

2016 TNT 213-3 CIVIL AND CRIMINAL EMPLOYMENT TAX CASES DIFFICULT TO DISTINGUISH. (Section 7202 -- Willful Failure to Pay Over) (Release Date: NOVEMBER 02, 2016) (Doc 2016-21993)

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Abstract:

The similarity between the requirements for the civil trust fund recovery penalty and the criminal charge of failure to pay over taxes may leave practitioners unable to discern whether an employment tax issue could trigger a Justice Department civil case, a criminal case, or both, according to a DOJ official.

Summary:

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The similarity between the requirements for the civil trust fund recovery penalty and the criminal charge of failure to pay over taxes may leave practitioners unable to discern whether an employment tax issue could trigger a Justice Department civil case, a criminal case, or both, according to a DOJ official.

Speaking November 2 at a conference, Caroline Ciralo, principal deputy assistant attorney general at the Justice Department's Tax Division, said that there is no simple formula for distinguishing a civil employment tax case for the trust fund recovery penalty under [section 6672](#) from a criminal employment tax case for failure to pay over taxes under [section 7202](#). Facts and circumstances -- including the amounts at issue, the particular defendant, and the location and industry involved -- could enter into the government's decision on which tool to use, she said.

Both [section 6672](#) and [section 7202](#) require a responsible person who willfully fails to pay over, account for, or collect taxes for which that person is responsible.

Civil and criminal enforcement are not mutually exclusive, Ciralo added. "We could seek a civil injunction against an employer and still pursue a criminal investigation and prosecution," she said.

Body

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"You won't know whether the case that is sitting on your desk is of interest to us on the civil side or the criminal side," she told the audience at the Philadelphia Tax Conference, which is cosponsored by the American Bar Association Section of Taxation.

Both [section 6672](#) and [section 7202](#) require a responsible person who willfully fails to pay over, account for, or collect taxes for which that person is responsible. (Prior coverage (Doc 2016-7790).)

Civil and criminal enforcement are not mutually exclusive, Ciralo added. "We could seek a civil injunction against an employer and still pursue a criminal investigation and prosecution," she said.

In a statement accompanying her appearance (Doc 2016-21997), Ciralo reiterated that the Swiss bank program has entered into the legacy phase during which the Tax Division is investigating the flood of new information included with the non-prosecution agreements signed under the program. The Tax Division and the IRS are following the money that left Switzerland and looking at institutions other than banks, such as "asset management companies, corporate service providers, financial advisers, [and] insurance companies," she stated in the release. (Prior coverage (Doc 2016-19908).)

In the release, Ciralo also noted that entities have been calling the Tax Division to acknowledge their own past behavior, to describe the behavior of individuals engaged in efforts to evade United States income taxation, and to cooperate with U.S. tax authorities to resolve potential criminal exposure. In her live remarks, she added, "These are entities that are located outside of the United States" which will help reduce the ordinary obstacles to obtaining international information. (Prior coverage (Doc 2016-21761).)

Ciralo said that any institution considering approaching the DOJ, or counsel for such an institution considering recommending such an approach, should look to the 78 non-prosecution agreements reached with the category 2 banks under the Swiss bank program. She noted that all of them are available online, along with the attached statements of facts, on a page of the Tax Division website (www.justice.gov/tax/swiss-bank-program). "If you have a client that walks in your door and [says] 'You know, I have heard a lot about the Swiss bank program, I am not in Switzerland. . . . Here's what my employees have done,' if it resembles what's in [those] statement[s] of facts," that client may want to consider reaching out to the Tax Division, she said. (Prior coverage (Doc 2016-1772).)

In her released remarks, Ciralo stated that the Tax Division is currently litigating approximately 36 cases involving foreign bank account reports and that the vast majority of those cases involve the penalty for willful failure to file FBARs. These cases include both defensive and affirmative collection suits and include issues such as the calculation of the penalty, the definition of foreign accounts, and Administrative Procedure Act challenges, according to her released remarks. (Prior coverage (Doc 2016-21350).)

References

Subject	Area:
Compliance;	
Employment	taxes;
Criminal	violations;
Litigation	and appeals;

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Tax avoidance and evasion;
Tax system administration;
Financial reporting reporting;
Penalties;
Tax havens;
Information reporting

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