Internal Revenue Manual Section 5.17.7.1.2 (08-01-2010)

Responsibility

1. A responsible person may be held liable for the TFRP if such person willfully fails to perform any one of the three duties listed in the statute: collecting, truthfully accounting for, and paying over the taxes. Slodov v. United States, 436 U.S. 238 (1978).
2. The statute does not impose upon the responsible person an absolute duty to pay over amounts that should have been collected and withheld by prior responsible persons. Slodov v. United States, 436 U.S. 238 (1978).
   A. A person who becomes a "responsible person" when the business does not have the funds to pay an employment tax liability that arose under previous management and who uses funds acquired after he became a "responsible person" to pay the operating expenses of the business rather than to pay the prior withholding tax delinquency is not personally liable for the delinquency under Section 6672. Slodov, Id. at 254.
   B. If funds are available to pay delinquent trust fund taxes at the time a responsible person assumes control of the business and the responsible person fails to use those funds to pay the delinquent taxes, that person will be liable for the delinquent taxes to the extent of the funds available to pay the trust fund taxes. Id. at 255.
3. One or more persons may be responsible persons within the meaning of IRC § 6672 for the same quarter. Thomas v. United States , 41 F.3d 1109 (7th Cir. 1994).

   Note:

   If the determination is made that more than one person is liable under IRC § 6672, the revenue officer may recommend that individual assessments of the penalty be made against each person.

4. A determination of "responsibility" depends upon the facts and circumstances of each case. Common factors considered by the court include the following:
   - Identification of the person as an officer, director, or principal shareholder of the corporation, a partner in a partnership, or a member of an LLC;
   - Duties of the officer as set forth in the by-laws;
   - Authority to sign checks;
   - Identification of the person as the one in control of the financial affairs of the business;
   - Identification of the person as the one who had authority to determine which creditors would be paid and those who exercised that authority;
   - Identification of the person as the one who controlled payroll disbursements;
   - Identification of the person as the one who had control of the voting stock of the corporation; and
   - Identification of the person as the one who signed the employment tax returns. See Cook v. United States , 52 Fed. Cl. 62, 89 AFTR2d 2002-1541, 2002-1 USTC ¶ 50,328 (Fed. Cl. 2002); Datloff v. United States, 252 F. Supp. 11, aff'd, 370 F.2d 655 (3d Cir. 1966).
5. The crucial test is whether the person has the "effective power to pay the taxes owed." Purcell v. United States , 1 F.3d 932, 937 (9th Cir. 1993). A person is deemed to have such power if he or she possesses the authority to exercise significant control over the company's financial affairs whether or not such control is in fact exercised. Purcell at 937. Significant control generally relates to the person's status, duty, and authority in the business that failed to carry out one of the three statutory duties. Davis v. United States, 961 F.2d 867 (9th Cir. 1992).
6. Those performing ministerial duties without exercising independent judgment will not be deemed responsible. See Policy Statement 5-14 (formerly P-5-60), at IRM 1.2.14.1.3.
7. An unpaid, voluntary board member of a tax-exempt organization will not be considered a responsible person if the board member is solely serving in an honorary capacity, does not participate in the day-to-day or financial operations of the business, and does not have actual knowledge of the failure on which the penalty is based. IRC § 6672(e). This exception, however, does not apply if it results in no person being liable for the TFRP. Also, a voluntary board member of a tax-exempt organization who is intimately involved in the financial decisions of the company may be a responsible person. See Jefferson v. United States, 459

F.Supp.2d 685 (N.D. Ill. 2006) (twenty year voluntary board president of a non-profit organization who was unpaid but did not serve solely in an honorary capacity, who had check signing authority and control of financial affairs, and who was aware that trust fund taxes had not been paid, was a responsible officer who willfully failed to pay the tax).