

PUBLICATION

Sixth Circuit Not Willing to Relent that Business Owner Was Liable for Trust Fund Tax Penalty Despite Creditor's Control over Finances

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In *Robert Karban, Jr. v. United States of America*, earlier this year, the Sixth Circuit ruled that Mr. Karban, the owner of a manufacturing company, was a responsible person for paying over trust fund taxes, which he willfully failed to do, even though the corporation's finances were under the control of its creditor, including the employment of a lock-box arrangement. Despite the taxpayer's request that the Sixth Circuit Court of Appeals reconsidered its earlier ruling that he was liable for a trust fund tax penalty, exceeding \$387,000, when the corporate employer failed to pay over trust fund taxes because its creditor had control over its finances, the Sixth Circuit would not relent. Karban argued that the agreement with its creditor required him to relinquish financial control of his company to the creditor and, accordingly, once that occurred he was no longer a responsible person. The court, however, found that Karban had the authority to sign and issue checks, knew the trust fund taxes were not being paid, ultimately made the decisions about which creditors to pay, and signed the checks to make those payments after consulting with, and obtaining the approval, of its creditor. Following a hearing in August, the Sixth Circuit just recently ruled that its earlier ruling would stand. As the IRS briefed the court, "This argument [ceding control to a lender absolves a responsible person of his willful acts] fails because the law is well-settled that such voluntary contractual agreements do not absolve corporate decision makers of their duty to ensure payment of the withheld taxes." It has been reported that the taxpayer has filed a petition for a writ of certiorari with the Supreme Court.

The upshot of this case is that the well-settled law on voluntary arrangements with corporate lenders and creditors is that such arrangements, even if they lead to a significant loss of control over the finances of the corporate employer, will not absolve a responsible person from their duty to pay over the withheld taxes to the government and will not provide them any protection from assessment of the trust fund tax penalty.

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