



TAX CRIMES: EMPLOYMENT TAXES, SECTION 7202, AND THE STATUTE OF LIMITATIONS

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Employers are required to withhold FICA and income tax from employees' pay checks and make periodic deposits of the amounts withheld. If the taxes are not withheld and paid over to the IRS, the employer is subject to monetary penalties and individuals affiliated with the employer may face personal liability for the trust fund recovery penalty. See I.R.C. §§ 6656 (employer penalty); 6672 (trust fund recovery penalty).

The failure "to collect, account for, and pay over" these taxes is also a felony. I.R.C. § 7202. While payroll tax violations were rarely prosecuted historically, times have changed, and the Tax Division [has made employment tax prosecutions a priority](#).

Last week, a district court issued an interesting opinion addressing the statute of limitations under section 7202. [United States v. Ogbazion](#), No. 3:15-cr-104, 2016 U.S. Dist. LEXIS 143358 (S.D. Ohio Oct. 17, 2016). The case is covered in some breadth on [Jack Townsend's excellent Federal Tax Crimes blog](#), but this post will focus on the limitations period for section 7202.

Mr. Ogbazion ran a tax preparation franchisor based in Ohio; after a civil investigation, he was indicted on August 25, 2015 on a variety of charges, including a violation of section 7202. *Ogbazion*, 2016 U.S. Dist. LEXIS 143358 at *1-*2. The indictment charged him with a failure to pay over \$1.25 million in payroll taxes for two different businesses in the second, third, and fourth quarters of 2009, and the first quarter of 2010. *Id.* at *17.

Tax crimes are generally subject to a three-year statute of limitations under section 6531 of the Internal Revenue Code, but the willful failure to file a return or pay a tax at the required time is subject to a longer limitations period of six years. I.R.C. § 6531(4). As with all limitations cases, a key question is when the violation occurred.

FICA imposes a tax on "employees" that the employer is directed to deduct from "wages." See I.R.C. § 3102(a). In a similar vein, an "employer" paying "wages" must collect income tax from her employees.

I.R.C. § 3402(a). The employer is required to make periodic deposits of the amounts collected, and to file quarterly returns on Form 941 reporting the wages paid and taxes collected. See Treas. Reg. § 31.6302-1(a) (imposing deposit requirement); see also Treas. Reg. § 31.6011(a)-4(a)(1) (imposing obligation to file quarterly returns). The returns are due “on or before the last day of the first calendar month following the period for which it is made.” Treas. Reg. § 31.6071(a)-1(a).

In a vacuum, the regulations cited above would suggest that the charges associated with Mr. Obazian’s payroll tax violations for the second quarter of 2009 had accrued by July 30, 2009, when the return for that quarter was due, which would mean that the August 25, 2015 indictment was untimely. The limitations provision, section 6531, however, also provides that “[f]or the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable.” I.R.C. § 6531.

Section 6513 provides that for purposes of the limitations period for refund claims, “a return for any period ending with or within a calendar year [that] is filed before April 15 of the succeeding calendar year . . . shall be considered filed on April 15 of such succeeding calendar year”; it also directs that “a tax with respect to remuneration or other amount paid during any period ending with or within a calendar year [that] is paid before April 15 of the succeeding calendar year . . . shall be considered paid on April 15 of such succeeding calendar year.” I.R.C. § 6513(c)(1), (2).

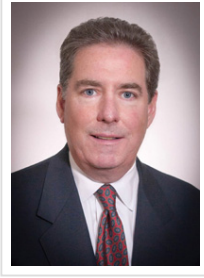
Accordingly, when Mr. Ogbazion moved to dismiss, the government responded that the indictment was timely because the statute of limitations began to run on the 2009 violations on April 15, 2010. *Ogbazion*, 2016 U.S. Dist. LEXIS 143358 at *30. The district court denied the motion to dismiss, but it also rejected the government’s argument that section 6513 controlled.

The court commenced its analysis by noting that there seemed to be little logic to applying section 6513 to determine when a violation of section 7202 occurred. *Id.* at *32. The *Ogbazion* court rejected the notion that the offense could be deemed to have occurred as of the date that payment was due because the failure to pay had to be willful, not an oversight. *Id.* at *34. The court observed that the Sixth Circuit had taken a similar approach in a case charging a willful failure to file a return or pay tax when due under section 7203 of the Code. *Id.* (citing *United States v. Sams*, 865 F.2d 713, 715-16 (6th Cir. 1988)).

The court concluded that section 6513 was only relevant to cases where the defendant had made earlier payments and had previously filed returns, relying upon *United States v. Habig*, 390 U.S. 222, 225 (1968). *Ogbazion*, 2016 U.S. Dist. LEXIS 143358 at *37. Consequently, the district court held that “the reference to 26 U.S.C. § 6513 is not intended to prolong running the statute of limitations in every case, and particularly not where 26 U.S.C. § 6513’s firm deadline has no logical correlation to the elements of the offense at issue.” 2016 U.S. Dist. LEXIS 143358 at *37-*38. The court denied the motion to dismiss, reasoning that the question when a failure to pay became willful should be determined by the jury. *Id.* at *38.

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