



## The Fourth Circuit Reminds Us that Failing to Pay Withholding Tax Can Land You in Jail

by Robert S. Horwitz

Anyone who has ever received a paycheck or paid employees knows that income tax and the employee's portion of social security and Medicare tax are withheld from the employee's wages. Income withholding tax accounted for \$2.8 trillion of tax collected in fiscal 2024. This compares with corporate income tax of \$565 billion paid that year. See [returns filed, taxes collected and refunds issued](#). Medicare and Social Security taxes account for \$1.56 trillion of tax collected in fiscal 2024, half of which is from tax withheld from employee wages. Total tax collected by the I.R.S. in fiscal 2024 was \$5.1 trillion. Tax withheld from employee wages (\$2.8 trillion plus \$0.75 trillion) thus accounted for approximately 70% of all tax collected in that year.

The taxes withheld from employee wage are a special fund held in trust for the United States. Internal Revenue Code ("I.R.C.") §7501(a). Employers are legally obligated to pay these withheld taxes to the I.R.S. I.R.C. §§3101, 3401. Employers are required periodically to pay the withheld tax and file Form 941 each calendar quarter with the I.R.S. I.R.C. §6011(a); Treas. Reg. § 31.6011(a)-1. Employees are credited with having paid the tax the employer was required to withhold regardless of whether it is paid by the employer to the I.R.S.

The withheld tax can be an alluring source of funds for both employers who may view it as a personal piggy bank to fund their lavish lifestyles and a cash-strapped business owner who treats the funds as a "short-term loan" with a view to keeping the doors open. To ensure that the withholding tax is paid, irrespective of the motivation of the business owner, the I.R.C. contains penalties that can be imposed upon persons who control corporate finances and who willfully fail to pay the withheld tax when due.

You may be familiar with I.R.C. §6672, which states:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax,



or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

For purposes of §6672, the term “person” 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. The term “willfully” simply means making a voluntary, conscious, and intentional decision to pay other creditors (like employees, rent, or vendors) while knowing that the withheld taxes are not being timely paid to the I.R.S.

Normally, the I.R.S. imposes civil penalties under §6672 against persons it determines were responsible for an entity’s failure to pay withholding tax. Section 6672, however, has a criminal counterpart. I.R.C. §7202, “which tracks the wording of § 6672, makes a violation punishable as a felony subject to a fine of \$10,000, and imprisonment for 5 years. Thus, an employer-official or other employee responsible for collecting and paying taxes who willfully fails to do so is subject to both a civil penalty equivalent to 100% of the taxes not collected or paid, and to a felony conviction.” The defendants in *United States v. Gentner*, No. 25-4140 (4<sup>th</sup> Cir. May 28, 2026), learned to their chagrin that the Government will assert criminal as well as civil liability against responsible persons who willfully fail to timely pay employee withholding taxes.

### **Background Facts**

As with any appeal of a criminal conviction, the facts were those in the trial record read “in the light most favorable to the prosecution.” The defendants, Richard Brassier and Greg Gentner, were the CEO and COO, respectively, of rFactr, Inc. (“the company”), a Charlotte, North Carolina, based software company. Brassier and Gentner were responsible for the company’s financial affairs, including the filing of Forms 941 and the payment of withholding taxes to the I.R.S.



Beginning in 2013, the company started becoming delinquent in the payment of withholding taxes. The defendants interacted with the I.R.S. concerning the unpaid withholding taxes, including meeting with I.R.S. officers. During their meetings, defendants assured the I.R.S. that they were seeking to come current with the company's trust fund tax obligations and were retaining an outside payroll company to help with the payroll taxes.

The company failed to become current or to pay past due withholding taxes. In 2015, the I.R.S. levied on the company's bank account. Both the I.R.S. and the company's outside advisor gave the defendants many warnings of the potential consequences of not paying the trust fund taxes. In August 2015, the company's outside advisor informed defendants that the company's unpaid trust fund debt was approximately \$300,000. Despite this warning, the company did not pay over any trust fund taxes to the I.R.S. in 2015 and the first quarter of 2016. By the end of the first quarter of 2016, the trust fund tax debt was more than \$500,000 even though the company had revenues of \$2.4 million in 2015 and the first quarter of 2016.

