 1983); cf. *People v. Williams*, 17 Cal. 142, 144 (1860) (reviewing conviction of defendant tax collector who attempted to offer a witness that would testify that tax collectors arm themselves for protection, while collecting taxes).

31. See, e.g., Michael Cooper, *Suspect Is Arrested in Threat to Store That Was Set Ablaze*, N.Y. TIMES, Apr. 28, 1998, at B3 (suspect in firebombing allegedly threatening to burn down store in dispute with store owner over sales tax on purchase of a hat).

32. See, e.g., Elizabeth Mehren, *Massachusetts Man Convicted of Office Massacre*, L.A. TIMES, Apr. 25, 2002, A1 (describing a workplace massacre that was the result of a tax dispute between employer and employee defendant).

33. See DAVIS, *supra* note 24, at 196-197.

The enactment of the Internal Revenue Code of 1954 retained the basic statutory scheme in I.R.C. § 6672, albeit with more specification regarding the type of tax to which the scheme applied.<sup>34</sup> The enactment in 1996 of TBOR2 amended I.R.C. § 6672 by giving a statutory right of contribution to responsible persons who pay the trust fund penalties,<sup>35</sup> together with the right to know the status of the IRS's collection efforts against other responsible persons with respect to the same trust funds.<sup>36</sup>

---

34. Internal Revenue Act of 1954, c. 736, 68A stat. 828 (1984) (current version at 26 U.S.C.A. § 6672 (2003)). Justice Brennan criticized the statute has having been drawn "perhaps inartfully" to achieve its intended purpose. *Slodov v. United States*, 436 U.S. 238, 250 (1978). Brennan was neither the first nor the last American jurist to be vexed by the complexity of the tax laws. *See, e.g.,* Judge Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947):

[T]he words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.

*Id.*; *see also* *Houston Textile Co. v. Comm'r*, 173 F.2d 464 (5th Cir. 1949) ("This petition brings up for solution one of those difficult jigsaw tax law puzzles all too common in the present deplorable crazy quilt patchwork state of the Internal Revenue."); *Cohen v. United States*, 995 F.2d 205, 209 (Fed. Cir. 1993) ("It is rare that tax law bears any recognizable relationship to common sense.").

35. *See* note 18 *supra* and accompanying text.

36. TBOR2, Pub. L. No. 104-168, § 902, 110 Stat. 1452, 1466 (1996) (codified at I.R.C. § 6103(e)(9) (2003)). The new subsection reads:

(9) Disclosure of certain information where more than one person subject to penalty under section 6672.—If the Secretary determines that a person is liable for a penalty under section 6672(a) with respect to any failure, upon request in writing of such person, the Secretary shall disclose in writing to such person—

(A) the name of any other person whom the Secretary has determined to be

liable for such penalty with respect to such failure, and

(B) whether the Secretary has attempted to collect such penalty from such other

person, the general nature of such collection activities, and the amount collected.

*Id.*

TBOR2 also made other amendments to section 6672, largely irrelevant to the discussion in this Article, relating to preliminary notice requirements and

B. Right of Contribution

Prior to TBOR2, responsible persons who paid the trust fund penalties had no Federal statutory right of contribution from other responsible persons.<sup>37</sup> As for a Federal right of contribution or indemnification based upon common law and not statute, in 1974 United States District Judge Raymond J. Pettine specifically requested briefings from the parties on the issue in the *DiBenedetto* case,<sup>38</sup> and then after considering such briefings, found that there was no such right under Federal law.<sup>39</sup> *DiBenedetto* had been called "the seminal case" on the question of the right of contribution for responsible parties under I.R.C. § 6672,<sup>40</sup> and had been followed in many other decisions.<sup>41</sup> With

---

to immunity for voluntary board members of tax-exempt organizations. TBOR2 § 901, 110 Stat. 1452, 1465-1466 (codified at I.R.C. § 6672(b)); TBOR2 § 904, 110 Stat. 1452, 1467 (codified at I.R.C. § 6672(e)).

37. See note 18 *supra* and accompanying text.

38. *DiBenedetto v. United States*, 1974 U.S. Dist. LEXIS 5908, 75-1 U.S.T.C. (CCH) ¶ 9,503 (D.R.I. 1974) (stating that the lower court requested briefings on whether a fourth party complaint can be viewed as providing a right of contribution, and if so whether a person found liable has the right to implead other "responsible persons").

39. See *id.* (finding that there is no right of contribution for a person found liable even there are other potentially "responsible persons").

40. *Rebelle v. United States*, 588 F. Supp. 49, 51 (M.D. La. 1984); I.R.C. § 6672(d) (2003).

41. See, e.g., *Swift v. Levesque*, 614 F. Supp. 172, 173 (D. Conn. 1985) (stating that while they find no federal right of contribution, the liable party is not precluded from pursuing a judgment against other possibly liable parties under state law); *Alten v. Ellin & Tucker, Chartered*, 854 F. Supp. 283, 288 (D. Del. 1994) (finding that a party is entitled to assert a right of contribution if it is under state law, however such a right is not provided under federal law); *Laub v. Ross*, 1992 U.S. Dist. LEXIS 21259, at \*5 (S.D. Fla. 1993), *magistrate's findings adopted and ordered*, 818 F. Supp. 340, 343 (S.D. Fla. 1993) (holding that although the lawsuit was an action to indemnify a party found liable under 26 U.S.C.A. § 6672, there was no federal jurisdiction, such an action must be brought under state law since there is no federal right to contribution); *Continental Ill. Nat'l Bank & Trust Co. v. United States*, 1987 U.S. Dist. LEXIS 5933, at \*3, 87-2 U.S.T.C. (CCH) ¶ 9,442 (E.D. Ill. 1987) ("The law is well established that in the absence of specific statutory authority, there exists no federal common law right of contribution."); *Schoot v. United States*, 664 F. Supp. 293, 297 (N.D. Ill. 1987) (finding that if someone is found liable for the unpaid taxes, they should

few exceptions, there was no Federal common law right of contribution prior to TBOR2.<sup>42</sup>

Various policy reasons were cited by courts for refusing to find an implied Federal right of contribution.<sup>43</sup> Courts have recognized that the complication of a case by such claims would

---

not be foreclosed from pursuing a remedy against another liable party under state law); *Geiger v United States*, 1978 U.S. Dist. LEXIS 18433, 78-1 U.S.T.C. (CCH) ¶ 9,395 (D. Md. 1978) (dismissing the claims of a party who attempted to seek contribution for tax penalties that he paid on the basis that there is no federal right to contribution); *Goranson v. United States*, 1991 U.S. Dist. LEXIS 19069, at \*13 (D. Mass. 1991) (stating that although there may be no right of contribution under federal law, that does not preclude an action under state law); *Garity v. United States*, 1980 U.S. Dist. LEXIS 16791, 81-2 U.S.T.C. (CCH) ¶ 9,598 (E.D. Mich. 1980) ("To the extent this case is based on an implied right of indemnity summary judgment is required by the well established principle that persons assessed penalties under section 6672 of the Internal Revenue Code have no right to indemnification or contribution from others who may also be liable."); *Cohen v. United States*, 35 AFTR 2d 75-1445 (E.D. Mich. 1975) (agreeing with *DiBenedetto* that there is no right to contribution); *Moats v. United States*, 564 F. Supp. 1330, 1341 (W.D. Mo. 1983) (finding the reasoning of *DiBenedetto* to be applicable to the case at bar); *Carlucci v. United States*, 793 F. Supp. 482, 484, 487 (S.D.N.Y. 1992) (dismissing the action for lack of subject matter jurisdiction and stating that if there is a state cause of action, the suit must be brought in a separate proceeding); *Cook v. United States*, 765 F. Supp. 217, 219-220 (M.D. Pa. 1991) (stating that there is no federal right to contribution, and a federal court lacks jurisdiction to hear a state claim for contribution concurrently with the Government's action); *Hanhauser v. United States*, 85 F.R.D. 89, at \*4 (M.D. Pa. 1979) (noting that case law consistently holds that there is no federal right of contribution); *Seachrist v. Riggs*, 1990 U.S. Dist. LEXIS 17844, at \*17, 91-1 U.S.T.C. (CCH) ¶ 50,019 (N.D. W. Va. 1990) (stating that "any action for indemnification or contribution . . . must arise under federal law" and further finding that no such right exists); *Knapp v. Applewhite*, 124 B.R. 609 (Bankr. M.D. Fla. 1991) (holding that "as a matter of law no such right to contribution exists"); *In re All Star Sports, Inc.*, 78 B.R. 281, 283 (Bankr. D. Nev. 1987) (noting that there is strong precedence supporting the finding that there is no federal right to contribution).

42. *But see Reid v. United States*, 558 F. Supp. 686, 689 (N.D. Miss. 1983) (finding that "[i]t is proper that indemnity be used as an equitable device to assure complete justice by shifting responsibility from the 'responsible person' back to the employer upon whose shoulders rests the original obligation.").

43. *See, e.g., Continental Ill. Nat'l Bank & Trust Co.*, 1987 U.S. Dist. LEXIS 5933, at \*4 (stating that an implied federal right of contribution would open the courts up to excessive collateral litigation).

prolong the judicial process, and hence delay the collection of the revenue.<sup>44</sup> Moreover, the prospect of being personally saddled with total liability for the company's tax bill has been viewed as a strong incentive for all who may be responsible persons to proactively ensure that the trust funds are in fact properly remitted to the government.<sup>45</sup> Focusing upon the need for retribution upon the wrongdoer, it has been observed that the penal effects of I.R.C. § 6672 would be diluted or defeated by allowing the responsible person in question to shift the burdens of his or her punishment.<sup>46</sup> Additionally, the old equitable clean hands doctrine has also been cited as a policy reason for denying a right of contribution for trust fund penalties.<sup>47</sup>

Some states have recognized a right of contribution under state law for I.R.C. § 6672 liability,<sup>48</sup> while other states have

---

44. See, e.g., *Swift*, 614 F. Supp. at 177; *Schoot*, 664 F. Supp. at 298; *Cook*, 765 F. Supp. at 219; *Moats*, 564 F. Supp. at 1341-1342; *Carlucci*, 793 F. Supp. at 486.

45. See, e.g., *Cook*, 765 F. Supp. at 219-220; *Rebelle*, 588 F. Supp. at 51; *Continental Ill. Nat'l Bank & Trust Co.*, 1987 U.S. Dist. LEXIS 5933, at \*4-\*5 (citing *Rebelle*, 588 F. Supp. at 51).

