Current Federal Tax Developments

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SECTION: 6015
DIVORCE DECREE SPLITTING EX-SPOUSE'S LIABILITY FOR PRIOR TAXES DID NOT CONTROL INNOCENT SPOUSE RELIEF

Citation: Asad and Akel v. Commissioner, TC Memo 2017-80, 5/15/17

In the case of *Asad and Akel v. Commissioner*, TC Memo 2017-80 the IRS agreed each of the now divorced spouses should be liable for only a portion of the tax due, each qualifying for innocent spouse relief under IRC §6015 for tax liabilities arising from rental properties owned by the other spouse.

However, the taxpayers in this case, while accepting that neither should be liable for the entire balance due, argued that rather than using the allocation the IRS arrived at based on the ownership of the properties leading to the tax liability, each should be relieved of 50% of the liability. That is, they proposed to split the tax evenly.

The taxpayers argued for this result because it was the result provided for in their divorce decree. As the opinion notes:

> In that divorce agreement, Asad and Akel had agreed that each would be liable for 50% of their tax liabilities from prior tax years, including tax years 2008 and 2009. The discussion of the divorce agreement at trial began with Asad proposing: "I would like to possibly see if my ex-spouse, Sam Akel, objects to it being 50/50 as we agreed on in the divorce decree." After some discussion, Akel said: "I agree to split it 50/50." Our interpretation of this discussion is that Asad and Akel thought that their willingness--at trial--to agree to a 50-50 split should permit their respective liabilities to the IRS to be reduced by 50%.

At first glance this certainly appears reasonable—the IRS still had the right to collect the entire balance due (the taxpayers did not dispute what was owed in total) and the ex-spouses had a court document (their divorce decree) providing for just such an even split.

But the Tax Court noted that the decree bound only those who were a party to it—and that did not include the IRS. As the Court commented:

> The divorce agreement establishes Asad's and Akel's rights against each other under state law. See *Rude v. Commissioner*, 48 T.C. 165, 174 (1967). It may allow one to recover against

> the other through a right of contribution. See *id*. However, it does not control their liabilities to the IRS.

Rather, the Tax Court noted, each generally remained joint and severally liable for the tax due, with any reduction in their personal liability being governed by the innocent spouse provisions found at IRC §6015.

As the IRS did not consent to settle the case based on such a 50/50 split of the tax liability, the Court instead divided the liability based on the relative contribution of each spouse to the liability that arose, which was a 28%/72% split.

As the Court noted, if one of the spouses ends up paying 72%, that spouse would most likely have a state law claim against the other to recover the overpayment from the other spouse. But that spouse also takes on, rather than the IRS, the risk that any such judgment might prove uncollectible.

SECTION: 6511
CCA OUTLINES WHEN REFUNDS CREATED BY OVDP FILINGS CAN BE OFFSET AGAINST TAX DUE

Citation: CCA 201719026, 5/12/17

In Chief Counsel Advice 201719026 the IRS looked at what happens to taxpayers who, under terms of the Offshore Voluntary Disclosure Program (OVDP), find that there is a refund due on one of the prior year returns filed under the program. The key question was whether any such refund could be offset against other taxes due or refunded to the taxpayer.

The OVDP program was created in 2009 to allow a method for taxpayers with previously undisclosed foreign bank accounts to come into compliance voluntarily. Under the terms of the program a taxpayer must disclose all such offshore accounts and file original or amended returns reporting the income for the most recent eight years of returns whose due date has passed. The taxpayer also gives consent for the IRS to assess tax for all those years as part of the program regardless of whether the period for assessment generally under IRC §6501 has run.

Normally this results in tax being due on those returns, but in some cases one or more of those original or revised returns may lead to a refund of tax. Not surprisingly, the taxpayers request that the overpayments be netted against the tax due in other years. Those IRS employees dealing with this issue sought advice from the Chief

Counsel's office to determine if such a request could be granted and, if so, under what conditions.

The CCA concludes that such an offset or refund will not be possible merely due to the taxpayer signing a consent to open the statute for assessing tax under IRC §6501. Rather, the amended or original return must be filed within an otherwise statutorily allowed time frame for a claim for refund for the overpayment to be available for the taxpayer.

