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THE TAX LAWYER

'Soup Nazi' Tax Evasion Case Holds Lessons For Every Business

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Robert N. Bertrand, CFO of the Soupman, Inc. chain made famous with Seinfeld's Soup Nazi character, has been indicted for tax crimes. The indictment alleges 20 counts of failure to pay Medicare, Social Security, and federal income taxes. Soupman, Inc. is based in Staten Island, and licenses the name and recipes of Al Yeganeh, the "Soup Nazi" character from Seinfeld. No crime has yet been proven, but the charges are quite serious.

In fact, a conviction could bring up to five years' imprisonment. Employers are required to withhold taxes from employee wages, and to account for and remit the money to the IRS. Taxes for Medicare, Social Security, and federal income taxes are withheld from the pay of employees, and the employer holds it as a kind of trustee. But prosecutors claim that Bertrand was cutting corners in a big way. Prosecutors claim that between 2010 and 2014, Bertrand paid Soupman employees on the side in unreported cash amounts.

No one likes scrutiny from IRS

The indictment claims that he also compensated certain employees in large unreported stock awards. Bertrand never reported this employee compensation to the IRS, and never paid trust fund taxes on the cash payments or the stock awards. The indictment suggests that it may be difficult for Bertrand to claim ignorance. Prosecutors even say that Bertrand received a 2012 warning from an external auditor that these payments *should be* reported to the IRS. The amount at stake in these taxes was not small either.

In fact, from 2010 through 2014, Soupman's total approximate unreported cash and stock compensation was $2,850,967.59. That translates to a total approximate tax loss to the United States of $593,971.52. Noting the dollars at stake to the federal government, the authorities have also mentioned the potential loss of future Social Security and Medicare benefits for the employees of Soupman Inc. The IRS does not like it when employers withhold taxes from employee pay but fail to send it to the IRS. The IRS calls this trust fund money, so if an employer fails to hand it over to the IRS, it is like theft.

The IRS tends to push hard in such situations, especially when payroll tax failures reflect a pattern. The IRS can close a business, and sometimes even take court action to make it doubly clear that the IRS does not want a repeat performance. If you are in business, it can be tempting to figure that you have to keep the rent paid and supplies ordered, and that the IRS won't miss the payroll tax money if you just divert it temporarily. But, no matter how good the reason, the practice is dangerous. It is one reason that in cases where the IRS catches the problem early, the IRS will encourage use of a payroll service.

Any failure to pay—even late payment—is serious, regardless of how or why the employer or its principals use the money. Using the money to pay suppliers and keep the business open isn't a good reason in the IRS view. Payroll services are one common answer, so the employer doesn't have discretion to use the money to pay vendors or for anything else. But what if the payroll service takes the money? That horrific possibility features prominently in a report from the Treasury Inspector General.

So be careful who you hire too. When a tax shortfall occurs, the IRS will usually make personal assessments against all responsible persons who have ownership in or signature authority over the company and its payables. The IRS can assess a Trust Fund Recovery Assessment, also known as a 100-percent penalty, against every "responsible person" under Section 6672(a). You can be liable even if have no knowledge the IRS is not being paid.

If you're a responsible person the IRS can pursue you personally for payroll taxes if the company fails to pay. The 100% penalty equals the taxes not collected. The penalty can be assessed against multiple responsible persons, allowing IRS to pursue them all to see who coughs up the money first. "Responsible" means officers, directors, and anyone who makes decisions about who to pay or has check signing authority.

For alerts to future tax articles, email me at Wood@WoodLLP.com. This discussion is not legal advice.