46. See, e.g., *All Star Sports*, 78 B.R. at 284.

47. *Wynne v. Fischer*, 809 S.W.2d 264, 267 (Tex. App. 1991). The *Wynne* decision related to a right of contribution in a state court under state law. *Id.* at 268.

48. See, e.g., *Lostocco v. D'Eramo*, 518 S.E.2d 690, 695 (Ga. Ct. App. 1999) (stating that Congress intended for their to be a right to contribution in state courts); *Goldhill v. Kramer*, 176 S.E.2d 232, 234 (Ga. Ct. App. 1970) ("Where one has paid more than his share of the common burden which all are equally bound to bear, contribution can be enforced by him in an action at law or equity."); *Aardema v. Fitch*, 684 N.E.2d 884, 899 (Ill. App. Ct. 1997) (holding that there is a right to contribution, because to find otherwise would result in inequity); *Kamins v. Spyres*, 540 P.2d 1208, 1211 (Okla. Ct. App. 1975) (affirming a lower courts jury instructions that stated there can be multiple parties that are responsible, and in such instances, there is joint liability); *People's Nat'l Bank of Souderton v. Onorato*, 63 Pa. D. & C.2d 485, 491 (Ct. C.P. Montg'y Co. 1972) (stating that "where there are joint obligors and one of the obligors shall discharge the debt, then, that obligor shall have the right in equity to proceed against the other obligors to enforce their proportionate share of contribution."); *Esstman v. Boyd*, 605 S.W.2d 237, 241 (Tenn. Ct. App. 1979) (finding that there is a right of contribution due to principles of equity and justice); see also *Swift*, 614 F. Supp. at 176-178 (finding a right of contribution under Connecticut law).

refused to recognize such a right.<sup>49</sup> Such a right can arise out of a contractual agreement between the parties.<sup>50</sup>

Thus, if a responsible person prior to TBOR<sup>251</sup> was to successfully assert a right of contribution for I.R.C. § 6672 penalties, it almost always had to be under state law, if available.<sup>52</sup> "The variations in state law sometimes [made] it difficult or impossible to press successful suits in state courts to force a contribution from other responsible persons."<sup>53</sup> The claims almost always needed to be brought in a state forum, inasmuch as the Federal courts declined to exercise pendant jurisdiction of such state law claims, particularly in the context of an action by the IRS to collect the I.R.C. § 6672 penalty.<sup>54</sup>

49. See, e.g., *Plato v. State Bank of Alcester*, 555 N.W.2d 365, 367 (S.Dak. 1996) (finding that it would be contrary to public policy to permit a liable party to assert a right of contribution under state law); *Wynne*, 809 S.W.2d at 268.

50. *Glude v. Sterenbuch*, 1998 U.S. App. LEXIS 410, at \*19-\*20 (4th Cir. 1998) (holding that the right to contribution was created through a contract, not by statute); *United States v. Becker*, 1989 U.S. Dist. LEXIS 3227, at \*11-\*12 (S.D.N.Y. 1989) (finding that where an agreement exists between the parties to share liability, the court should give effect to said agreement); *Tubb v. Bartlett*, 862 S.W.2d 740, 751 (holding that where there is an indemnity agreement that was created to include tax liabilities, there is a right of contribution) (Tex. Ct. App. 1993); see also *Laub v. Ross*, 1992 U.S. Dist. LEXIS 21259 (S.D. Fla. 1993) (dismissing, for want of Federal jurisdiction, an action to vacate arbitration which under state law upheld one responsible party's contractual right of contribution).

The *Tubb* case upheld the contractual right of indemnification in Texas, notwithstanding that an equitable right of contribution is not available in that state. Compare *Tubb*, 862 S.W.2d at 751 with *Wynne*, 809 S.W.2d at 267-268.

51. The right of contribution is prospectively effective to penalties assessed after July 30, 1996, the date TBOR<sup>2</sup> was enacted. TBOR, § 903(b) 110 Stat. 1466 (1996).

52. See generally cases cited *supra* note 41.

53. H.R. REP. NO. 104-506, at 40 (1996), reprinted in 1990 U.S.C.C.A.N. 1143, 1163.

54. See, e.g., *Carlucci v. United States*, 793 F. Supp. 482, 485-486 (S.D.N.Y. 1992); *Cook v. United States*, 765 F. Supp. 217, 220 (M.D. Pa. 1991); *Schoot v. United States*, 664 F. Supp. 293, 298 (N.D. Ill. 1987); *Wright v. United States*, 1992 U.S. Dist. LEXIS 775, 93-1 U.S.T.C. (CCH) ¶ 50,056, 70 A.F.T.R.2d (RIA) 6187 (E.D.N.Y. 1992) (dismissing a third party complaint for lack of subject matter jurisdiction).

There were several problems with the pre-TBOR2 version of I.R.C. § 6672.<sup>55</sup> The statute was characterized as “harsh” by several judges, albeit necessarily so.<sup>56</sup> But if the harshness was necessary as a matter of policy, much of the unfairness of I.R.C. § 6672 prior to TBOR2 was not.<sup>57</sup> In light of the IRS’s “pay as much as you can when you can” tax collection policies and practices,<sup>58</sup> together with the IRS’s prerogative to pursue the responsible person or persons of its choice<sup>59</sup> and to make settlements with any responsible person on any terms of its choosing,<sup>60</sup> it is not difficult to imagine diverse possibilities for the unfair administration of the statute on the part of the IRS. “The IRS apparently makes no effort to administrate the penalty

---

55. See, e.g., *Howard v. United States*, 711 F.2d 729, 737 (5th Cir. 1983) (holding that the government can choose arbitrarily which “responsible party” it wishes to collect from).

56. E.g., *id.* (holding that under section 6672 the government can pursue any party they choose even if this results in the least blameworthy party being found liable); *Wright v. United States*, 809 F.2d 425, 428 (7th Cir. 1987) (stating that “the statute is harsh, but the danger against which it is directed . . . is an acute one against which, perhaps, only harsh measures are availing.”); *Carter v. United States*, 717 F. Supp. 188, 191 (S.D.N.Y. 1989) (noting that courts have stated that application of section 6672 can sometimes have harsh results); *Mussato v. United States*, 1982 U.S. Dist. LEXIS 14336, at \*8 (D. Colo. 1982) (finding that “[p]laintiff is a responsible person under the harsh statute”).

57. See, e.g., *Mussato*, 1982 Dist. LEXIS 14336, at \*7-\*8 (stating that the IRS need not find the most responsible party).

58. *Fowler v. United States*, 820 F. Supp. 1390, 1397 (D. Wyo. 1993) (stating that a party may end up paying more money because “the IRS accounts for the penalty payments in what amounts to a ‘pay as much as you can when you can’ basis”).

59. See, e.g., *Mussato*, 1982 U.S. Dist. LEXIS 14336, at \*7-\*8 (stating that they must determine if the party found liable was a “responsible party,” who the court believes is most blameworthy is not relevant to their ultimate ruling); see also H.R. REP. NO. 104-506, at 40 (1996), *reprinted in* 1990 U.S.C.C.A.N. 1143, 1163 (“The IRS may collect this penalty from a responsible person from whom it can collect most easily, rather than from the person with the greatest culpability for the failure.”).

60. See, e.g., *Wollman v. United States*, 571 F. Supp. 824, 828 (S.D. Fla. 1983) (holding that the government cannot be precluded from settling with one of the responsible parties).

against potentially liable officers and directors in an equitable or fair manner.”<sup>61</sup>

This broad discretion can indeed serve to work gross injustices in situations where the one responsible party who contributed most to the delinquency disappears,<sup>62</sup> or squanders all of his or her assets on such vices as drugs or alcohol,<sup>63</sup> or is otherwise not an available or convenient source for the IRS to tap.<sup>64</sup> The IRS can proactively give favored treatment to one responsible person over others, even when the favored party wielded greater and closer control over the failure to pay the taxes than the parties not so favored.<sup>65</sup>

The IRS’s general ability to control taxpayer abuse by its employees is most questionable,<sup>66</sup> and its discretion is not always

61. *Fowler*, 820 F. Supp. at 1394.

62. *See, e.g., Thosteson v. United States*, 304 F.3d 1312, 1315 (11th Cir. 2002); *Grizaffi v. United States*, 1987 U.S. Dist. LEXIS 6951 (N.D. Ill. 1987).

63. *See, e.g., Unger v. United States*, 1999 U.S. Dist. LEXIS 10932, 84 A.F.T.R.2d (RIA) 6817 (S.D.N.Y. 1999), *on remand from United States v. Landau*, 155 F.3d 93 (2d Cir. 1998), *cert. denied*, 526 U.S. 1130 (1999).

64. *See, e.g., Thosteson*, 304 F.3d at 1318.

65. *See, e.g., Bowlen v. United States*, 956 F.2d 723, 725 (7th Cir. 1992) (noting that the IRS offered a “conditional dispensation” to another responsible party, and not to the Bowlens).

66. *See, e.g., Dixon v. Comm’r*, 316 F.3d 1041, 1046, *opinion editorially corrected at* 2003 U.S. App. LEXIS 4843 (9th Cir. 2003) (noting that the secret settlement deals made by IRS trial attorneys with key plaintiffs in test case affecting approximately 1,300 taxpayers “amounted to a fraud on both the taxpayers and the Tax Court”); IRS Inspection Service and Taxpayer Advocate Roles for Ensuring that Taxpayers are Treated Properly: Hearing Before the U.S. Sen. Comm. on Fin., 1998 Leg., 105th Sess. (Feb. 5, 1998) (statement of Lynda D. Willis, Director, Tax Policy and Administration Issues, General Government Division), *available at* <http://www.unclefed.com/GAOReports/ggd98-63t.pdf> (last visited Aug. 20, 2003); 137 CONG. REC. S11813 (Aug. 1, 1991) (statement of Sen. Symms) (“As the pressure on the IRS grows year after year to collect every last dollar due to the Treasury, the incidents of taxpayers abuse by the Service grow as well.”); 126 CONG. REC. 14415 (1980) (remarks of Sen. Baucus) (“Numerous horror stories have been reported in Montana and elsewhere . . . Fear of the IRS is based . . . on its well-earned reputation for inconsistency and unpredictability”); Statement of the National Society of Accountants Presented to the U.S. H.R. Comm. on Ways and Means Subcomm. on Oversight on the 2002 Tax Return Filing Season (statement of William Stevenson, NSA Federal Taxation Chairman), 2002 TAX NOTES TODAY 69-42 (Apr. 9, 2002).



exercised on a pure cost/benefit or tax potential basis.<sup>67</sup> Giving the tax collector discretion so broad as to determine the amount of a tax owed by any one taxpayer has long been recognized as an invitation for such abuse,<sup>68</sup> yet such was and is precisely the discretion effectively reposed in the IRS in its enforcement of I.R.C. § 6672.<sup>69</sup>

Concerned about the unfairness inherent in I.R.C. § 6672, Congress, as part of TBOR2, amended the statute to give responsible persons the right of contribution,<sup>70</sup> and also required

---

Despite assurance of IRS management to the contrary, we fear that this [National Research Program] is ripe for abuse by over zealous IRS agents. Indeed, at a recent hearing of this Subcommittee, the IRS National Taxpayer Advocate in a question and answer session remarked that it may be necessary to have a third party monitor these audits to protect taxpayers.