As the advice describes a normal situation that leads to the request for advice:

> A typical fact pattern might involve a taxpayer for whom the disclosure period is tax years 2003 through 2010. For tax years 2003 through 2007 and 2009 and 2010, the taxpayer reports additional income and tax. But the amended return submitted for tax year 2008 includes a large loss, resulting in an overpayment for that tax year. After reviewing the amended return, the examining agent confirms the claimed loss and the resulting tax computations show an overpayment for tax year 2008. The taxpayer then requests that the overpayment for tax year 2008 be credited against increases in tax for the other tax years in the disclosure period or the miscellaneous offshore penalty. You have asked for advice regarding how I.R.C. §§ 6511 and 6514 affect the Service's ability to credit the overpayment as requested by the taxpayer.

The memorandum outline the basic rules for the time periods for a taxpayer to file a claim for refund as follows:

> I.R.C. § 6514(a)(1) prohibits the Service from crediting or refunding any overpayment unless the taxpayer timely filed a claim for refund or credit of such amount. I.R.C. § 6511(a) requires that a claim for refund or credit be filed within three years from the time the original return was filed or two years from the time the tax was paid, whichever is later. In addition, the amount of any refund or credit is limited by I.R.C. § 6511(b), which provides either: (1) a three year look-back period in cases in which the claim was filed within three years of the return or (2) a two year look-back period in cases in which the claim was filed within two years of payment.
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> I.R.C. § 6511(c) provides a special rule for situations where a taxpayer has executed a consent to extend the statute of limitations on assessment pursuant to I.R.C. § 6501(c)(4).

> I.R.C. § 6511(c)(1) provides that, when a taxpayer enters into an agreement to extend the period of limitations on assessment during the three-year refund or credit period prescribed in I.R.C. § 6511(a), the period for filing a timely claim for refund or credit shall not expire prior to six months after the expiration of the assessment period as extended by that agreement. Where a claim for refund or credit is filed within the period prescribed by I.R.C. § 6511(c)(1), I.R.C. § 6511(c)(2) limits the amount of the refund or credit to the portion of the tax paid after the execution of statute extension plus the portion of the tax paid within the look-back period which would be applicable under I.R.C. § 6511(b)(2) if the claim for refund or credit had been filed on the date that the statute extension was executed.

The memorandum then goes on to describe how to apply these rules to a taxpayer who has entered the OVDP program:

> Whether a taxpayer with the facts described above is entitled to have his or her 2008 overpayment credited against increases in tax for other tax years in the disclosure period or against the miscellaneous offshore penalty will depend on whether the 2008 amended return (which serves as the claim for refund or credit) was filed within the period prescribed by I.R.C. § 6511. If, for example, the taxpayer entered the OVDP in March, 2012, there is a good chance that the taxpayer's 2008 amended return was filed within the three-year period described in I.R.C. § 6511(a). If, on the other hand, the taxpayer entered the OVDP in March, 2014, it is less likely that the amended return was filed within the three-year period described in I.R.C. § 6511(a). It is certainly possible that the amended return was filed within that three-year period, particularly if the original 2008 return was filed late, although there may not be any payments in the 3-year look back period prescribed by I.R.C. § 6511(b)(2)(A). It is also possible that the taxpayer made payments with respect to the 2008 tax year after the 2008 return was filed. If the amended return was filed within two years of any payment, it would also be timely filed. However, I.R.C. § 6511(b)(2)(B) would limit the amount of the refund or credit to amounts paid within the two-year period preceding the filing of the claim.

> A claim for refund or credit for 2008 might also be timely by virtue of I.R.C. § 6511(c)(1). OVDP FAQ 25 requires taxpayers who are participating in OVDP to submit properly executed statute extensions for each of the eight tax years included in the disclosure period. If a taxpayer and the Service entered into an agreement under I.R.C. § 6501(c)(4) extending the taxpayer's 2008 period of limitations on assessment during the three-year period described in I.R.C. § 6511(a), then the taxpayer's claim for refund or credit would be timely as long as it was filed within six months of the expiration of the of the period within which assessment may be made pursuant to the agreement or any extension thereof. However, as with claims filed within the standard three-year or two-year periods described in I.R.C. § 6511(a), claims considered timely under I.R.C. § 6511(c)(1) are also subject to amount limitations. Therefore, even if the hypothetical taxpayer executed a statute extension within the period provided for by I.R.C. § 6511(a), I.R.C. § 6511(c)(2) would limit the amount of the 2008 overpayment available for credit to the portion of the tax paid after the execution of statute extension, plus the portion of the tax paid within the look-back period which would be applicable under I.R.C. § 6511(b)(2) if the claim for refund or credit had been filed on the date that the statute extension was executed. If the statute extension was executed within three years of the original return, the look-back period would be three years. If the statute was executed within two years of a payment, the look-back period would be two years.

