Responsible Person Liability for Sales and Use Taxes:  
They Don’t Pay You Enough for This!

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As states struggle to generate revenue and recover from the recent economic downturn, they are more aggressively trying to recover unpaid entity-level sales and use tax liabilities from “responsible persons” held accountable under the law for those taxes. This session will explore the circumstances in which responsible persons may be held personally liable for these entity-level taxes, noting differences in the states’ approaches to critical issues and analyzing potential defenses that may be available to thwart the imposition of personal liability.

An understanding of these issues may prevent your employer’s liabilities from becoming your own. After attending the session, the participant will be able to:

• Identify key issues concerning the imposition of responsible person liability

• Understand who may be held liable as a “responsible person,” for what periods and what amounts

• Distinguish different states’ approaches to imposing responsible person liability

• Analyze key determinants to imposing responsible person liability

• Recognize potential defenses to the imposition of responsible person liability

Given the breadth of this topic, these materials are not exhaustive of all authorities and issues surrounding responsible person liability for entity-level sales and use taxes. Rather, the speakers have selected those issues and authorities deemed most worthy of discussion to illustrate principles of interest to IPT members. In addition, because many instances of responsible person liability are not litigated to the level of a reported court decision, some examples included in these materials are administrative hearing decisions that may not be binding legal precedent in particular jurisdictions.

I. BACKGROUND

The specter of “responsible person liability” should be a foremost concern of business owners, officers, directors, members, partners and key employees, particularly those involved in collecting and remitting entity-level sales and use taxes. These concerns extend to in-house tax department personnel who manage the reporting and payment functions for these taxes.

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1 With appreciation for research contributed by Independent SALT Alliance members David Barrons (Michigan), Louis Fuller (Mississippi) and Ira Lipstet (Texas).
A. The Economic Climate

The recent increase in responsible person liability actions across the states may be traced to the general downturn in the national economy. As cash-strapped states search for new and creative ways to raise revenue, and become increasingly technologically sophisticated in enforcing their tax laws, they are also turning to responsible person liability laws in order to recover unpaid entity-level sales and use taxes from individuals who were involved in the business. At the same time, this period of economic hardship has caused liquidity problems for many businesses, overwhelming their cash flow and allocation of scarce resources. Quite often, states pursue responsible person liability assessments following the bankruptcy, dissolution or liquidation of an entity, leaving responsible persons “holding the bag.” Once thought of as an extreme remedy, responsible person liability has become much more common.

B. The Government is Not Your Lender

One of the most important points in this session is that sales and use taxes should never be considered a funding source for business. Sales and use taxes are trust fund taxes that are considered state funds from the moment of collection. As state property, if they are not turned over to the state at the time and in the manner prescribed by law, that noncompliance may be deemed a theft of state funds.

Businesses must – at all costs – resist the temptation to treat the government as a lender and “borrow” tax funds to pay other creditors – even if that borrowing is short-term and with every intention of repaying the government when cash flow allows. Businesses that pay other creditors first do so at their peril. And that peril extends to individuals involved in making that decision.

While the government may not be banging on your company’s door every month demanding payment, tax collection agencies have “super-collection” powers not available to trade creditors. In addition to potential criminal liability for theft of state funds, responsible person liability may be imposed in addition to all other penalties imposed under a state’s tax laws. E.g., Fla. Stat. §213.29; Ind. Code §6-2.5-9-3(2); Va. Code Ann. §58.1-1815. Bankruptcy is also no defense – either the entity’s bankruptcy proceeding or the responsible person’s. No automatic stay will prevent collection of a responsible person liability assessment, nor is such an assessment dischargeable in a bankruptcy proceeding.

The limited liability under state law normally afforded to officers, directors and owners of an artificial entity is also stripped away, and dissolution of the entity is no defense against a personal liability assessment. E.g., Tex. Tax Code §111.016. Likewise, transferee liability generally is no defense against a personal liability assessment. E.g., Beltram v. So. Car. Dep’t of Revenue, Docket No. 13-ALJ-17-0244-CC (S.C. 3/25/15); cf., Mich. Code 205.27a(5)(successor liability must be pursued prior to responsible person liability).

2 E.g., “data mining,” a topic discussed at prior symposia.

3 I.e., the state should pursue a transferee of the entity’s assets before pursuing the entity’s responsible persons to recover trust fund taxes.
C. What’s Not Covered

This session covers responsible person liability in the context of state sales and use taxes, but it is important to note that the same or similar principles may apply to federal income tax, Social Security and Medicare withholdings, as well as state fuel taxes, gross receipts taxes and other similar taxes.