*Id.*; see generally DAVIS, *supra* note 24.

67. See generally DAVID BURNHAM, *A LAW UNTO ITSELF: POWER, POLITICS AND THE IRS* (Random House, 1989); DAVIS, *supra* note 24.

The courts have a tendency to be especially stringent with the tax affairs of former (and, for that matter, current) IRS employees, and "[t]he standard to which the courts hold former IRS agents obviously impacts the standard to which IRS tax examination personnel will hold their former colleagues in personal tax examination situations." Kenneth H. Ryesky, *Of Taxes and Duties: Taxing the System with Public Employees' Tax Obligations*, 31 AKRON L. REV. 349, 361 n.50 (1998). The fact that one of the responsible persons in question is a former employee of the IRS may well be a factor in the IRS's determination of whom to pursue. *Id.*

68. See SMITH, *supra* note 28:

[Maxim] II. The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax-gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort, by the terror of such aggravation, some present or perquisite to himself. The uncertainty of taxation encourages the insolence and favours the corruption of an order of men who are naturally unpopular, even where they are neither insolent nor corrupt. The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that a very considerable degree of inequality, it appears, I believe, from the experience of all nations, is not near so great an evil as a very small degree of uncertainty.

*Id.*

69. *Id.*

70. TBOR2, Pub. L. No. 104-168, § 903, 110 Stat. 1452, 1466 (codified at I.R.C. § 6672(d) (2003)).

the IRS to disclose its collection activities against other responsible persons for the same trust funds.<sup>71</sup> There now is a Federal statutory right of contribution where none had previously existed. Actual payment of the tax to the IRS is a prerequisite to asserting the claim for contribution.<sup>72</sup>

## II. SOME POTENTIAL ISSUES AND PROBLEMS IN ASSERTING THE FEDERAL RIGHT OF CONTRIBUTION FOR TRUST FUNDS

As with other new statutory provisions, putting the statutory theory of I.R.C. § 6672(d) into practice will likely have its ambiguous moments until a body of case law develops to give guidance as to the statute's application.<sup>73</sup> Several areas not explicitly spelled out in the statute, which may require judicial clarification, are now discussed:

### A. Courts in Which an I.R.C. § 6672(d) Contribution Claim Will Be Heard

All Federal courts are courts of limited jurisdiction and require specific jurisdictional authorization to exercise their authority.<sup>74</sup> The jurisdiction of the Federal courts in taxation

---

71. TBOR2, Pub. L. No. 104-168, § 902, 110 Stat. 1452, 1466 (codified at I.R.C. § 6103(e)(9) (2003)).

72. I.R.C. § 6672(d) (2003); *Jones v. Noblit*, 2001 U.S. Dist. LEXIS 9699, at \*2 (D. Kan. 2001) (stating that an action for contribution under Section 6672(d) requires the plaintiff to pay the taxes prior to bringing suit).

73. See ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 59 (Little Brown & Co. 1938) ("Observers have often remarked a tendency, in common phrase, to pass the buck to the courts, . . . to fill out a skeleton statute.").

74. U.S. Const., art. III, § 2; *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) (noting that "federal courts are courts of limited jurisdiction"); *Marbury v. Madison*, 5 U.S. 137, 173-174 (1803) (explaining the Supreme Courts jurisdiction to hear cases); *American Fair Credit Ass'n v. United Credit Nat'l Bank*, 132 F. Supp. 2d 1304, 1308-09 (D. Colo. 2001) (stating that federal courts have limited jurisdiction, and the burden of establishing subject matter jurisdiction is on the party asserting it).

matters is certainly limited.<sup>75</sup> A Federal court's jurisdiction is never presumed, but must be affirmatively demonstrated.<sup>76</sup>

With TBOR2's addition of Subsection (d) to I.R.C. § 6672 there now is specific jurisdiction conferred upon Federal courts to entertain a right of contribution action for trust funds, provided that the action "is separate from, and is not joined or consolidated with" any proceeding in which the IRS seeks to collect trust fund penalties from any responsible party with respect to the underlying trust funds.<sup>77</sup> This proviso obviates the public policy concerns over complications from a trust fund penalty contribution claim which might potentially hinder and delay the revenue collection processes.<sup>78</sup>

Assuming that there is no IRS collection action involved in the proceeding (which, for all practical purposes, would mean that the IRS is not a party to the proceeding), it is quite obvious that the Federal District Courts would have original jurisdiction in an I.R.C. § 6672(d) action for contribution because it would be a

---

75. I.R.C. § 7421 (2003); *see also* *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-37 (1974) (holding that pursuant to the Anti-Injunction Act, a court is not permitted to enjoin the assessment or collection of taxes, any suit must be heard subsequent to the government's action to assess or collect taxes).

76. *See, e.g.,* *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) ("A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears.").

In pleading a case before a Federal court, an indispensable preliminary matter to be addressed by the pleading party is the court's jurisdiction. *FED. R. CIV. P. 8(a)(1)*; *see also* *Tingley v. I.R.S.*, 1995 U.S. Dist. LEXIS 2363, at \*4 (W.D. Wash. 1995) (holding that federal courts are courts of limited jurisdiction, and the party asserting such jurisdiction must affirmatively prove it).

77. I.R.C. § 6672(d) (2003); *see also* *Winters v. United States*, 1997 U.S. Dist. LEXIS 12487 (dismissing cross-claim for contribution in case where IRS sought to collect trust fund penalty). Though the *Winters* decision cited section 6672(d) in its rationale, the penalties at issue were assessed prior to the effective date of section 6672(d) and accordingly, a claim for contribution would not be available under section 6672(d) (though there might be a state claim for contribution). *See* TBOR2 § 903(b), 110 Stat. 1466.

78. *See* note 44 *supra* and accompanying text. *But see* *MacDonald v. United States*, 2003 U.S. Dist. LEXIS 14418 (S.D. Mich. 2003) (finding that cross claim against third party for contribution based upon breach of contract is separate from and does not implicate I.R.C. § 6672(d), but dismissing the cross claim on other jurisdictional grounds).

civil action "arising under" a Federal statute.<sup>79</sup> Such actions have already been brought in at least one Federal District Court.<sup>80</sup>

Whether a Federal Bankruptcy court would have jurisdiction over an I.R.C. § 6672(d) action is more problematic.<sup>81</sup> The Bankruptcy court, of course, would not have jurisdiction over a § 6672(d) action if an IRS claim to collect the trust fund penalty were involved; and because the IRS, as a creditor, would most highly likely be involved if the tax were not paid in full, it is very difficult to imagine a § 6672(d) claim being assertable in a Bankruptcy proceeding where the tax remains unpaid in full or in part.<sup>82</sup> Moreover, Bankruptcy courts do not have the authority to determine the tax liabilities of parties other than the debtor at bar.<sup>83</sup>

If the IRS has been paid in full and has thereby been taken out of the picture, then there might be occasion for a Bankruptcy court to somehow deal with the matter, though sufficient case law on this point has yet to develop.<sup>84</sup> If, for example, the debtor in Bankruptcy, having paid the trust fund penalty in full prior to insolvency, were asserting a § 6672(d) claim for contribution against another responsible person, then such would certainly be the property of the Bankruptcy estate.<sup>85</sup> However, if the only

79. 28 U.S.C. § 1331 (2003).

80. *Spade v. Star Bank*, 2002 U.S. Dist. LEXIS 21643 (E.D. Pa. 2002) (adjudicating a section 6672(d) action where plaintiff asserted a right of contribution for a tax assessment); *Spade v. Star Bank*, 2002 U.S. Dist. LEXIS 24228 (E.D. Pa. 2002). In the *Spade* cases, though the Court for the Eastern District of Pennsylvania adjudicated the respective section 6672(d) claims of Jerome Spade (and ergo had subject matter jurisdiction over them), Mr. Spade was unsuccessful on the merits of his claims. *Id.*; see also *Walker v. United States*, 43 Fed. Cl. 519, 520 (1999) (suspending action pending adjudication of section 6672(d) suit in Federal District Court).

81. See *In re Macagnone* 240 B.R. 444, 445 (M.D. Fla. 1999).

82. See generally *Kankel v. C.I.R.*, 2000 WL 1819417 (M.D. Fla. 2000).

83. *Quattrone Accountants, Inc. v. I.R.S.*, 895 F.2d 921, 925-26 (3d Cir. 1990) (stating that their authority to determine tax liability only extends to the debtor before the court).

84. See, e.g., *In re Ozark Restaurant Co. v. Andersen*, 816 F.2d 1222 (8th Cir. 1987).

85. *Id.* at 1225 (8th Cir. 1987) (noting that causes of action of the debtor are part of the estate), *cert denied*, 484 U.S. 848 (1987); see also *In re Chenoweth v.*

connection to the bankruptcy were the prospects of increasing the value of the Bankruptcy estate, then the claim would not be a core proceeding in Bankruptcy,<sup>86</sup> and therefore not a matter for a Bankruptcy judge without consent of the parties.<sup>87</sup>

If, on the other hand, the § 6672 trust fund penalty were already paid by another responsible person and a § 6672(d) claim were then in turn being asserted against the debtor, then such may well be within the jurisdiction of the Bankruptcy court as a claim by a creditor of the Bankruptcy estate.<sup>88</sup> From a policy standpoint there should be no objection per se to such adjudication by a Bankruptcy court; after all, the allowance or disallowance of claim against a bankruptcy estate is a "core" matter over which Bankruptcy courts generally do have jurisdiction,<sup>89</sup> and the actual payment to the IRS, albeit by a party other than the debtor in bankruptcy, should moot all objections based upon the detinue of the Treasury's revenue on account of litigation.<sup>90</sup>

Once the § 6672 penalty is paid to the IRS, a refund action may be brought in the Court of Federal Claims.<sup>91</sup> The jurisdiction of the Court of Federal Claims is limited to suits against the United States,<sup>92</sup> and any actions before that court are disregarded

---

Chenoweth, 143 B.R. 527, 534 (S.D. Ill. 1992) ("Causes of action are among the property interests that become property of a debtor's bankruptcy estate.").