The memorandum goes on to note that there are other specialized extensions of time to file a claim for refund under the law, such as the period to file a claim for refund arising from a net operating loss, that could also serve to allow recognition of the claim as available to offset taxes due.

The memorandum ends with the following summary:

> Ultimately, whether a taxpayer is entitled to have any overpayment credited against a liability for another tax year or against the miscellaneous offshore penalty depends on whether that taxpayer filed a timely claim for refund or credit. If the claim was filed within the period prescribed by I.R.C. § 6511, the claim is timely and the taxpayer is entitled to a credit for the overpayment of amounts paid within the

> relevant look-back period. If the claim for refund was not filed within the period prescribed by I.R.C. § 6511, the overpayment is barred and I.R.C. § 6514 prohibits the Service from crediting it against liabilities for other tax types or periods.

SECTION: 6501
NINTH CIRCUIT PANEL FINDS STATUTE FOR IRS TO ASSESS LISTED TRANSACTION DISCLOSURE PENALTY DOES NOT START UNLESS FORM 8886 FILED

Citation: May v. United States, CA9, Case No. 15-16599, 5/16/17

The Ninth Circuit Court of Appeals reversed a District Court decision that determined the IRS had acted too late in attempting to assess a penalty in the case of *May v. United States*, CA9, Case No. 15-16599. In a 2-1 split decision the panel decided that the one statute found in IRC §6501(c)(10)(A) does not begin to run until a taxpayer files a Form 8886 with the IRS, regardless of whether the IRS is already in possession of the information that is provided in that form.

The District Court found that the IRS had attempted to assess the penalty for failure to disclose a listed transaction more than one year after the IRS agent examining the taxpayer came into possession of information that would justify the imposition of the penalty.

IRC §6501(c)(10)(A) provides that the penalty must be assessed against the taxpayer within one year of the date "the Secretary is furnished the information so required." The majority opinion found:

> The meaning of the phrase "the information so required" is made clear by referring back to the introductory paragraph of § 6501(c)(10), which in turn refers to § 6011 — explaining that what must be filed to commence the running of the limitations period is that "which is required under section 6011 to be included with [a] return or statement." Section 6011 instructs that taxpayers "shall make a return or statement according to the forms and regulations prescribed by the Secretary" and that "[e]very person required to make a return or statement shall include therein the information required by such forms or regulations." I.R.C. § 6011(a).

> Thus, in §§ 6501(c)(10) and 6011(a), Congress expressly required taxpayer compliance with the IRS's determination of how listed transactions are to be reported.

The majority opinion goes on to conclude:

> In sum, § 6501(c)(10)(A)'s reference to "the information so required" under § 6011 functions as an incorporation by reference of the disclosure requirements of Treasury Regulation § 1.6011-4(d), which requires that a taxpayer disclosing a listed transaction do so on Form 8886 and send a completed copy of that disclosure to the OTSA. It is undisputed that May neither filed a Form 8886 nor sent it to the OTSA. For that reason, May failed to do what was required to start the running of the § 6501(c)(10)(A) statute of limitations. Thus, the one-year limitations period of § 6501(c)(10)(A) did not commence, and the IRS's assessment of the penalty was timely.

However, the dissenting opinion does not agree with this view finding:

> The position advocated by the Government and accepted by the majority exalts form over substance. The Government admitted as much in so many words at oral argument. The statute says that the limitations period starts running on "the date on which the Secretary is furnished the information so required." 26 U.S.C. § 6501(c)(10)(a). But the Government insists that it doesn't actually matter when the relevant information was provided to the appropriate IRS agents because the provision of information doesn't count unless it is presented to the IRS on Form 8886. That's not a logical reading of the statute.

The dissent notes that the judge does not necessarily believe that the taxpayer had shown the IRS was effectively in possession of the information—just that the act of filing the form should not be the sole method accepted for "providing the information" and starting the statute.

> I have no quarrel with the Government's position that the taxpayer should be required to provide the relevant information in a coherent form to the appropriate tax agents. An interpretation that started the limitations period as soon as some IRS office, somewhere, had the information or as soon as IRS agents collectively had the information would be both

> illogical and open to abuse. I don't disagree that it might be appropriate to remand this case to the district court to apply a more precise interpretation of the statute. But I am not persuaded by the Government's interpretation, especially in the context of a civil penalty, and cannot join my colleagues in adopting it.