Interested persons should also be aware of state laws governing the dissolution, winding up and distribution of an entity’s assets, as well as preferential transfer laws, which may also bear on individual liability for unpaid entity taxes. This session will not delve into those issues.

II. WHO CAN BE HELD LIABLE FOR WHAT AND WHEN?

As a general matter, most states impose personal liability for a company’s sales (and, potentially, use) taxes based on an individual’s involvement in the company’s finances and conduct in failing to file required tax returns or pay required taxes. E.g., Code of Ala. §§40-29-72 & 40-29-73 (any person with authority and control over corporate funds and payment of creditors, who participated in decision to pay other creditors and not trust fund taxes). These states impose liability on “any person” responsible for that process, based on some degree of culpability. However, other states impose derivative or “strict” liability on individuals based solely on their ownership interest in or position with the company, regardless of their individual blameworthiness. This section of the materials discusses the nature of the duty owed by responsible persons, who may owe that duty, and the standards by which states determine whether that duty has been breached, resulting in responsible person liability.

A. Fiduciary Duty Owed

1. Fiduciary Duty Generally

The duty owed by responsible persons to the state is generally recognized as a fiduciary duty, i.e., that the tax funds are held in trust as an agent for the state. E.g., Cash v. State, 628 So. 2d 1100, 1101 (Fla. 1993)(dealer’s conviction for grand theft upheld where he collected tax monies and used them to pay business and personal debts; law created principal-agent relationship between state and dealer, under which dealer acted in fiduciary capacity as agent for the state in collecting and remitting taxes). A fiduciary duty under the law generally requires a person to act with scrupulous good faith and candor primarily for the benefit of another. Black’s Law Dictionary, p. 563 (5th ed. © 1979).

This fiduciary duty is non-delegable. See, Ill. DOR Offc. of Admin. Hrgs., ALJ Decision ST 15-01 (1/20/15) (responsible persons have fiduciary obligation to properly care for funds entrusted to them and cannot absolve themselves of liability merely by disregarding that obligation and leaving it to someone else to discharge, or delegating that responsibility to someone else); In Re Sacher, N.Y. Div. of Tax App. DTA No. 824107 (7/2/15)(wife personally liable because she delegated sole authority to husband “who had a history of irresponsible business behavior, including nonpayment of taxes”); Heineman v. Testa, Oh. Bd. Tax App., Case No. 2013-1985 (6/23/15)(responsible person cannot “delegate away” control or supervision of tax filings and remittances in order to escape liability).
2. Who Owes That Duty?

This fiduciary duty is generally owed by all persons involved in collecting and remitting trust fund taxes, from the top corporate officers and directors down to the tax department employees responsible for collecting, accounting for and remitting these taxes. Most states imposing sales and use taxes have adopted comprehensive responsible person liability laws that encompass a broad range of activity. E.g., Oh. Admin. Code §5703-9-49; Tex. Tax Code §111.016. A common consideration is the individual’s authority and discretion to determine which company debts are paid. E.g., Mo. Rev. Stat. §144.157.1; Coffman v. DOR, Wa. Bd. of Tax App. Docket No. 85111 (3/11/15). As one Administrative Law Judge observed:

In determining whether an individual is a responsible person, the courts have indicated that the focus should be on whether that person has significant control over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and disbursal of funds. Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the government. The ability to sign corporate checks is a significant factor in determining whether a person is a responsible party because it generally comes with the ability to choose which creditors are paid. Individuals who hold corporate office and who have authority to make disbursements are presumptively responsible persons for purposes of 26 USC § 6672, the federal responsible officer statute.

