

## Internal Revenue Manual Section 5.17.7.1.3 (08-01-2010)

### Willfulness

1. Under IRC § 6672(a), the failure to collect or pay over trust fund taxes must be willful.
2. Definition of willful — intentional, deliberate, voluntary, reckless, knowing (not accidental). No evil intent or bad motive is required. Domanus v. United States, 961 F.2d 1323 (7th Cir. 1992).
3. To show "willfulness," the government must show that the responsible party was aware of the outstanding taxes and either deliberately chose not to pay the taxes or recklessly disregarded an obvious risk that the taxes would not be paid. Phillips v. United States, 73 F.3d 939, 942 (9th Cir. 1996).
4. A responsible person's failure to investigate or correct mismanagement after being notified that withholding taxes have not been paid satisfies the IRC § 6672 "willfulness" requirement. Finley v. United States, 123 F.3d 1342 (10th Cir. 1997).
5. The payment of net wages (wages minus trust fund taxes) to employees when funds are not available to pay withholding taxes is a willful failure to collect and pay over under IRC § 6672. If funds are not available to cover both wages and withholding taxes, a responsible person has a duty to prorate the available funds between the United States and the employees so that the taxes are fully paid on the amount of wages paid. For purposes of determining willfulness, an employee owed wages is merely another creditor of the business, and preferences to employees over the government constitute willfulness. Hochstein v. United States, 900 F.2d 543, 548 (2d Cir. 1990).
6. The circuits that have decided the issue have split on whether "reasonable cause" negates a responsible person's willfulness and is a defense to TFRP liability.
  - A. The Eighth and First Circuits have determined that reasonable cause is not a defense. Olsen v. United States, 952 F.2d 236 (8th Cir. 1991); Harrington v. United States, 504 F.2d 1306 (1st Cir. 1974).
  - B. The Ninth Circuit has not stated specifically that the reasonable cause defense does not apply; however, it has determined that "conduct motivated by a reasonable cause may, nonetheless, be willful." Phillips v. United States, 73 F.3d 939, 942 (9th Cir. 1996).
  - C. The Tenth, Eleventh, Second, and Fifth Circuits have determined that the reasonable cause defense applies, at least conceptually, to willfulness determinations under Section 6672. Even these circuits, however, apply the defense narrowly. Smith v. United States, 555 F.3d 1158, 1170 (10th Cir. 2009) (reasonable cause defense must be narrowly construed with respect to Section 6672); Thosteson v. United States, 331 F.3d 1294, 1301 (11th Cir. 2003) (court does not decide whether reasonable cause applies, but notes that this defense is exceedingly limited); United States v. Winter, 196 F.3d 339, 345 (2d Cir. 1999) (reasonable cause defense negated willfulness only if the responsible person reasonably believed that taxes were being paid); Logal v. United States, 195 F.3d 229, 233 (5th Cir. 1999) (reasonable cause defense is exceedingly limited.).
7. A mistaken belief that payments to other creditors were required to be made in preference to trust fund taxes does not make the failure to pay non-willful. Thomsen v. United States, 887 F.2d 12, 17-18 (1st Cir. 1989).