In June 2016, defendants and the company applied to participate in the I.R.S. Voluntary Disclosure Program for 2015 and the first two quarters of 2016. They were advised that participating did not relieve the company of its trust fund tax obligations. On its application, the company represented that it was "moving its payroll process to an outside vendor" to "ensure continued compliance and payment going forward." The company was accepted into the Voluntary Disclosure Program. Nonetheless, it failed to pay more than \$160,000 of trust fund taxes that became due after it was accepted into the program, even though it earned more than \$1.4 million during that period. While the trust fund taxes were not being paid, the company paid Bresser \$287,000 and Gentner \$194,000 in 2016.

In 2017, the I.R.S. advised the defendants that the company was obligated to always be current on its trust fund tax obligation. Bresser told the IRS that the company was hiring an outside payroll company to assist with trust fund tax payments. This promise, like similar previous promises, was hollow.



The company ceased operations in February 2018. The IRS assessed trust fund recovery penalties against both defendants. Rather than paying the I.R.S., the defendants funded a lawsuit on behalf of the company; when the company received \$200,000 from two former clients, none of the funds went to the I.R.S. In 2019, 2020, and 2021, Bresser earned \$430,000, \$560,000, and \$740,000 from a new job. In 2021, the defendants paid the trust fund tax, plus penalties and interest, owed by the company. This payment occurred after the United States Attorney contacted them to set up a meeting because criminal charges were being prepared.

In January 2023, defendants were indicted for willfully failing to pay over tax withheld from employee wage for five quarters in 2016 and 2017, the quarters after the company entered the Voluntary Disclosure Program, in violation of §7202, and other tax charges. The case was tried by a jury in March 2024. The defendants testified on their own behalf. The jury convicted both defendants of the five counts of violating §7202, but acquitted defendants of additional charges involving tax evasion and the filing of false tax returns. The district court denied defendants' motion for judgment of acquittal or, in the alternative, for a new trial on the §7202 counts. The defendants appealed, claiming the district court committed four errors that required reversal.

### **The Alleged Trial Court Errors**

The errors claimed by defendants were (a) the district court erred in allowing the jury to review the indictment during deliberations; (b) jury instructions were inconsistent with the Voluntary Disclosure Program; (c) the jury instructions were “confusing, misleading and prejudicial” to the defendants; and (d) the trial court erred in denying the motion for judgment of acquittal since it “failed to weigh and assess their extensive cooperation” with the I.R.S. Noting that claims of error in jury instructions are reviewed for abuse of discretion, the Fourth Circuit rejected all of the defendants' claims.



*Claim 1: Allowing the jury to review the indictment during deliberations*

Under Fourth Circuit law, it is not an abuse of discretion for a trial court to allow a jury to review the indictment during deliberations so long as the court admonishes the jury that the indictment is not evidence and is to be consulted solely to aid in following the court's instructions and the arguments of the parties. The Fourth Circuit found that the district court "adhered to these standards." Additionally, Gentner's attorney was the first person to mention the jury would be provided with the indictment. Thus, there was no abuse of discretion in the jury being allowed to review the indictment during deliberations.

*Claim 2: The Voluntary Disclosure Program*

The Fourth Circuit began its discussion of this claim by noting that defendants failed to object to the jury instructions as being inconsistent with the Voluntary Disclosure Program. This would normally be deemed a waiver of the argument on appeal; it was, however, addressed by the appellate court.

Defendants' claim was that under the Voluntary Disclosure Program the company was allowed to prioritize payments while resolving its tax obligations. The jury allegedly was not properly instructed on this and on the company's ability to pay withholding tax. The Fourth Circuit found this claim lacking.

Citing Fourth Circuit cases under §6672, the Fourth Circuit stated that the jury was correctly instructed that it could consider the company's ability to pay and its intentional preference of other creditors over the United States in determining willfulness. The defendants' contention ignored the fact that the five quarters in issue in the criminal case were all after the company applied to enter the Voluntary Disclosure Program. In these circumstances, "the challenged willfulness instructions were not an abuse of discretion."



*Claim 3: Were the jury instructions “confusing, misleading, and prejudicial”*

Defendants argued that the willfulness instruction favored the prosecution by omitting their theory of alleged insufficiency of company funds and instructing the jury that it could consider defendants’ “discretionary purchases” and “intentional preferences of other creditors over the United States.”

The district court’s instructions on willfulness were not an abuse of discretions. Not only did the court give the standard willfulness instruction; it gave a supplemental good faith instruction requested by the defendants. The defendants presented “a robust defense and testify about rFactr’s financial struggles.” The instructions given the jury adequately covered defendants’ “willfulness and good faith defenses in a commendable manner.”