Note that the case is not a published decision and is a split decision. But it certainly suggests that a taxpayer facing the issue of whether a transaction was a listed transaction requiring disclosure may need to file the Form 8886 to insure the IRS is "on the clock" for assessing any penalty, even if that filing would duplicate information the IRS already clearly possesses as part of the exam.

SECTION: 6672
CEO AND PRESIDENT, RELYING ON WORK OF OUTSIDE AUDITOR, REASONABLY BELIEVED TRUST FUND TAXES HAD BEEN PAID

Citation: Byrne v. United States, CA6, No. No. 2:06-cv-12179, 5/15/17

The Sixth Circuit Court of Appeals in the case of *Byrne v. United States*, CA6, No. No. 2:06-cv-12179 had to decide if the president and CEO had acted recklessly in not insuring that trust fund taxes had been deposited when they were aware of issues with the quality of work performed by the controller. If they had, they would be liable personally for the undeposited trust fund taxes under IRC §6672.

Any responsible person may be held personally liable by the IRS for unpaid trust fund taxes (that is, federal income taxes and FICA taxes withheld from employee's paychecks) if the IRS can show that individual either:

- Had actual knowledge that the taxes had not been paid and had the ability to pay the taxes (even if that meant not paying other bills) *or*
- Recklessly disregarded known risks regarding a failure to pay such trust fund taxes.

In this case neither the president nor the CEO were aware of the actual nonpayment of trust fund taxes until they were no longer able to control the payment of the taxes. So, the question was whether they had recklessly ignored an obvious danger that taxes would not be paid correctly by their less than reliable (and, eventually, apparently less than honest) controller.

The business's financing arrangement with GMAC required that it obtain annual audited financial statements prepared by an independent CPA firm. That firm also advised the controller with regard to payroll tax matters, as the opinion notes:

> In January 1999, WCD (the CPA firm) provided Fuller (the controller) with the forms he needed to comply with the relevant tax laws and also provided guidance on how to prepare and file trust-fund taxes. Despite this guidance, Fuller deposited trust-fund taxes with the IRS on a biweekly, as opposed to a semiweekly, basis.

The IRS noticed this little problem, which also came to the attention of the president, Mr. Byrne, and the CEO, Mr. Kus. As the opinion continues:

> This resulted in a large penalty assessment against Eagle Trim in early 1999. By the end of 1999, Kus and Byrne had decided that Fuller was not adequately performing his duties, and Kus provided Fuller a handwritten list of tasks that he needed to start completing accurately and timely.

GMAC had regular collateral reviews performed as part of their financing agreement with the business, and those uncovered further issues with payroll tax deposits in 2000.

> In March 2000, GMAC's auditor, Lender Services, sent a letter to GMAC, stating that Eagle Trim had provided inadequate supporting documentation for Lender Services' collateral reviews. Lender Services therefore recommended, among other things, that Eagle Trim implement procedures to "[e]nsure all tax payments are made timely[ ] with supporting detail retained." GMAC forwarded this letter to Eagle Trim, and Kus reviewed it. Within two weeks, Fuller sent a letter to GMAC, responding to Lender Services' letter. Fuller acknowledged that he missed two trust-fund tax deposits during Eagle Trim's switch from Northwestern Bank to National City Bank, but he asserted that Eagle Trim was then current with all tax deposits. Fuller copied Kus and Byrne on this correspondence.

The CPA firm completed its audit of and issued a management letter with certain recommended actions:

> Also in March 2000, WCD sent a letter to Kus, copying Byrne and Fuller, advising Eagle Trim of deficits in its

> accounting practices, which WCD had observed while conducting its 1999 audit. The letter also stated, however, that WCD's observations did not discover any "material weaknesses," defined as conditions which Eagle Trim's internal control structure failed to "reduce to a relatively low level the risk that errors or fraud in amounts that would be material in relation to the financial statements being audited may occur." WCD recommended in its letter that Eagle Trim hire an assistant controller with an accounting degree.
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> Pursuant to WCD's recommendation, in April 2000, Eagle Trim hired Kelly Gillman, an accountant, to assist Fuller with his duties as controller. Perhaps due in part to Fuller's continued mishandling of Eagle Trim's finances, in July 2000, Eagle Trim also hired Andrew Jones as Eagle Trim's chief financial officer. As CFO, Jones reported to both Byrne and Kus on all of the financial aspects of Eagle Trim. Fuller reported to Jones, providing monthly financial statements for Jones to review.