Ill. DOR Offc. of Admin. Hrgs., ALJ Decision ST 15-01 (1/20/15)(citations omitted); see also, In re Nowell, Ia. DOR Docket No. 2013-300-2-0023 (Final Order, 1/7/15)(Control, supervision or authority may be established by corporate bylaws, duties assumed in practice, empowerment to sign checks or hire and fire employees, or control over financial affairs of corporation).

a) Joint and Several Liability

As discussed in more detail below, multiple persons may be held personally responsible for the same unpaid taxes. E.g., Mo. Rev. Stat. §144.157.1; Coffman v. DOR, Wa. Bd. of Tax App. Docket No. 85111 (3/11/15)(Multiple shareholders and officers/directors of corporation held personally liable for sales tax collected but not remitted by company); Ill. DOR Offc. of Admin. Hrgs., ALJ Decision ST 15-01 (1/20/15)(the law “does not confine liability to only one person or to the person most responsible. All responsible persons owe a fiduciary obligation to care properly for the funds that are entrusted to them”); In re Nowell, Ia. DOR Docket No. 2013-300-2-0023 (Final Order, 1/7/15)(Control over company’s financial affairs must be “significant,” but need not be exclusive); In Re Sacher, N.Y. Div. of Tax App. DTA No. 824107 (7/2/15)(wife’s liability was joint and several with husband’s, even though she had little to no involvement with day-to-day operations of entity); Heineman v. Testa, Oh. Bd. Tax App., Case No. 2013-1985 (6/23/15)(law does not require liability to attach to only one person; it applies to anyone who either exercised or had the power to exercise the requisite control over the entity’s financial affairs – unilateral control is not required).
States are increasingly requiring taxpayers to self-identify potential responsible persons in the taxpayer’s application for a sales tax license. E.g., Calif. Seller’s Permit Application; Florida Business Tax Application, DR-1, item 12. In New York, auditors may request that a company complete a responsible person questionnaire after issuing an assessment notice to the company. E.g., Matter of Crescent Beach, DTA No. 822080 (N.Y.S. Tax App. Trib. 9/22/11); Matter of Grillo, DTA No. 823237 (N.Y.S. Div. of Tax App. 11/3/11).

b) Officers/Directors

States differ in their approach to imposing responsible person liability on officers or directors of corporate taxpayers. Most states impose responsible person liability only on officers and directors who bear some responsibility for or control over filing sales tax returns or remitting taxes to the state; a few states, on the other hand, impose liability on officers and directors regardless of whether they bear that responsibility or have that control.

(1) Responsible for filing returns or remitting taxes.

- Ala. Code §40-29-72(b): officer of a corporation, or a member of a partnership, who as such officer, or member is under a duty to perform the act in respect of which the violation occurs

- Calif. Rev. & Tax. Code, ch. 6, art. 8, §6829: Applies on termination, dissolution or abandonment of any business, to officer, member, partner or “other person” having control or supervision of, or who is charged with responsibility for, filing returns or paying taxes, or who is under a duty to act for the entity in complying with any requirement of the sales and use tax laws

- Conn. Gen. Stat. §12-414a: Any officer who is responsible for or has supervision over filing sales tax return or paying the tax

- Fla. Stat. §213.29: Any officer or director of a corporation who has “administrative control” over the collection and payment of sales tax and willfully directs any employee of the corporation to fail to collect or pay over, evade, defeat or truthfully account for the tax. E.g., Sarmentaro v. Fla. DOR, DOAH Case No. 11-4681 (3/7/13)(corporate president personally liable for corporation’s default on its stipulated time payment agreement for delinquent sales tax)

- Oh. Rev. Code §5739.33; Oh. Admin. Code §5703-9-49: Officer liable if responsible for executing entity’s fiscal responsibilities on date return is filed or required to be filed (whichever is earlier) under specified circumstances (discussed below)

- Mich. Code §205.27a(5): Officer must have had actual responsibility for tax filing or payment and willfully failed to file or pay during the time period of default
• Mo. Rev. Stat. §144.157.3: Any officer, director or statutory trustee of any corporation who has direct control, supervision or responsibility for filing returns and making payments of tax, and who fails to file such return or make payment of all taxes due

• Va. Ruling P.D. 12-100 (6/15/12): 20% shareholder elected president of corporation was not a responsible person because he did not have specific duty of timely reporting and paying tax on behalf of corporation; individual also lacked knowledge of corporation’s failure to file and pay taxes until after resignation of secretary-treasurer, who oversaw all of corporation’s financial dealings

(2) Regardless of responsibility for filing returns or remitting taxes.

• Md. Code Ann., Tax-Gen. §11-601(d): Personal liability for sales and use taxes imposed on “any president, vice president or treasurer,” regardless of whether that individual oversees or manages financial or tax matters; Fox v. Comptroller, 728 A. 2d 776 (Md. Ct. Spec. App. 1999);


(3) Other business entities.