Defendants’ attack on the placement of the good faith defense instruction also failed because it failed to consider the instructions as a whole and the trial court emphasized that defendants’ defenses applied to each charged count and that good faith was a complete defense to the charges. Additionally, the trial court gave defendants’ requested supplemental good faith defense. As a result, there was no abuse of discretion.

*Claim 4: The trial court’s alleged failure to weigh and assess defendants’ alleged cooperation with the I.R.S. in ruling on their motion for judgment of acquittal*

Under Fourth Circuit law, a trial court can grant a judgment of acquittal or for new trial if the evidence weighed so heavily against the verdict it would be unjust to enter judgment. In the case before it, the defendants only challenged the willfulness finding. Citing cases under §6672, the court noted it had held that willfulness is shown by the intentional preference of other creditors over the United States or there was a



pattern of failing to pay withholding tax over an extended period of time. If a person intentionally paid other expenditures instead of known tax obligations, even if those expenditures were allegedly needed for the business to survive, the person has acted willfully.

The evidence of willfulness was “overwhelming.” Even though the company generated revenues more than sufficient to pay its withholding tax obligations, its unpaid trust fund obligation grew. The defendants’ alleged cooperation with the I.R.S. was a “red herring” because they failed to pay trust fund taxes for a number of quarters after their alleged cooperation. The defendants clearly understood the need to stay current on trust fund taxes after entry into the Voluntary Disclosure Program. The evidence established that the defendants decided to pay themselves first, fund a lawsuit on behalf of the company and pay non-Governmental creditors rather than trust fund taxes. Thus, this claim was also lacking.

Having reviewed and rejected all defendants’ claims of error, the Fourth Circuit affirmed the judgment.

### **Take Aways**

This case should be a warning to the owners and controlling individuals of a business against dipping into trust fund taxes to pay other creditors, including their own payroll, without paying trust fund taxes. Even if the unpaid trust fund taxes are not being used to fund lavish lifestyles and the company is struggling to survive, willful failure to pay trust fund taxes can result in criminal charges against persons who have control over the business’ financial affairs.

The amount of unpaid trust fund taxes for the five quarters charged was under \$200,000. Arguably, this amount would normally not lead to criminal charges being filed for violating §6672, at least in California. See *United States v. Easterday*, 564 F.3d 1004 (9<sup>th</sup> Cir. 2009) (failure to pay approximately \$18 million of payroll tax over a number of years). In many criminal trust fund cases, the government presents evidence that the defendants used the unpaid trust fund tax to fund lavish lifestyles. See, *United States v. DeMuro*, 677 F.3d 550 (3<sup>rd</sup> Cir.

2012); *United States v. Blanchard*, 618 F.3d 562 (6<sup>th</sup> Cir. 2010); *United States v. Ellis*, 548 F.3d 539 (7<sup>th</sup> Cir. 2008).

There are several factors that, in my opinion, led to criminal charges being filed against Gentner and Bresser. First, they pyramided unpaid trust fund taxes for an extended period of time, from 2013 through 2017. Second, they repeatedly informed the I.R.S. that the company was going to engage an outside payroll company to ensure future compliance but never did so. Third, after the company entered the Voluntary Disclosure Program, it continued to pyramid trust fund taxes even though defendants were advised to stay current on trust fund taxes. Fourth, they disregarded the advice of an outside consultant to pay the trust fund taxes. Fifth, after the company ceased operations defendants personally funded a lawsuit on behalf of the company and used funds paid the company by clients to pay creditors other than the United States.

If an entity has begun to fall behind in paying trust fund taxes, it is important for the business to start becoming current on its payroll tax and to designate all payments of past-due taxes to trust fund tax. The owners and persons who control the entity's finance should also consult with competent tax professionals and follow their advice to minimize the risk of the case going criminal.

**Robert S. Horwitz** is a Principal at Hochman Salkin Toscher Perez P.C., former Chair of the Taxation Section, California Lawyers' Association, a Fellow of the American College of Tax Counsel, a former Assistant United States Attorney and a former Trial Attorney, United States Department of Justice Tax Division. He represents clients throughout the United States and elsewhere involving federal and state administrative civil tax disputes and tax litigation as well as defending clients in criminal tax investigations and prosecutions. In 2022 the Tax Section of the California Lawyers Association awarded him the Joanne M. Garvey Award for lifetime achievement in and contributions to the field of tax law. Additional information is available at <http://www.taxlitigator.com>.