86. See *In re* R.I. Lithograph Corp. v. Aetna Casualty & Surety Co., 60 B.R. 199, 203-204 (Bankr. D.R.I. 1986) (holding that although RILC's action for indemnification would increase the value of their estate, that in itself does not make it a core proceeding).

87. 28 U.S.C. § 157(c) (2003).

88. See 28 U.S.C. § 157(b)(2)(B) (2003). See *infra* notes 169-178 and accompanying text for a discussion of issues relating to the dischargeability of the obligation in bankruptcy.

89. 28 U.S.C. § 157(b)(2)(B) (2003); see also *In re* S. G. Phillips Constructors, Inc. v. Burlington, 45 F.3d 702, 703 (2d Cir. 1995) (reversing a district court's order and stating that "the determination of claims is a 'core' bankruptcy function").

90. See *supra* note 44 and accompanying text.

91. I.R.C. § 6672 (2003).

92. See 28 U.S.C.S. § 1491(a)(1) (2003); see also *Cottrell v. United States*, 42 Fed. Cl. 144,148 (Fed. Cl. 1998) (stating that the Court of Federal Claims only has jurisdiction over suits against the United States).

to the extent that relief is sought against other parties.<sup>93</sup> Accordingly, the Court of Federal Claims is not an appropriate forum for a § 6672(d) action, and indeed, that court has suspended proceedings against the United States for tax refunds where the plaintiff has simultaneously brought a § 6672(d) contribution claim against other responsible persons in another tribunal.<sup>94</sup> The Court of Federal Claims clearly is not and should not be a forum for a § 6672(d) action.<sup>95</sup>

The United States Tax Court, in which the Respondent party is always the Commissioner of Internal Revenue who seeks to collect a tax and the Petitioner party is always the taxpayer seeking to avoid paying that tax assessment, would certainly not be the appropriate forum for an I.R.C. § 6672(d) contribution action.<sup>96</sup>

“If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court.”<sup>97</sup> Accordingly, Federal § 6672(d) claims might also be brought in state courts.<sup>98</sup> State courts have had jurisdiction to entertain claims arising under other Federal statutes, including the civil rights statutes<sup>99</sup> and the Telephone Consumer Protection Act,<sup>100</sup>

93. *National Cored Forgings Co. v. United States*, 126 Ct. Cl. 250, 256 (Ct. Cl. 1953) (refusing to adjudicate simultaneous claims against other parties and focusing on the claims against the United States).

94. *See Walker v. United States*, 43 Fed. Cl. 519, 521 (Fed. Cl. 1999).

95. *See supra* notes 92-94 and accompanying text.

96. The United States Tax Court normally does not have the jurisdiction to hear disputes regarding section 6672 trust fund issues even as between taxpayer and IRS. *Wilt v. Comm’r*, 60 T.C. 977, 978 (1973) (dismissing the case for lack of subject matter jurisdiction).

97. *Claflin v. Houseman*, 93 U.S. 130, 137 (1876).

98. *Id.*

99. *See, e.g., Williams v. Horvath*, 548 P.2d 1125, 1127 (Cal. 1976) (noting California state court jurisdiction over Federal 42 U.S.C. § 1983 claim); *Lloyd v. Page*, 474 So. 2d 865, 867-868 (Fla. Dist. Ct. App. 1985) (stating that state courts have concurrent jurisdiction over cases arising under federal statutes); *Madison v. Cinema I*, 454 N.Y.S.2d 226, 227 (N.Y. Civ. Ct. 1982) (finding New York City Civil Court had jurisdiction over a Federal 42 U.S.C. § 1981 claim).

though states such as Texas seem to require a specific enabling statute from the state legislature in order for the state courts to have jurisdiction to hear complaints arising under a particular Federal statute.<sup>101</sup> Therefore, the use of a state court forum for a Federal § 6672(d) contribution action would depend upon whether such a claim is allowed under the laws of the particular state,<sup>102</sup> and while such claims ideally should be allowed, the explicit jurisdiction of the Federal courts over a § 6672(d) matter goes a long way towards eliminating the unfairness in those states whose courts will not countenance such claims.<sup>103</sup>

### B. Statute of Limitations

Congress did not set forth a specific limitations time for bringing an action under I.R.C. § 6672(d) when it enacted the statute in 1996.<sup>104</sup> Accordingly, the four year Federal catch-all limitations period in 28 U.S.C. § 1658 for commencing civil

---

100. See *Schulman v. Chase Manhattan Bank*, 710 N.Y.S.2d 368, 369 (N.Y. App. Div. 2000) (finding jurisdiction in New York state courts to entertain claims arising under the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2003)); see also *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099 (N.J. Super. Ct. Law Div.. 1995) (hearing and adjudicating a 47 U.S.C. § 227 claim in state court).

The Telephone Consumer Protection Act is an unusual Federal statute in that a private right of action under it may only be brought in a state court. See *Foxhall Realty Law Offices, Inc. v. Telecomm. Premium Servs., Ltd.*, 156 F.3d 432, 434 (2d Cir. 1998) (finding that state courts have exclusive jurisdiction over claims based on the Telephone Consumer Protection Act of 1991); *Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 516 (3rd Cir. 1998) (following other circuit courts rulings that state court has exclusive jurisdiction over claims brought under the Telephone Consumer Protection Act of 1991).

101. See *Autoflex Leasing, Inc. v. Manufacturers Auto Leasing, Inc.*, 16 S.W.3d 815, 817-818 (Tex. Ct. App. 2000) (stating that a Federal claims arising under the Telephone Consumer Protection Act was not authorized in Texas courts prior to the effective date of the Texas enabling statute).

102. Cf. generally *supra* notes 48-53 and accompanying text.

103. Cf. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2003). Unlike claims arising under section 6672(d), TCPA actions may be brought in state courts. *Id.*; see also *supra* note 100 and accompanying text.

104. I.R.C. § 6672(d) (2003).

actions applies to I.R.C. § 6672(d) actions.<sup>105</sup> Notwithstanding the use of the word “penalty” in I.R.C. § 6672(a), trust fund exaction (or attempted exaction) from responsible persons by the I.R.S. does not amount to a “penalty” within the meaning of 28 U.S.C. § 2462, and accordingly, the five-year period of limitation in that statute would be inapplicable to the dilatory § 6672(d) plaintiff.<sup>106</sup>

The statute of limitations being four years “after the cause of action accrues,”<sup>107</sup> the event constituting the accrual of the cause of action must then be identified. On that score, I.R.C. § 6672(d) seems reasonably explicit on its face, entitling the responsible person bringing the § 6672(d) action to “an amount equal to the excess of the amount *paid* by such person [emphasis supplied].”<sup>108</sup> Actual payment of moneys to the IRS (or, perhaps, to another responsible person in the same or another § 6672(d) action) would constitute an accrual of the action.<sup>109</sup>

Suppose, however, that the total trust fund liability had yet to be paid in full even after the responsible person bringing the I.R.C. § 6672(d) action made a payment to the IRS, or indeed, that the IRS was continuing its collection efforts against the § 6672(d) plaintiff in question. Case law has yet to develop on the question of whether the statute of limitations is tolled pending full satisfaction of the underlying tax debt, or whether a new § 6672(d) claim must be brought with respect to amounts paid after initiating the original § 6672(d) action. But the potential for

---

105. 28 U.S.C. § 1658(a) (2003). The statute, by its own terms, applies to “a civil action arising under an Act of Congress” which was enacted after § 1658 became effective, which was December 1, 1990. *Id.* I.R.C. § 6672(d), enacted July 30, 1996, falls within the coverage of 28 U.S.C. § 1658 well beyond civil. *Id.*; see also I.R.C. § 6672(d) (2003).

106. See *United States v. Marine Midland Bank*, 544 F. Supp. 268, 271 (W.D.N.Y. 1982) (ruling that lender liability pursuant to I.R.C. § 3505, a statute with a scheme similar to I.R.C. § 6672, is not a “penalty” for the purposes of 28 U.S.C. § 2462 and therefore, the 5 year limitation in § 2462 does not apply to I.R.C. § 3505 actions). 28 U.S.C. § 2462 (2003) applies to the Internal Revenue Code by dint of I.R.C. § 6533, which reads, in relevant part, “[f]or period of limitation in respect of civil actions for fines, penalties, and forfeitures, see section 2462 of Title 28 of the United States Code.”

107. 28 U.S.C. § 1658(a) (2003).

