

Department of Justice Considers Personal Benefit an Important Factor in Prosecuting Employment Tax Cases

by Frank L. Brunetti on September 24, 2013

Since 2008, the U.S. economy has struggled and employers faced with the dilemma of either paying employees and vendors, or paying employment tax often chose the former. The belief is that they can always catch up. Unfortunately, I have seen many employers incur substantial tax liability for employment taxes, interest and penalties, and have found themselves personally liable.

The Department of Justice will now consider whether an individual personally benefited from employment taxes that were not properly withheld or paid as a key factor in considering whether it will criminally prosecute a case.

"Using the money to keep a business afloat is not a defense against criminal liability for an employer, but the DOJ is less likely to prosecute in that case than when the employer is using the funds to purchase homes, cars, and other luxury items," said Margaret Leigh Kessler, Assistant Chief (Western Criminal Enforcement Section), DOJ Tax Division.

Speaking during the "Civil and Criminal Tax Penalties" session of the American Bar Association Section of Taxation meeting in San Francisco, Kessler pointed out that no one factor is dispositive as to whether a case will become criminal. She said there are many different factors that may cause the IRS to refer a case to the DOJ for criminal prosecution, including engaging in a course of illegal conduct over a long period; taking aggressive measures to actively hide assets once the Service has determined noncompliance; and lying to the IRS agents reviewing the case.

"The size of the business is not a driving factor," Kessler said. "While a case involving large amounts of money may be more attractive to the DOJ, officials wouldn't be eager to prosecute it criminally if they didn't have evidence that the money was being used for personal benefit."

Those employers who use employment taxes for cars, vacation homes and the like now face not only personal liability but criminal prosecution.