Nevertheless, payroll tax problems continued with another IRS penalty notice for $98,622.32 arriving in October of 2000.

> David Drake, a WCD partner, met with Fuller to discuss the penalty. Fuller informed Drake that he had failed to pay the trust-fund taxes on time because of difficulties associated with Eagle Trim's switch from Northwestern Savings Bank to National City Bank. He said that he had contacted the IRS several times about the issue and that an IRS representative had informed him that Eagle Trim had made all trust-fund tax deposits in full and on time since June 14, 2000. Following his conversation with Fuller, Drake sent a letter to the IRS, repeating Fuller's explanation for the late trust-fund tax deposit and requesting that the IRS waive the penalties. Drake also attached an Eagle Trim check to the letter to pay the interest on the late trust-fund taxes. On November 10, 2000, Fuller sent a letter to Kus, Byrne, and Jones, describing the IRS penalty, his meeting with Drake, and Drake's request for an abatement of the penalty.

The next audit was completed by the CPA firm and another management letter was issued.

> WCD issued a "clean" audit on December 11, 2000, regarding Eagle Trim's financial statements through

> September 30, 2000, opining that the financial statements presented Eagle Trim's financial position fairly in all material respects. The report found that Eagle Trim was current in the payment of trust-fund taxes. Despite WCD's clean audit report, in January 2001, WCD sent a letter to Kus, copying Byrne, Jones, and Fuller, identifying flaws in Eagle Trim's accounting practices observed by WCD in the course of its 2000 audit. The letter included a section devoted to Eagle Trim's failure to pay trust-fund taxes in a timely manner, recounting the IRS penalties assessed for unpaid trust-fund taxes in 1999 and the first quarter of 2000. The letter added that WCD had been informed by "management" that trust-fund taxes for the second quarter of 2000 had been untimely as well, though the IRS had not yet assessed a penalty. WCD recommended that Eagle Trim "take the measures necessary to ensure that all payroll taxes and withholdings are deposited in a timely manner" and offered to assist Eagle Trim should "any payroll tax questions arise." WCD stated, however, that its observations did not discover any "material weaknesses" in Eagle Trim's internal control structure.

Unfortunately, it turned out that the controller, in addition to having issues with depositing trust fund taxes, had been engaging in some "creative" accounting.

> Also in January 2001, Lender Services discovered that Eagle Trim's financial statements were fraudulently overstated and the company, rather than being profitable, was losing money. According to GMAC's review, Fuller had falsified certain receivables by adding digits to the invoice. For example, an $8,000 invoice was recorded as an $80,000 receivable. Eagle Trim entered into a Forbearance Agreement with GMAC, dated January 31, 2001, and an Access and Accommodation Agreement with GM, dated February 2, 2001. Under the terms of these agreements, GM hired a crisis management company, BBK, Ltd. ("BBK"). At the time the Forbearance and Accommodation Agreements were executed, Kus and Byrne were unaware that Eagle Trim was delinquent on trust-fund taxes for the second, third, and fourth quarters of 2000. After execution of the agreements, both GMAC and BBK reviewed and approved all funding for Eagle Trim and had complete control over the flow of money in and out of Eagle Trim.

The crisis management company discovered there was more unwelcome news for the president and CEO, uncovering the unpaid trust fund taxes

> In late February 2001, BBK informed Byrne and Kus that Eagle Trim was delinquent on its trust-fund tax deposits for the last three quarters of 2000. Fuller and Byrne asked BBK for permission to pay these delinquent taxes, but the BBK reviewers refused to approve this expenditure. Fuller was then fired.

Not surprisingly, the auditors took a closer look and uncovered additional problems:

> On March 1, 2001, WCD sent a letter to Byrne, copying Kus. The letter explained that due to the discovery of "intentional, improper accounting" resulting in material misstatements, Eagle Trim should no longer rely on WCD's audit reports for 1999 and 2000. The same day, Drake sent a letter to Byrne explaining that WCD was recalling its audit reports due to the discovery that Fuller had been making "a series of incorrect, inaccurate and/or fictitious entries, primarily relating to tooling receivables, pre-paid tooling and accounts payable." Drake wrote that "there was a significant effort on the part of Mr. Fuller to disguise these activities, and to prevent their discovery in the course of our audits. . . ."

The IRS argued that the actions of the president and CEO amounted to a reckless disregard of a known risk that trust fund taxes might be paid, but they had taken no action to assure such payments were made. The District Court agreed with the IRS, so the president and CEO appealed the case to the Sixth Circuit Court of Appeals.