108. I.R.C. § 6672(d) (2003).

109. 28 U.S.C. § 1658(a) (2003); I.R.C. § 6672(d) (2003).



judiciary inefficiency in what might be multiple causes of action is a lesser evil than the unfairness that I.R.C. § 6672(d) was designed to counteract, and is lessened all the more by the significant (though hardly perfect) likelihood that if other responsible persons are viable sources of payment then the IRS would pursue them as well. In view of the compelling purpose in enacting the statute, namely, protection from the unfairness inherent in the IRS's broad discretionary powers to those who actually pay the trust fund taxes, the requirement of actual payment should be adhered to.<sup>110</sup>

C. Determining the "Proportionate Share of the Penalty"

I.R.C. § 6672(d) authorizes a right of contribution for "an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty."<sup>111</sup> In order to do the arithmetic to determine the amount to be sued for in a § 6672(d) action it is necessary to construe the meaning of "proportionate share."<sup>112</sup>

A most administratively simple construction of the term "proportionate share"<sup>113</sup> would be equal aliquot shares among responsible persons—*e.g.*, giving one-half of the total if there were two responsible persons, or one-fifth of the total if there were five responsible persons. Such construction is most certainly *not* the construction intended by Congress, which identified a significant unfairness in the pattern of IRS not always going after "the person with the greatest culpability for the failure" to pay over the trust funds.<sup>114</sup> Had Congress intended the "proportionate share" to be an equal allocation among responsible persons, there certainly was more definitive and explicit language available for it to do so.<sup>115</sup>

---

110. See H.R. REP. NO. 104-506, at 40 (1996), *reprinted in* 1990 U.S.C.C.A.N. 1143, 1163.

111. I.R.C. § 6672(d) (2003).

112. *Id.*

113. *Id.*

114. H.R. REP. NO. 104-506.

115. *Cf. McDermott, Inc. v. AmClyde & River Don Castings, Ltd.*, 511 U.S. 202, 210 n.9 (1994) ("In this opinion, we use the phrase 'proportionate share

Moreover, though I.R.C. § 6672 operates upon any responsible person without regard to degree of fault or blame,<sup>116</sup> many courts have spoken in terms of the relative degrees of responsibility of responsible persons.<sup>117</sup> The concept of relative responsibility was set forth in a very graphic nautical metaphor by U.S. District Judge Whitman Knapp in one of his *Unger* litigation rulings:

[T]hese seemingly impartial uncalled witnesses might have established that Unger considered himself “a cabin boy on a sinking ship” whose sole duty was to follow the admiral’s orders as the latter was trying to maneuver the vessel to safety; and that he faithfully followed those orders even after being warned (by the company’s outside accountants) that if the ship ultimately sank he might follow it to the bottom of the

---

approach.’ We have deliberately avoided use of the term ‘pro rata’ . . . because that term is also used to describe an equal allocation among all defendants without regard to their relative responsibility for the loss.” (citations omitted); *In re Del-Val Fin. Corp. Sec. Litig.*, 868 F. Supp. 547, 561 (S.D.N.Y. 1994) (using term “proportionate share” as a function of fault, not equal aliquot apportionment); *Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 214 S.E.2d 823, 826–827 (W. Va. 1975) (construing term “proportionate share” as a function of real property area, and not equal apportionment).

116. See *Howard v. United States*, 711 F.2d 729, 737 (5th Cir. 1983) (stating that “section 6672(a) looks only to ‘responsible persons,’ not to ‘the most responsible person,’ for satisfaction”).

117. See, e.g., *id.*; *Gephart v. United States*, 818 F.2d 469, 476 (6th Cir. 1987) (stating that although other corporate officials “were *more* responsible than plaintiff, and exercised *greater* authority, this does not affect a finding of liability against plaintiff”); *Keohan v. United States*, 138 F. Supp. 2d 62, 75 (D. Mass. 2001) (commenting that although there may be people that are more responsible, that does not negate any other party’s liability); *Sutton v. United States*, 194 F. Supp. 2d 559, 565 (E.D. Tex. 2001) (holding that I.R.C. section 6672 applies to any responsible party and does not consider the degree of liability); *Mussato v. United States*, 1982 U.S. Dist. LEXIS 14336, at \*8 (D. Colo. 1982) (“If my duty were to assess the tax against the chief culprit, I would quickly assess the tax against Mr. Seaborn, and I would excuse Mr. Mussato. But, that’s not what I am required to decide nor am I permitted to rule on the basis of comparative fault.”).

sea while the admiral was picked up by helicopter and safely put ashore.<sup>118</sup>

Accordingly it is clear that "proportionate share" does not necessarily mean equally distributing the burden.<sup>119</sup> Determining the "proportionate share" of the responsible person, then, must necessarily entail an analysis of the relative culpability of all responsible persons.<sup>120</sup> Fortunately, this need not be a major judicial or administrative nightmare, because the same case law factors used to objectively determine *whether* a person is a responsible person under I.R.C. § 6672 can also be applied to help fix the *degree* of responsibility.<sup>121</sup> A roster of these factors, derived from prior decisions, has conveniently been enumerated in the *Fiataruolo* opinion as follows:

[whether and to what extent the person in question]

- (1) is an officer or member of the board of directors,
- (2) owns shares or possesses an entrepreneurial stake in the company,
- (3) is active in the management of day-to-day affairs of the company,
- (4) has the ability to hire and fire employees,

---

118. *Unger v. United States*, 1997 U.S. Dist. LEXIS 190, at \*2 (S.D.N.Y. 1997). The *Unger* litigation would wind its way through the courts for many years, and included a remand after denial of certiorari by the United States Supreme Court on one issue. *See also* *Unger v. United States*, 1999 U.S. Dist. LEXIS 10932, 84 A.F.T.R.2d (RIA) 6817 (S.D.N.Y. 1999), *on remand from* *United States v. Landau*, 155 F.3d 93 (2d Cir. 1998), *cert. denied*, 526 U.S. 1130 (1999).

119. *See, e.g.*, *Howard*, 711 F.2d at 737.

120. *Fiataruolo v. United States*, 8 F.3d 930, 939 (2d Cir. 1993).

121. *Id.*

(5) makes decisions regarding which, when and in what order outstanding debts or taxes will be paid,

(6) exercises control over daily bank accounts and disbursement records, and

(7) has check-signing authority.<sup>122</sup>

To which the New York State Supreme Court, Appellate Division, Third Department<sup>123</sup> would hasten to add an eighth factor, whether and to what extent the person in question did or could have actually signed the tax returns.<sup>124</sup> Moreover, a similar set of factors is set forth in the Internal Revenue Manual.<sup>125</sup>

122. *Id.* (tabular arrangement supplied).

123. For reasons apparently relating more to tradition and nostalgia than to logic, New York State's lowest trial courts of general jurisdiction are known as the "Supreme Courts" in that state, while the intermediate appellate courts are called the "Appellate Divisions" of the Supreme Court and the highest court in the New York State Court System is known as the "Court of Appeals." See FRANCIS BERGAN, *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932* at 25 (Columbia Univ. Press 1985); see also DAVID D. SIEGEL, *NEW YORK PRACTICE* §§ 10-12 (3d ed. 1999).

By statute, the Appellate Division Third Department hears appeals from decisions of the New York State Tax Appeals Tribunal, N.Y. TAX L. § 2016 (2003).

124. *Hall v. Tax Appeals Tribunal*, 574 N.Y.S.2d 862, 863 (N.Y. App. Div. 1991) (considering whether the individual was able to sign tax as a factor in assessing liability); *Rosenblatt v. N.Y. State Tax Comm'n*, 498 N.Y.S.2d 529, 533 (N.Y. App. Div. 1986) (Mikoll, J., dissenting) (stating that Rosenblatt was responsible for taxes because he was responsible for filing and preparing the tax returns), *rev'd in part and dissent upheld*, 498 N.E.2d 148 (1986); *Hopper v. Comm'r of Taxation*, 637 N.Y.S.2d 494, 495 (N.Y. App. Div. 1996) (finding that petitioner was a responsible person who could be held liable because he signed tax returns on behalf of the company), *appeal denied*, 88 N.Y.2d 808, 670 N.E.2d 1345 (1996); *Amengual v. State Tax Comm'n*, 464 N.Y.S.2d 272, 273 (N.Y. App. Div. 1983) (stating that an important factor in determining liability is whether the individual signs the company's tax returns); see also 20 N.Y. COMP. CODES R. & REGS., tit. 20 § 526.11(b)(2) (1976).

The Ohio courts also use actual signature on the tax returns as a factor in determining personal responsibility for state trust fund taxes. See, e.g., *Burns v. Tracy*, 1995 Ohio App. LEXIS 309, at \*7 (Ohio Ct. App. 1995) (stating

Accordingly, sound established guidance does exist for objectively comparing responsible persons and fixing relative degrees of responsibility, ergo, "proportionate share," for the purposes of an I.R.C. § 6672(d) action.<sup>126</sup> The tribunal that determines such proportions certainly should, and quite likely will, make use of the factors articulated in case law.<sup>127</sup>

Another potential issue in determining the "proportionate share" is the degree to which a determination by one administrative agency or tribunal is valid precedent for others.<sup>128</sup> The IRS's determinations or collection actions or inactions certainly cannot be viewed as indicators of relative responsibility in light of the patently demonstrated lack of objectivity of that agency.<sup>129</sup> Indeed, the IRS makes no pretensions to determine relative trust fund responsibility among responsible persons, and such was the very basis for enacting I.R.C. § 6672(d) in the first place.<sup>130</sup> But there is no reason why a proceeding in which the decider specifically determines respective degrees of responsibility, and in which all responsible parties have had opportunity to present the merits of their respective cases, should not be valid precedent.<sup>131</sup> Such a situation can arise, for example,

---

"personal derivative liability may be imposed upon an officer who is connected with the making and filing of the returns even though there may exist a higher authority within the corporation which may have exclusively controlled or directed which debts should be paid."); *Olszko v. Tracy*, 1995 Ohio App. LEXIS 3509, at \*9 (Ohio Ct. App. 1995) (affirming the Board of Tax Appeals determination in finding appellant was a responsible party based on his ability to sign checks and tax returns). Similarly, actual signature on the tax returns is a factor weighed by the Illinois Department of Revenue. *See, e.g., Illinois Dep't of Revenue v. John Doe*, No. ST 02-22, at 7 (Aug. 19, 2002), available at <http://www.revenue.state.il.us/legalinformation/hearings/st/st02-22.pdf> (last visited Aug. 26, 2003).

125. *See* I.R.M. § 5.7.3.3.1 (July 31, 1998), available at <http://www.irs.gov/irm/page/0,,id%3D21886,00.html#ss6> (last visited Aug. 27, 2003).

126. *Id.*

127. *Id.*

128. *See generally* *United States v. Landau*, 155 F.3d 93 (2d. Cir. 1998), cert. denied, 526 U.S. 1130 (1999).

129. *See generally supra* notes 59-68 and accompanying text.

130. *See generally supra* notes 59-68 and accompanying text.

131. *See generally* *Landau*, 155 F.3d 93.

where the cognizant state taxation authority imposes personal trust fund liability with respect to state trust fund taxes either before or after the IRS imposes such liability with respect to Federal taxes.<sup>132</sup>

D. Appropriate Parties to an I.R.C. § 6672(d) Action

Though I.R.C. § 6672(d) specifically tells us who is *not* to be a party in an action for contribution — the IRS itself<sup>133</sup> — the statute is silent as to whom, other than the party seeking contribution, must necessarily be involved in the action.<sup>134</sup> But if all who are potentially responsible are actual parties to the action instead of being mere witnesses, “the adversary process should assure that each potential responsible person will present his or her

132. Compare, e.g., *id.* (reciting fact that IRS assessed trust fund penalties in 1987 against Nathan Unger and Robert Landau with respect to Federal withholding taxes owed by Robert Landau Associates (“RLA”) for 1984 tax year) with *Matter of Unger*, N.Y.S. Tax App. Tribunal, D.T.A. Nos. 805351 and 805353 (Mar. 24, 1994) (reciting fact that New York State Department of Taxation & Finance issued Notices of Determination to Nathan Unger and Robert Landau on December 20, 1984 with respect to sales taxes for periods ending August 31, 1984 owed by RLA), available at <http://www.nysdta.org/Decisions/805351.dec.rtf> (last visited Nov. 17, 2003). Though the aforementioned proceedings involving RLA’s respective taxes did not entail any right of contribution issues (and indeed, for Federal purposes the trust fund penalties were assessed well prior to the effective date of section 6672(d)), the Federal and state proceedings clearly illustrate how a contribution action may arise after the relative responsibility of the responsible persons has been adjudicated in a prior proceeding involving the same individuals but different trust fund taxes.

