

## **Contribution Among Responsible Persons Under Section 6672(d)**

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# **Riddles Raised by Those Who Don't Read: Solving Purported Problems with the Right of Contribution Under Code Sec. 6672(d)**

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Larry Campagna and William Grimsinger answer two questions that may arise under the Code provision that permits a person who is liable for the trust fund recovery penalty to seek contribution from other responsible persons—whether contribution may be sought only from those identified by the IRS and whether contribution is determined according to comparative fault.

## **Introduction**

In 1996, Congress enacted as part of the Taxpayer Bill of Rights II<sup>1</sup> a little noticed and, to date, little used provision that permits a person who is liable for the trust fund recovery penalty to seek contribution from other responsible persons. The provision, Code Sec. 6672(d), authorizes any person liable for the trust fund recovery penalty to recover contribution from other persons liable for the penalty. Code Sec. 6672(d) contains one obvious procedural limitation: the contribution suit must be separate from any action in which the United States seeks to collect a trust fund penalty, whether by direct claim or

counterclaim. Defense attorneys in some of the first cases filed under Code Sec. 6672(d) have suggested two other poten-

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tial problems for responsible persons seeking contribution, both of which result from what they see as ambiguity in the stat-

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*Code Sec. 6672(a) makes clear that a person who is liable for the penalty is any person who was required to collect, truthfully account for and pay over the trust fund taxes and who willfully failed to do so.*

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ute. In fact, there is little or no ambiguity in the statute; legislative history and logic provide the answers to these purported issues.

First, the new provision creates a right of contribution only from persons who are liable for the trust fund recovery penalty under Code Sec. 6672(a). The problem is whether contribution can be recovered from each individual who could have been held liable as a responsible person under Code Sec. 6672(a) or is contribution available only from those individuals who have been assessed by the IRS? Second, a person seeking contribution is entitled to recover “an amount equal to the excess of the amount paid by such person over such person’s proportionate share of the penalty.” But what does “proportionate share” mean? Should the amount of contribution be allocated per capita among all contribution defendants or is some concept of relative fault to be read into the statute? Must the court allocate liability among all the responsible parties or only among those from whom contribution has been sought?

Fortunately, there are answers to these questions. The statutory scheme of Code Sec. 6672, the legislative history of Code Sec.

6672(d) and two recent cases interpreting the statute all make a persuasive argument that contribution may be recovered from

all individuals who were responsible persons, regardless of whether the IRS actually assessed the trust fund recovery penalty against each of them. The lan-

guage of Code Sec. 6672(d), the legislative history and policy considerations all strongly suggest that contribution ought to be recovered on a per capita basis, with each party to the contribution suit bearing an equal share of the trust fund penalty.

## **The Statute Defines Liability for Contribution Independent of Any Action by the IRS**

The right of contribution under Code Sec. 6672(d) entered the Code as part of the Taxpayer Bill of Rights II. New Code Sec. 6672(d) provides:

RIGHT OF CONTRIBUTION WHERE MORE THAN 1 PERSON LIABLE FOR PENALTY.—If more than 1 person is liable for the penalty under subsection (a) with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person’s proportionate share of the penalty. Any claim for such recovery

may be made only in a proceeding which is separate from, and is not joined or consolidated with—

- (1) an action for collection of such penalty brought by the United States, or
- (2) a proceeding in which the United States files a counterclaim or third-party complaint for the collection of such penalty.

Plainly, the right of contribution under Code Sec. 6672(d) turns on whether an individual from whom contribution is sought is “liable for the penalty under subsection (a).” Liability for contribution does not turn on assessment by the IRS, comparative fault or any issue other than liability under Code Sec. 6672(a).

The question raised by defendants in contribution cases is: What does it mean to be liable for the trust fund recovery penalty under Code Sec. 6672(a)? Code Sec. 6672(a) provides in pertinent part:

GENERAL RULE.—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. [Emphasis added.]

Code Sec. 6672(a) makes clear that a person who is liable for

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