The opinion begins by noting what other Circuits had held regardless when reckless conduct rises to a level to trigger the trust fund penalty. The panel eventually decided to follow the guidance of the Second Circuit which it summarized as follows:

> The Second Circuit also defines willful conduct as "includ[ing] a reckless disregard for obvious and known risks as well as a failure to investigate . . . after having notice that withholding taxes have not been remitted to the Government." *Winter v. United States*, 196 F.3d 339, 345 (2d Cir. 1999) (citation and internal quotation marks omitted). But the Second Circuit recognizes an exception to § 6672(a) liability when a responsible person "believed that the taxes

> were in fact being paid, so long as that belief was, in the circumstances, a reasonable one." *Id.*(citation and internal quotation marks omitted).

The key distinction is the Second Circuit's recognition of a "reasonable belief" defense. So, the question became whether the president and CEO had a reasonable belief the taxes were being paid.

The panel agreed that the president and CEO were aware that the controller was not performing his work adequately, not completely performing his duties. But the panel found merely knowing that the controller was perhaps not competent did not equate to knowing that the trust fund taxes had not been paid.

The panel disagreed with the District Court that the president and CEO could not rely on the work of its audit firm in this matter. Rather, the panel ultimately found that the information received from the CPA supported a reasonable belief that the taxes had been paid:

> …Byrne and Kus's hiring of WCD — an independent, professional accounting firm — to assist in tax matters and conduct annual, full-scope audits further demonstrates that they took reasonable steps to comply with all of Eagle Trim's legal tax obligations, including the timely payment of trust-fund taxes. We acknowledge that Eagle Trim, not WCD, was ultimately responsible for its financial statements and payment of taxes. But we find nothing in the record that would cause us to question the reasonableness of Byrne and Kus's reliance on WCD's competency. The district court reasoned that Byrne and Kus could not rely on Drake's October 2000 letter to the IRS, in which he stated, "[Eagle Trim] ha[s] in fact paid all of [its] deposits in full and on time since [June 14, 2000, which] should indicate that [it is a] responsible taxpayer[ ]." According to the district court, because Drake did not say in the letter whether he investigated Fuller's story, Byrne and Kus could not reasonably have relied on this letter. That is, the district court's logic is that Byrne and Kus could not reasonably rely on any of WCD's statements after notice of Fuller's prior failures to pay the trust-fund taxes on time. Because Byrne and Kus had no prior indication of errors or inaccuracies in WCD's auditing, we hold that their reliance on WCD's representations was reasonable.

> Third, while WCD noted in its December 2000 audit report that Eagle Trim had been delinquent in paying its trust-fund taxes for the first quarter of 2000 and that deposits for the second quarter of 2000 were late, WCD confirmed that Eagle Trim's "financial statements . . . [were] fairly presented in conformity with generally accepted accounting principles." WCD also opined that Eagle Trim had accurately disclosed "[p]ending or anticipated tax assessments or refunds, price or profit renegotiation, other potential or pending claims, lawsuits by or against any branch of government or others[.]" WCD's audit report also concluded that "there ha[d] been no . . . [f]raud involving management or employees who have significant roles in internal control."

By the time the CPA firm gave notice that its work could no longer be relied upon, the matter was already out of the hands of the president and CEO, since the entity in control of the business would not allow payment of the taxes.

The Court also noted that experts had not been able to discover what the controller had done without significant work. The Court notes:

> Of course, in March 2001, WCD withdrew its December 2000 audit report "[f]ollowing the discovery in January 2001 that Bernie Fuller had been making a series of incorrect, inaccurate and/or fictitious entries." Thus, even licensed CPAs, who had spent several weeks at Eagle Trim performing a full-scope audit, missed Fuller's inaccurate accounting entries. Anthony Pierfelice, one of the crisis management consultants, confirmed that by the time GMAC and BBK took control of Eagle Trim's finances, "it took several months to gain an understanding of the full amount of the tax liability." In fact, Pierfelice stated that "[i]t was not until after the bankruptcy that [the crisis management firm] w[as] able to meet with the IRS and reconcile the amounts outstanding."
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> We cannot say that Byrne and Kus acted unreasonably or held an unreasonable belief that Fuller had begun to pay the trust-fund taxes on time, given that WCD, a CPA firm, did not detect Fuller's suspect financial accounting after having performed a full-scope audit and that it took several months for a crisis management firm to determine the exact amount of Eagle Trim's tax liability.