133. The proper party would be the United States, inasmuch as the IRS itself cannot be sued *eo nomine*. See *Evseroff v. I.R.S.*, 2000 U.S. Dist. LEXIS 15888, at \*6 (E.D.N.Y. 2000) (stating that the pleadings should be amended from the Internal Revenue Service to reflect the correct party, the United States), *aff’d*, 2001 U.S. App. LEXIS 13139 (2d Cir. 2001); see also *Castleberry v. Alcohol, Tobacco & Firearms Div. of the Treasury Dep’t* 530 F.2d 672, 673 n.3 (5th Cir. 1976) (noting that the Treasury Department cannot be sued). Indeed, the phraseology of section 6672(d) speaks in terms of an action in which “the United States” is attempting to collect the trust fund penalty, and does not mention the Internal Revenue Service by name. (2003).

134. See I.R.C. § 6672(d) (2003).

respective view of operations within the company in the most comprehensive and convincing manner."<sup>135</sup> It thus would seem that, barring unusual circumstances, all potentially responsible persons should ideally be necessary parties to a § 6672(d) action if their relative degree of responsibility has not otherwise been determined or admitted.<sup>136</sup>

As a practical matter, most people who would qualify as responsible persons under I.R.C. § 6672 would know the identities of all other responsible persons from whom contribution might be claimed.<sup>137</sup> Even if some responsible persons are overlooked, those named in a § 6672(d) action would have every incentive to implead those not sued by the first-party plaintiff.<sup>138</sup> And the IRS must, upon request of a person it has determined to be liable for a § 6672 penalty, identify all others it has determined to be responsible persons and disclose information regarding its collection activities against such persons.<sup>139</sup> Persons so identified by the IRS should normally be

---

135. *Walker v. United States*, 43 Fed. Cl. 519, 522 (Fed. Cl. 1999).

136. FED. R. CIV. P. 19, I.R.C. § 6672(d) (2003).

137. *But see* *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138 (1983) (defendant is captioned as "Jack F. Adler . . . [and 426 other named Defendants listed in the Complaint], individually and as partners trading as Touche Ross & Co., severally and in the alternative, Defendants-Respondents"). *Rosenblum* was an accounting malpractice lawsuit brought before the days of limited partnerships and other limited liability entities, where all 427 partners faced potential malpractice liability, though it is not clear whether every one personally knew every other one. Defendant Jack F. Adler's misfortune to lead the list of partners appears to have been more a consequence of his place in the accounting firm's alphabetical order than in its pecking order. Though not a I.R.C. § 6672(d) trust fund liability matter (and indeed, decided over a decade before TBOR2), the *Rosenblum* case thus suggests how dysfunctions in identifying responsible parties in a large geographically-dispersed employer might arise, particularly an employer lacking the organizational discipline and fiscal controls supposedly found in accounting firms).

138. *See* FED. R. CIV. P. 19, I.R.C. § 6672(d) (2003).

139. *See* I.R.C. § 6103(e)(9) (2003).

The scope of the IRS's disclosure would appear to include any agreements with entities controlled by the other responsible persons for the payment of the taxes in question. *See* *United States v. N.Y. State Div. of the Lottery*, 1996 U.S. Dist. LEXIS 16840, at \*3-\*4 (S.D.N.Y. 1996) (finding that a liable party is entitled to disclosure regarding money that the Internal Revenue Service receives towards

parties to a § 6672(d) lawsuit.<sup>140</sup> If, perchance, despite all of the foregoing safeguards, a § 6672(d) action somehow goes forward to judgment without the inclusion of all responsible persons, then such an unlikely situation could potentially be remedied by an additional § 6672(d) action against such omitted parties by those who have been found liable in the first § 6672(d) action and have paid their judgments accordingly (though impleader in the initial action would obviously be a far, far preferable alternative).<sup>141</sup>

Issues regarding the identity and involvement of necessary parties to a § 6672(d) action thus seem, overall, to be little cause for concern.<sup>142</sup> There nonetheless are conceivable situations where the issue might surface.<sup>143</sup> These include the large employer with many units in diverse cities, several of whose geographically-dispersed personnel might technically qualify as responsible parties,<sup>144</sup> or where a responsible party has a

---

the tax assessed because it would effectively reduce the party's financial responsibility). The *New York State Division of the Lottery* decision illustrates an anomaly of TBOR2. While the IRC § 6672(d) right of contribution is effective with respect to taxes assessed after the July 30, 1996 effective date of the Act, TBOR2 § 903(b), 110 Stat. 1466, the IRC § 6103(e)(9) right to disclosure became effective upon the July 30, 1996 enactment of the Act, TBOR2 § 902(b), 110 Stat. 1466. Accordingly, though DiBella, the responsible person in *New York State Division of the Lottery*, was unable to benefit from the Federal statutory right of contribution (but apparently could assert a state common law right), he was able to benefit from the information disclosure requirements even though the § 6672 penalties had been assessed before TBOR2. *Id.*

140. See I.R.C. § 6672(d) (2003).

141. Cf., e.g., SIEGEL, *supra* note 123, § 173 at 283.

142. FED. R. CIV. P. 19, I.R.C. § 6672(d) (2003).

143. See *H. Rosenblum, Inc.*, 461 A.2d 138 (1983).

144. Cf., e.g., *id.* This accounting malpractice lawsuit was brought before the days of limited partnerships and other limited liability entities, and all 427 partners faced potential malpractice liability, though it is not clear whether every one personally knew every other one. *Id.* Defendant Jack F. Adler's misfortune to lead the list of partners appears to have been more a consequence of his place in the accounting firm's alphabetical order than in its pecking order. *Id.* Though not an I.R.C. § 6672(d) trust fund liability matter (and indeed, decided over a decade before TBOR2), the *Rosenblum* case thus suggests how dysfunctions in identifying responsible parties in a large geographically-dispersed employer might arise, particularly an employer lacking the



successor in interest.<sup>145</sup> Even if and when such situations should arise, the courts and parties are given broad leeway to bring about the joinder of parties and/or to proceed in the absence of parties,<sup>146</sup> and indeed, persons against whom there might be asserted a right of contribution in general are not indispensable parties to a lawsuit.<sup>147</sup> So while it is generally quite preferable to include all responsible persons as parties to an I.R.C. § 6672(d) action, such actions can certainly go forward in cases where that ideal is unfulfilled.<sup>148</sup>

### E. Interplay with the Estate Tax

Death is a taxable event,<sup>149</sup> and though there are serious prospects for the Federal Estate Tax to be repealed,<sup>150</sup> the law is still effective.<sup>151</sup> Moreover, repeal of the Federal Estate Tax would not necessarily ordain the repeal of the analogous state estate tax statutes, which, in many cases, are patterned after the Federal

---

organizational discipline and fiscal controls supposedly found in accounting firms. *Id.*

145. See *United States v. N.Y. State Div. of the Lottery*, 1996 U.S. Dist. LEXIS 16840, at \*6 (S.D.N.Y. 1996).

146. See FED. R. CIV. P. 19, see also N.Y. C.P.L.R. § 1001 (Consol. 2003).

147. See *Nottingham v. General American Communications Corp.*, 811 F.2d 873, 880-881 (5th Cir. 1987) (stating that parties who may be liable for contribution or indemnification are not necessary parties), *cert. denied*, 484 U.S. 854 (1987).

148. See *supra* notes 133-147 and accompanying text.

149. I.R.C. §§ 2056A(b)(1)(B), (9) (1999).

150. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, §§ 501-531, 115 Stat. 148 [hereinafter EGTRRA]. EGTRRA contains provisions for its own sunset which would repeal the repeal of the Federal Estate Tax after December 31, 2010, thus effectively reinstating the Federal Estate Tax beginning in the year 2011. EGTRRA § 901, 115 Stat. 150. There are legislative efforts currently underway to make the gradual repeal of the Federal Estate Tax permanent, and indeed, to accelerate it. See, e.g., S. 3, 107th Cong. (2002); *Press Release, Kyl to Reintroduce Contract With Investors* (Jan. 6, 2003), 2003 TAX NOTES TODAY 5-29 (Jan. 8, 2003).

151. I.R.C. § 2001 (2003).

scheme.<sup>152</sup> Accordingly, a § 6672(d) cause of action may be relevant with respect to taxation of a decedent's estate.<sup>153</sup>

Claims against the estate are deductible from the gross estate in computing the taxable estate.<sup>154</sup> Such claims can include liabilities imposed by law or arising out of torts.<sup>155</sup> "The claim must be a personal and enforceable obligation of the decedent" at the time of death.<sup>156</sup> If the claim asserted against the estate is a judgment of a court, the judgment must be on the merits of the case.<sup>157</sup> Where the court rendering the judgment is not the highest court in the state, the IRS may apply the law of the state as the highest court has or would apply it, and in doing so, override the judgment.<sup>158</sup> The judgment in a collusive lawsuit not adjudicated on the merits is not necessarily accepted as a deductible claim against the estate.<sup>159</sup>

Where there is a viable right of contribution from other parties with respect to a claim against the estate, such claim must be reduced accordingly,<sup>160</sup> or, in the alternative, the right of contribution is an estate asset, the inclusion of which would bring

152. See, e.g., Joshua S. Rubenstein, *Federal "Repeal" of Estate Tax Puts Burden on States*, N.Y.L.J., Sept. 9, 2002, at 9.

153. I.R.C. § 6672(d) (2003).

154. I.R.C. § 2053(a)(3) (2003).

155. Treas. Reg. § 20.2053-4 (1958).

156. *Kasishke v. United States*, 426 F.2d 429 (10th Cir. 1970).

