

Employment Taxes- A Recent Summary Judgment Case.

The owner of a small business who is the subject of an assessment for the trust fund recovery penalty under Section 6672 of the Internal Revenue Code is generally in a tight spot. Consequently, a recent District of Maryland case in which the owner successfully defeated a summary judgment motion by the government is worth reading.

In *Hudak v. United States*, 2013 U.S. LEXIS 98790 (D. Md. July 16, 2013), the government sought summary judgment on its claim that Timothy Hudak, the owner of the Hudak Companies, was responsible for roughly 2.3 million dollars in unpaid payroll taxes over a period from 2007 to 2010. Mr. Hudak defeated summary judgment on two basic issues: responsible party status and willfulness.

On the responsible party front, despite the fact that Mr. Hudak owned the company and signed checks, the court refused to grant summary judgment for the government, concluding that Hudak's reliance on the company's chief financial officer created fact issues, as there was evidence that it was the CFO who made the decisions about which creditors to pay and in what amounts. *Hudak v. United States*, 2013 U.S. LEXIS 98790, slip op. at *7-*9.

On the issue of willfulness, Mr. Hudak acknowledged that he became aware of a shortfall as of February 2010. *Id.* at *10. His knowledge at that point triggered an obligation to use all unencumbered funds of the corporation to pay the back taxes. *Id.* at 11. Hudak defeated summary judgment because he presented evidence that the funds held by the corporation were subject to a prior encumbrance under Maryland law in favor of subcontractors. *Id.* at *12 and n. 8.

This is a very favorable ruling for Mr. Hudak; I am a little surprised at the court's analysis of his responsible party status, as I would have thought that his stronger argument was that he lacked willfulness in the period that he reasonably relied on the CFO.

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