Officer and director liability also applies to persons in similar positions with limited liability companies, business trusts, partnerships and other non-corporate business entities. E.g., Calif. Rev. & Tax. Code, ch. 6, art. 8, §6829; Oh. Rev. Code §5739.33 and Oh. Admin. Code §5703-9-49; Mich. Code §205.27(a)5. Liability may also extend to an officer of one member of an affiliated group that performs tax reporting or remittance functions for another member of the group. Oh. Admin. Code §5703-9-49.

c) Shareholders/Owners

States may additionally impose responsible person liability on shareholders and similar owners of an entity, often at specified ownership percentages:

• Oh. Admin. Code §5703-9-49: Officers of corporation or LLC, or trustee of business trust, who own (collectively or individually) more 50% of entity have non-delegable duty to execute fiscal responsibility of entity and are personally liable if: (i) entity filed return showing tax liability without submitting payment; (ii) entity failed to file return; (iii) entity collected tax; or (iv) individual actually controlled or supervised preparation and submission of returns

• Miss. Code Ann. §27-65-55(2): Persons owning stock of 10% or more of corporation or 10% interest in LLC of 35 or fewer owners and exercising responsibility for fiscal
management is liable for sales taxes that become due and unpaid to the extent such taxes accrued while such person was exercising responsibility for fiscal management.

At one time, certain field offices in the Florida Department of Revenue routinely assessed personal liability penalties against the owners of single member limited liability companies, regardless of the state’s statutory requirement that such persons willfully fail to comply with the law. The Office of General Counsel issued instructions to stop assessing those per se liabilities, but the sentiment may still linger among local collection agents. In contrast, a New York State Department of Finance & Taxation policy offers prorated relief from per se liability to qualifying minority-interest limited partners and LLC members under specified conditions. New Policy Relating to Responsible Person Liability Under the Sales Tax Law, TSB-M-11(17)S (9/19/11); e.g., Matter of Franklin, DTA No. 824910 (N.Y.S. Tax App. Trib. 5/14/15)(minority owner entitled to prorated relief from LLC’s sales tax liabilities after factors indicative of his duty to act (i.e., managerial responsibilities, authority to hire and check-signing authority) were no longer present).

d) Key Employees

Responsible person liability may extend to key employees responsible for collecting, accounting for or remitting sales and use taxes. For example:

- Oh. Admin. Code §5703-9-49: Employee is personally liable if: (i) Signs or prepares and submits without signing any sales or use tax return; (ii) Supervises or controls other employees who do so; or (iii) Exercises authority to sign checks drawn on entity account; however, employee not personally liable if he or she can show that the failure to comply resulted from orders from an officer, trustee or supervising employee which prevented the employee from complying.

Typically, this liability is imposed on anyone who signs checks for the business and has authority to determine which business debts are paid. E.g., Ill. DOR Offc. of Admin. Hrgs., Docket No. ST 14-29 (11/14/14)(secretary/manager of corporation who had authority to sign checks and execute tax returns was held personally liable for unpaid sales taxes; delegation of those functions to outside accountant was unpersuasive, because secretary/manager had power to supervise and control accountant, but failed to do so); Coffman v. DOR, Wa. Bd. of Tax App. Docket No. 85111 (3/11/15)(control or supervision over collected tax funds must be “significant” to impose personal liability, i.e., authority and discretion to determine which debts paid).

Employees may also be found liable under the “catch all” provisions applicable to “any person,” discussed below.

e) “Any Person”/Duty to Act

Many states include “catch-all” language in their statutes imposing personal liability on “any person” who meets specified criteria. E.g., Calif. Rev. & Tax. Code, ch. 6, art. 8, §6829 (Any “other person” having control or supervision of, or who is charged with responsibility for, filing returns or paying taxes, or who is under a duty to act for the entity in complying with any

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requirement of the sales and use tax laws); Fla. Stat. §213.29 (Any person who is required to collect, truthfully account for and pay over sales or use tax, and willfully fails to do so or willfully attempts in any manner to evade or defeat the tax or payment thereof); Mo. Rev. Stat. §144.157.1 (Any person responsible to collect and pay over sales or use tax who willfully fails to do so is personally liable for payment of the tax).