157. Treas. Reg. § 20.2053-1(b)(2) (1972).

158. *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) ("While the decrees of 'lower state courts' should be 'attributed some weight . . . the decision [is] not controlling,' where the highest court of the State has not spoken on the point").

159. *Id.* at 463-465; Rev. Rul. 83-54, 1983-1 C.B. 229.

160. *Johnson v. United States*, 742 F.2d 137, 141 (4th Cir. 1984) ("By the terms of the regulation, therefore, the amount covered by these rights of contribution, whether exercised or not, must be excluded for any deduction claimed by the estate."), *rev'g* 1983 U.S. Dist. LEXIS 18189 (W.D. Va. 1983); *Kasishke v. United States*, 1969 U.S. Dist. LEXIS 10959, at \*14 (N.D. Okla. 1969) (noting that rights of contribution are assets of an estate thus increasing the value of the estate), *aff'd*, 426 F.2d 429 (10th Cir. 1970); *Estate of Theis v. Comm'r*, 81 T.C. 741, 745 (1983) (noting that only enforceable claims can be deducted from the value of an estate), *aff'd*, 770 F.2d 981 (11th Cir. 1985).

about the same result.<sup>161</sup> This is true even where that right of contribution is subsequently relinquished.<sup>162</sup>

In an Estate Tax situation, then, there would be valuation issues where a decedent either had an I.R.C. § 6672(d) right of contribution against others, or owed contribution to others.<sup>163</sup> This would likely entail a review the facts by the IRS or other taxation authority in order to fix relative degrees of responsibility. The highly specialized estate tax function within the IRS and the various state taxation authorities<sup>164</sup> have long dealt with the task of valuing the assets of and the claims against estates, and can be expected to handle an asset or claim relating to I.R.C. § 6672(d) with no less expedience or competence than with any other estate asset or claim.<sup>165</sup>

#### F. Interplay with the Bankruptcy Law<sup>166</sup>

“[A]ny case that intertwines the provisions of the Bankruptcy Code with those of the Uniform Commercial Code can become confusing and complex.”<sup>167</sup> “Intertwin[ing] the provisions of the Bankruptcy Code with the Internal Revenue Code” is surely no

---

161. *Kasishke*, 1969 U.S. Dist. LEXIS 10959, at \*14–\*15.

162. *Johnson*, 742 F.2d at 141.

163. I.R.C. §§ 2001, 6672(d) (2003).

164. See *Sack v. Bentsen*, 1995 U.S. App. LEXIS 5714, at \*10 n.12 (1st Cir. 1995) (upholding, *inter alia*, IRS recruitment practices calculated to employ persons having “up-to-date knowledge of legal principles and agency practices” in Estate Tax Attorney positions.); *Collins v. Comm’r, T.C.* Memo 1973-192 (noting that between 1967 and 1971, the IRS had upgraded its employment qualifications to require a law degree for new hires in the Estate and Gift Tax examination section); see also *Bass v. Bragalini*, 143 N.Y.S.2d 490, 493 (Sup. Ct. Albany Co. 1955) (finding that associate attorneys for the Department of Taxation and Finance are considered independent officers and further outlining their responsibilities and the large degree of discretion afforded to them in their positions), *aff’d*, 143 N.Y.S.2d 494 (N.Y. App. Div. 1955), *leave to appeal denied*, 309 N.Y. 1032 (1955).

165. I.R.C. § 6672(d) (2003).

166. The amenability of Bankruptcy court to a case brought under I.R.C. § 6672(d) is discussed *supra* at notes 83–88 and accompanying text.

167. *In re Flo-Lizer, Inc.*, 946 F.2d 1237, 1242 (6th Cir. 1991) (Guy, J., dissenting).

less complex. Accordingly, this article will not dwell upon "the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code."<sup>168</sup>

It will suffice, therefore, to mention that a § 6672(a) trust fund penalty itself is nondischargeable in bankruptcy.<sup>169</sup> And because the taxes given priority under § 507 of the Bankruptcy Code include "a tax required to be collected or withheld and for which the debtor is liable in whatever capacity [emphasis supplied],"<sup>170</sup> which, in turn, is exempted from discharge under § 523 of the Bankruptcy Code,<sup>171</sup> it would seem that an obligation incurred by a debtor in bankruptcy as a result of a § 6672(d) action would similarly be nondischargeable.<sup>172</sup> Indeed, debts to third parties for taxes paid to the taxing authority by the third party have been held to be nondischargeable in bankruptcy.<sup>173</sup>

Moreover, for the purposes of § 547 of the Bankruptcy Code,<sup>174</sup> pre-petition trust funds paid by debtor employers to the IRS or other taxation authorities do not constitute voidable preferences,<sup>175</sup> even where the funds had been commingled with

168. MSR Exploration, Ltd., v. Meridian Oil, Inc., 74 F.3d 910, 914 (9th Cir. 1996).

169. 11 U.S.C. §§ 507(a)(8)(C), 523(a)(1)(A) (2003); *In re Mosbrucker*, 227 B.R. 434 (B.A.P. 8th Cir. 1998) (stating that tax liability under section 6672 is not dischargeable in bankruptcy proceedings); *Smith v. United States* 894 F.2d 1549, n. 6 at 1554 (11th Cir. 1990) (citing *United States v. Sotelo*, 436 U.S. 268, 277, a case decided under the prior Bankruptcy Code).

170. 11 U.S.C. § 507(a)(8)(C) (2003).

171. 11 U.S.C. § 523(a)(1)(A).

172. A lawyer with expertise in bankruptcy and a bent for scholarly research and writing would surely find positive reception from the bench and bar for a more detailed article on this point of law.

173. See, e.g., *In re Waite*, 698 F.2d 1177, 1178 (11th Cir. 1983) (stating that under the Bankruptcy Code, debts for taxes are not dischargeable); *In re Norris*, 107 B.R. 592, 595 (Bankr. E.D. Tenn. 1989) (stating that the majority rule is that a creditor who fulfills a nondischargeable tax obligation for the debtor has a nondischargeable claim against the debtor).

174. 11 U.S.C. § 547 (2003).

175. *Begier v I.R.S.*, 496 U.S. 53, 61 (1990) (holding that money held in trust for the Internal Revenue Service is not considered part of the bankruptcy estate, they are considered funds in trust for the Government); *In re R & T Roofing Structures & Commercial Framing, Inc.*, 887 F.2d 981, 985, 988 (9th Cir. 1989) (noting that funds held in trust for the government are not considered voidable

the debtors assets.<sup>176</sup> Whether and to what extent funds which had been paid by a debtor in bankruptcy to another responsible person pursuant to an I.R.C. § 6672(d) judgment (or in settlement of the case) are similarly out of reach of the bankruptcy trustee under Bankruptcy Code § 547 awaits case law interpretation.<sup>177</sup> If such transfers are in fact found to be voidable § 547 preferences, then the purpose of I.R.C. § 6672(d) would be defeated, unless and to the extent that the transfer was a collusive one.<sup>178</sup>

### III. AVOIDING OR MINIMIZING LIABILITY IN TRUST FUND RESPONSIBLE PERSON CONTRIBUTION LIABILITY ACTIONS

Trust funds held by employers are very tantalizing sources of relief for cash flow problems.<sup>179</sup> Once an employer has succumbed to their allure, and thus gotten into the predicament of having failed to properly remit trust fund taxes to the government, the responsible persons must then shift their focuses from damage prevention to damage control,<sup>180</sup> and show, if possible, that there were others to blame for the failure, and that

---

preferences; however, the court held that the government failed to establish that the funds in question were held in trust); *In re Razorback Ready-Mix Concrete Co.* (Bankr. E.D. Ark. 1984) 45 B.R. 917, 918-922 (Bankr. E.D. Ark. 1984) (finding that funds withheld from wages and paid to the government are protected funds and cannot be recovered by the debtor).

176. *Id.* at 919.

177. I.R.C. § 6672 (2003), 11 U.S.C. § 547 (2003).

178. *Cf., e.g., In re Pulcini*, 261 B.R. 836, 843 (Bankr. W.D. Pa. 1991) (finding transfer of real property not voidable where the transfer in question was apparently noncollusive, and implying that the transfer would be voidable if there had been collusion involved).

179. *See, e.g., Slodov v. United States*, 436 U.S. 238, 243 (1978) (noting "the funds can be a tempting source of ready cash to a failing corporation beleaguered by creditors"); *Buffalow v. United States*, 109 F.3d 570, 572 (9th Cir. 1997) (noting how companies facing financial difficulties often use money held in trust for the government); *see also IRS's Efforts to Improve Compliance With Employment Tax Requirements Should Be Evaluated: Report to the U.S. Sen. Comm. on Small Bus. & Entrepreneurship*, 2002 Leg., 107th Sess. (Jan. 15, 2002).

180. *See, e.g., Jean v. United States*, 2002 U.S. Dist. LEXIS 20183, at \*14 (D. Mass. 2002) (finding that potentially responsible person's responsibility ceased, if not before, upon his voluntary relinquishment of signatory authority on company checking account).

the others were more responsible.<sup>181</sup> This can easily become a distasteful finger-pointing affair, reminiscent of the famous Thomas Nast "Tweed Ring" political cartoon depiction.<sup>182</sup> And once the IRS is on the case, obstructing or hindering its agents in their quest for factual information and documents will, if anything, enhance the chances of being a target for IRS collection actions.<sup>183</sup>

Inappropriate attitudes and perceptions regarding the roles and obligations of responsible persons can lead to running afoul of the trust fund rules.<sup>184</sup> Employer policies born of the attitude that the company is merely a debtor of the taxation authorities, rather than a trustee of money collected for the public fisc, are prescriptions for trouble.<sup>185</sup> Employees in responsible positions who passively acquiesce in superiors' directives not to pay the trust fund taxes to the taxing authorities leave themselves open to collection actions by the IRS.<sup>186</sup> It certainly cannot be said by or

181. This can be done through asserting the right of contribution from other responsible parties. See I.R.C. § 6672(d) (2003).

182. See Thomas Nast, *Who Stole the People's Money?* (cartoon), HARPER'S WKLY, Aug. 19, 1871, available at <http://www.boondocksnet.com/gallery/nast710819.html> (last visited Aug. 19, 2003).

183. I.R.S. Policy Statement, Trust Fund Recovery Penalty Assessments (Feb. 2, 1993), 1993 TAX NOTES TODAY 27-17 (Feb. 5, 1993).