This liability is often expressed in terms of the individual’s “duty to act” on behalf of the entity to ensure its compliance with the state’s sales and use tax laws. E.g., Calif. Rev. & Tax. Code, ch. 6, art. 8, §6829; Mass. Ann. Laws Ch. 64H, §16; N.J. Stat. Ann. §54:32B-2(w); N.Y. Tax Law §1131(1); N.C. Gen. Stat. §105-242.2(b). In Cooperstein v. Director, Div. of Tax., 13 N.J. Tax 68 (Tax Ct. 1993), aff’d 14 N.J.Tax 192 (App. Div. 1994), the New Jersey Tax Court looked at 9 factors to determine whether a person has “duty to act”:

1. Contents of corporate bylaws
2. Status as officer or shareholder
3. Authority to sign checks, and actual exercise of that authority
4. Authority to hire and fire employees, and actual exercise of that authority
5. Responsibility to prepare and/or sign tax returns
6. Day-to-day involvement in business, or responsibility for management
7. Power to control payment of corporate creditors and taxes
8. Knowledge of failure to remit taxes when due
9. Derivation of substantial income or benefits from corporation

See also, 20 N.Y. Comp. Codes R. & Regs. 562.11(b)(2): duty to act is imposed on: persons authorized to sign returns; persons responsible for maintaining corporate books; persons responsible for managing the company – even if that person did not have a duty to remit tax on behalf of the company; e.g., Matter of Franklin, DTA No. 824910 (N.Y.S. Tax App. Trib. 5/14/15)(minority owner entitled to prorated relief from LLC’s sales tax liabilities after factors indicative of his duty to act (i.e., managerial responsibilities, authority to hire and check-signing authority) were no longer present); In Re Sacher, N.Y. Div. of Tax App. DTA No. 824107 (7/2/15)(question is not whether responsible person actually exercised authority over entity, but whether person could have exercised such authority and control to ensure proper tax was collected and paid).

These statutes extend potential liability to anyone who signs checks for a business or who otherwise has the authority to direct spending of business funds. E.g., Mo. Rev. Stat. §144.157.1
(Includes persons who can and do sign checks or tax returns, but must have actual authority to determine which creditors are paid). This may include outside accountants, volunteers, and persons acting as attorney-in-fact or as a surrogate (e.g., personal representative) for a responsible person. E.g., Comptroller v. Liuzza, 610 F. 3d 937 (5th Cir. 2010) (bankruptcy trustee held personally liable for paying other creditors and not state sales tax obligations of bankruptcy estate).

III. Standard Imposed: Derivative or “Strict” Liability vs. Willful Failure

States differ on the standard by which they determine whether a responsible person has breached his or her fiduciary duty. Some states impose derivative or “strict” liability on responsible persons for the entity’s failure to remit trust fund taxes or file requisite tax returns, while other states only impose liability if that individual willfully fails to file returns or pay taxes that are due. States also differ in how they define “willful failure.” This section of the materials explores these various approaches employed by the states.

A. Derivative or “Strict” Liability

Several states impose strict liability on responsible persons, regardless of whether that individual intended to violate the sales and use tax laws. Under these states’ laws, if the entity fails to pay sales tax when due, personal liability is imposed on those officers and employees deemed under the law to be “responsible” for that failure. E.g., Heineman v. Testa, Oh. Bd. Tax App., Case No. 2013-1985 (6/23/15). For example:

- Conn. Gen. Stat. §12-414a: Any officer who is responsible for or has supervision over filing sales tax returns or paying the tax
- Miss. Code Ann. §27-65-55(2): Persons owning stock of 10% or more of corporation or 10% interest in LLC of 35 or fewer owners and exercising responsibility for fiscal management is liable for sales taxes that become due and unpaid to the extent such taxes accrued while such person was exercising responsibility for fiscal management
- Oh. Rev. Code §5739.33 and Oh. Admin. Code §5703-9-49: Officers or trustees of entity that fails to file returns or remit taxes are personally liable for sales or use tax if responsible for executing entity’s fiscal responsibilities on date return is filed or required to be filed, whichever is earlier, by:
  - Signing return or preparing and submitting return without signing
  - Signing or preparing and submitting without signing any other tax return, unless entity divided up responsibility for different tax returns
- Exercising management, control or authority over employees whose duties include preparing, signing or filing returns
- Retaining, directing or otherwise controlling outside accountants, bookkeepers or other persons charged with filing returns for entity
- Exercising authority to sign checks or authorizing use of signature stamp or facsimile to sign checks drawn on entity’s account to pay tax liabilities
- Determining priorities by which entity’s creditors are paid instead of state, including in-kind distribution of entity assets
- Using or managing sales or use taxes paid by consumers and held in trust for benefit of state, or instructs employee to do so
- Performing any other function that would indicate control over entity’s fiscal operations

- 20 N.Y. Comp. Codes R. & Regs. 562.11(b)(2): Mere duty to act is sufficient: persons authorized to sign returns; persons responsible for maintaining corporate books; persons responsible for managing company – even if did not have duty to remit tax on behalf of company; e.g., Matter of Franklin, DTA No. 824910 (N.Y.S. Tax App. Trib. 5/14/15)(minority owner entitled to prorated relief from LLC’s sales tax liabilities after factors indicative of his duty to act (i.e., managerial responsibilities, authority to hire and check-signing authority) were no longer present); In Re Sacher, N.Y. Div. of Tax App. DTA No. 824107 (7/2/15)(question is not whether responsible person actually exercised authority over entity, but whether person could have exercised such authority and control to ensure proper tax was collected and paid).

- Tex. Tax Code §111.016:
  - Any person who receives or collects a tax or any money represented to be a tax holds the same in trust for the state and is liable for the full amount collected, plus interest and penalties
  - Includes any person who controls or supervises the collection of tax or money from another
  - Includes any person who controls or supervises accounting for or paying over tax or money
  - Includes, but is not limited to, any officer, director, manager or employee of corporation, association, LLC or partnership with a duty to perform an act with respect to collecting, accounting for or payment of tax or money

- Coffman v. DOR, Wa. Bd. of Tax App. Docket No. 85111 (3/11/15): On dissolution of corporation, any individual having control or supervision of sales tax funds collected shall be personally liable for any unpaid tax, penalty and interest
• W.Va. Code §11-15-17: Corporate officers liable, without standards for imposition; 
  *Scheml v. Commr.*, 222 W. Va. 98 (1998)(State due process protections may absolve 
corporate officer from personal liability under “fundamental fairness” test – assessment 
must not be arbitrary, capricious or unreasonable)

**B. Willful Failure**

Many states impose responsible person liability based on an individual’s “willful failure”
to comply with that state’s sales and use tax laws requiring the collection and remittance of taxes 
and the filing of returns. E.g.:

• Calif. Rev. & Tax. Code, ch. 6, art. 8, §6829(a) (“Upon the termination, dissolution, or 
abandonment of the business, … any officer, member, manager, partner, or other person 
having control or supervision of, or who is charged with the responsibility for the filing 
of returns or the payment of tax, or who is under a duty to act for the [business] … in 
complying with any requirement of this part, shall … be personally liable for any unpaid 
taxes and interest and penalties on those taxes, if the officer, member, manager, partner, 
or other person willfully fails to pay or to cause to be paid any taxes due from the 
[business] pursuant to this part”)

• Fla. Stat. §213.29 (“Any person who is required to collect, truthfully account for, and pay 
over any [sales or use] tax … and 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 
such tax or the payment thereof” is personally liable)

• Ill. Code 35 ILCS 735/3-7 (officer or employee of entity who has control, supervision or 
responsibility for filing sales tax returns and payments, and willfully fails to perform)

  1. What does “willful failure” mean?

States differ in their definition of “willful failure.” Some states, like Florida, take a 
narrow view that “willful” in this context requires actual intent to violate the tax laws. Fla. 
Admin Code Rule 12-13.002(7)(“Willful” means with actual knowledge or belief that such act 
or omission constitutes [a violation of the state’s revenue laws] and with intent nevertheless to 
commit or cause such act or omission”). Other states expand the “knowledge” requirement to 
include constructive knowledge, i.e., that the responsible person “knew or should have known” 
of the requirement to pay taxes or of the specific outstanding tax liability. E.g., Ill. DOR Offc. of 
Admin. Hrgs., ALJ Decision ST 15-01 (1/20/15)(Responsible person “knew or should have 
known whether returns were filed and taxes paid”); *Matter of Steinberg*, DTA No. 822971 
(N.Y.S. Div. of Tax App. 9/9/10)(considering whether individual had knowledge of tax liability 
through educational background or work experience); *Dellorfano v. Comm’r*, 2010-972 (Mass. 
App. Tax Bd. 10/22/10)(corporate officer had LLM in tax and worked as tax counsel for CPA 
firm); *Blackmon v. Maza & Friedman*, Case No. 46178 (Ga. Ct. App. 1971)(preferential transfer 
to other creditors in the face of tax assessed against company was willful attempt to evade or 
defeat tax).