184. See *Rosenblatt v. N.Y. State Tax Comm'n*, 498 N.Y.S.2d 529, 530-531 (N.Y. App. Div. 1986), *rev'd on other grounds*, 68 N.Y.2d 775 (1986); *Sutton v. United States*, 194 F. Supp. 2d 559, 564 (E.D. Tex. 2001) (rejecting corporation president's argument that paying the IRS without specific approval from the major shareholder "would be akin to stealing from the company"); cf. *Dep't of Correction v. Headen*, N.Y.C. Office of Admin. Trials & Hrgs. OATH Index No. 986/99 (May 20, 1999) (recommending disciplinary action against respondent who claimed 99 exemptions from his income tax withholding, and testified that he considered the withholding to be in a nature of a personal loan to be repaid when filing his annual tax return), available at <http://search.citylaw.org> (last visited Sept. 9, 2003).

185. See generally *supra* note 183.

186. See, e.g., *Crutcher v. United States*, 2002 U.S. Dist. LEXIS 3994, at \*24 (N.D. Ala. 2002) (holding that plaintiff, an individual who did have check signing authority was a responsible party despite the existence of a superior officer who directed the dispersion of funds); see also *Matter of O'Reilly*, N.Y. State Div. of Tax Appeals, Dkt. No. DTA 818564 (Jan. 9, 2003) (imposing state

about a responsible person that the nonpayment of the trust fund taxes to the taxation authorities is none of his or her concern.<sup>187</sup> Responsible persons are required to take a certain degree of proactivity in asserting the governmental claim to the tax monies it is entitled to by statute, even, on occasion, at the risk of their jobs.<sup>188</sup>

The best way to avoid liability for contribution under I.R.C. § 6672(d) is, of course, to ensure that all trust funds are properly withheld and timely paid over to the tax collector, so that I.R.C. § 6672 and its analogous state statutes never become relevant in the first place.<sup>189</sup> "If the statute is followed, the amount retained as taxes never leaves the employer's possession" until it is turned over to the government.<sup>190</sup> This ideally includes defining the duties of a particular person within the organization to remit the payments of the tax, with another person having meaningful cognizance and authority to ensure that the tax has been so remitted.<sup>191</sup> In that regard, another section of the Internal Revenue Code, together with its corresponding Treasury Regulations, can be put to good use, because a filing or payment that complies with the timely mailing rule of I.R.C. § 7502 produces a specified paper or electronic document as evidence.<sup>192</sup>

---

trust fund liability against petitioner, a law firm partner despite petitioner's assertions that he had insufficient control over the finances of the firm), *available at* <http://www.nysdta.org/Determinations/818564.det.htm> (last visited Nov. 17, 2003).

187. *Gephart v. United States*, 818 F.2d 469, 475 (6th Cir. 1987).

188. *Id.* at 474; *Howard v. United States*, 711 F.2d 729, 734-735 (5th Cir. 1983) (stating that the court, "cannot condone his abdication of the responsibility imposed upon him by law").

189. I.R.C. § 6672 (2003).

190. *United States v. Porth*, 426 F.2d 519, 522 (10th Cir. 1970).

191. *Cf. Rosenblatt v. N.Y. State Tax Comm'n*, 498 N.Y.S.2d 529, 533 (N.Y. App. Div. 1986) (Mikoll, J., dissenting), *rev'd in part and dissent upheld*, 68 N.Y.2d 775 (1986) (finding, on appeal, that trust liability of corporation comptroller whose duties included filing tax returns but who "did not have control over the payroll department where tax withholding took place").

192. *See* I.R.C. § 7502 (2003); *Treas. Reg. § 301.7502-1* (2003); *Treas. Reg. § 301.7502-2* (2003).

Several commentators have discussed at length the unsettled controversy as to whether documentation or evidence other than that specified

Production of the document thus created, or a reliable copy thereof, can provide good assurances to all potentially responsible persons.<sup>193</sup> Taking such action to avoid getting oneself ensnared into a § 6672 situation, if done correctly, also goes a long way towards preventing a trust fund failure from occurring at all, to the benefit of all potentially responsible persons and indeed, to the public treasury itself.<sup>194</sup>

### CONCLUSION

Because a large bulk of tax collections by the Treasury is through employer withholding,<sup>195</sup> trust fund liability is a necessary tool to ensure the collection of revenue for the public treasury. I.R.C. § 6672 was enacted “to assure payment of withheld taxes,”<sup>196</sup> and “was designed to cut through the shield of organizational form and impose liability upon those actually responsible for an employer’s failure to withhold and pay over the tax.”<sup>197</sup> But taxation, as Ricardo observed, “frequently operates very differently from the intention of the legislature by its

---

by I.R.C. § 7502 and the regulations thereunder is valid evidence of a timely filing of a tax return or payment. See Kenneth H. Ryesky, *Analysis of The Split Authority on Proof of a Postmark Under Internal Revenue Code § 7502*, 21 U. DAYTON L. REV. 379 (1996); Nicole D. Stanger, *Carroll v. Commissioner: Narrow Judicial Interpretations of Internal Revenue Code § 7502 May Cause Increased Burden on Taxpayers*, 30 AKRON L. REV. 581 (1997). Adhering to the explicit language of the Internal Revenue Code in that regard is certainly good advice. See I.R.C. § 7502 (2003).

193. See *Mason Motors Co. v. United States*, 8 F. Supp. 2d 1177, 1178 (D. Minn. 1998) (noting how when the employer no longer required the employee to submit documentation and financial statements, the employee ceased paying employment taxes); cf. *Reyers v. N.Y. State Tax Comm’n*, 498 N.Y.S.2d 199, 201 (N.Y. App. Div. 1986) (holding that where the petitioner obtained false verbal assurances that tax returns were filed and paid the willfulness requirement of the state statute was not met and thus the tax assessment was annulled).

194. I.R.C. § 6672 (2003).

195. See U.S. Treasury Dep’t, Table 18—Treasury Department Gross Tax Collections: Amount Collected by Quarter and Fiscal Year, FY 1987–2002, available at <http://www.irs.gov/pub/irs-soi/02tc18fy.xls> (last visited Aug. 27, 2003).

196. *Slodov v. United States*, 436 U.S. 238, 248 (1978).

197. *Pacific Nat’l Ins. Co. v. United States*, 422 F.2d 26, 31 (9th Cir. 1970).



indirect effects.”<sup>198</sup> The harsh results of the IRS asserting the trust fund penalties are obviously not the primary legislative intent behind I.R.C. § 6672.<sup>199</sup>

Though the Federal right of contribution under I.R.C. § 6672(d) was certainly a step in the appropriate direction, there is much more that can be done by the governing authorities to apply the trust fund scheme in a fair and equitable manner; or, better still, to reduce the number of instances in which it is necessary to resort to it at all.<sup>200</sup> For one thing, there is little to protect the lowly subordinate from the personal financial effects of the unemployment which may result from disobedience of directives from above that are contrary to the trust fund obligation.<sup>201</sup> Though many would call for new statutory remedies to the problem, there is much to suggest that more credible and consistent enforcement of the existing remedies, criminal or otherwise, would go a long way towards curbing the trust fund abuses by employers.<sup>202</sup> Moreover, the IRS can do its part to educate and inform the responsible persons of their responsibilities.<sup>203</sup> But regardless of what the governmental authorities do, the ultimate responsibility rests upon the responsible persons.<sup>204</sup>

---

198. DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 157 (J. M. Dent & Sons 1973) (1817), *reprinted in* 1 *THE WORKS AND CORRESPONDENCE OF DAVID RICARDO* 239 (Piero Sraffa, ed., Cambridge Univ. Press, 1951), *also available at* <http://www.econlib.org/library/Ricardo/ricP4.html#Ch.16>, Taxes on Wages (last visited Aug. 13, 2003).

199. *Slodov*, 436 U.S. at 247–248.

200. I.R.C. § 6672(d) (2003).

201. *See generally supra* notes 115–116 and accompanying text.

202. *See, e.g.*, Leonard R. Rosenblatt, *Payroll Tax Fraud: No Excuses, No Exemptions*, N.J. L.J., Feb. 15, 1999, at 36.

203. *See, e.g.*, IRS’s Efforts to Improve Compliance With Employment Tax Requirements Should Be Evaluated: Report to the U.S. Sen. Comm. on Small Bus. & Entrepreneurship, 2002 Leg., 107th Sess. (Jan. 15, 2002).

TBOR2 included, *inter alia*, an uncodified provision requiring the IRS to “take such actions as may be appropriate to ensure that employees are aware of their responsibilities under the Federal tax depository system.” TBOR2, § 904(b), 110 Stat. 1467 July 30, 1996.

204. I.R.C. § 6672 (2003).

Sufficient case law guidance on the construction of I.R.C. § 6672(d) has not yet developed, and many ambiguities remain.<sup>205</sup> As with other new statutes, the courts will eventually deal with clarifying its specific applications. Though the attorneys representing responsible persons will no doubt play a proactive role in bringing about the interpretation of the law, and will, hopefully, achieve remunerative gain for their labors in doing so, persons responsible for facilitating the tax withholding process would do well to heed Professor Siegel's oft tendered admonishment that such legal advancements are best suited for "Somebody Else's Case."<sup>206</sup>

---

205. See generally discussion, *supra* Part II.

206. See, e.g., David D. Siegel, *Expiration of Lis Pendens Forfeits Right to Foreclose Mortgage*, N.Y. L.J., Nov. 8, 2002, at 4 ("It will make them pursue the lis pendens requirements punctiliously, leaving the ultimate resolution of the matter to be determined in the best place possible—Somebody Else's Case."); David D. Siegel, *The Recent Amendments to Rule 4 Pose Problems for Practitioners*, NAT'L L.J., Aug. 1, 1983, at 48 ("The cited F.R.D. article . . . had nothing specific to proffer—except the admonition to let the matter get decided in somebody else's case, which means toeing the line on all of the new requirements punctiliously."); see also *Miller v. Weyerhaeuser Co.*, 685 N.Y.S.2d 393, 395 (N.Y. Sup. Ct. 1999) ("This case presents a classic example that Professor David D. Siegel characteristically warns practitioners about when he says let it happen in 'Somebody Else's Case.'"); Norman H. Dachs & Jonathan A. Dachs, *The New Venue Rule*, N.Y. L.J., Jan. 9, 2001, at 3 ("Under the circumstances, the best and easiest advice is the advice so often given by Professor Siegel, and given by him in this situation as well, which is to let it be in 'somebody else's case' that these issues be resolved.").

## *Notes & Observations*