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4 Based largely on 26 U.S.C. §6672, discussed below.

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Still other states take an even broader view that knowledge and intent to evade the tax are not required. E.g., Skaperdas v. Director, Div. of Tax., 14 N.J. Tax 103 (Tax Ct. 1994), aff’d 16 N.J.Tax 454 (App. Div. 1996); Ill. DOR Offc. of Admin. Hrgs., Docket No. ST 14-29 (11/14/14) (“Willful” failure to pay taxes does not require criminal intent or other “bad” motive; all that must be shown is a voluntary, conscious and intentional failure to collect, truthfully account for and pay over taxes held in trust for the government, or reckless disregard for obvious or known risks; subjective state of mind of responsible person is not determinative); see also, Calif. Rev. & Tax. Code, ch. 6, art. 8, §6829(d) (“willfully fails to pay or to cause to be paid" means that the failure was the result of an intentional, conscious, and voluntary course of action).

2. Reckless Disregard

Some states hold that reckless disregard of the known or obvious risk that these trust fund taxes may not be remitted to the government is a sufficient basis to impose responsible person liability. This standard may be satisfied by simply showing indifference to the company’s legal obligations to collect and timely remit sales and use taxes, and nonpayment of those taxes:

- **Beltram v. So. Car. Dep’t of Revenue**, Docket No. 13-ALJ-17-0244-CC (3/25/15): President of company personally liable for tax funds embezzled by bookkeeper who had ability to sign company checks using stamp of president’s signature, where president was her supervisor and responsible for verifying that corporate accounts reconciled, yet sold assets of company and “didn’t do anything” to wind up corporate affairs of company

- **State v. Crawford**, 262 S.W.2d 532 (Tex. Ct. App. 2008): Willful failure to pay tax includes both knowledge that taxes owed and payment of other creditors, and reckless disregard of risk that taxes may not be paid to state

- Ill. DOR Offc. of Admin. Hrgs., ALJ Decision ST 15-01 (1/20/15): “Willfulness includes “failure to investigate or to correct mismanagement after having notice that … taxes have not been remitted to the Government… [and] may indicate a reckless disregard for obvious or known risks”

  a) IRC §6672 Standard

Some states impose responsible person liability using standards similar to, or based on decisions interpreting, the federal “responsible person” liability statute in 26 U.S.C. §6672(a). E.g., Fla. Stat. §213.29; Tex. Tax Code §111.016.

- 26 U.S.C. §6672(a):
  - 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.

• Tex. Tax Code §111.016:
  o Any person who receives or collects a tax or any money represented to be a tax holds the same in trust for the state and is liable for the full amount collected, plus interest and penalties
  o Includes any person who controls or supervises the collection of tax or money from another
  o Includes any person who controls or supervises accounting for or paying over tax or money to the state
  o Includes, but is not limited to, officers, directors, managers and employees of corporation, association, LLC or partnership with duty to perform an act with respect to collecting, accounting for or payment of tax or money to the state

• Ill. DOR Offc. of Admin. Hrgs. ALJ Decision ST 15-01 (1/20/15):
  o Liability attaches to those with power and responsibility within corporate structure for seeing that taxes are remitted to the government [citing Monday v. U.S., 421 F.2d 1210 (7th Cir. 1970)]
  o Ability to sign checks is a significant factor because of ability to determine which creditors are paid; persons holding corporate office and who have authority to make disbursements are presumptively responsible persons under 26 USC §6672 [citing Hildebrand v. U.S., 563 F. Supp. 1259 (D.C. N.J. 1983)]

• Ill. DOR Offc. of Admin. Hrgs., Docket No. ST 14-29 (11/14/14): “For guidance in determining whether a person is responsible under [state law], the Illinois Supreme Court has referred to cases interpreting section 6672 of the Internal Revenue Code, 26 U.S.C.A. section 6672. These Federal cases state that the critical factor in determining responsibility is whether the person had "significant" control over the corporation's finances. A key indicia of such control is participation in decisions regarding the payment of creditors and disbursement of funds. Significant control does not mean exclusive or absolute control over the dispersal of funds. All that is required is that the person could have impeded the misapplication of revenues to pay expenses other than delinquent tax liabilities by preventing the corporation from squandering the taxes that it should have paid to the taxing authority.” (Citations and footnote omitted.)

C. Periods, Types of Taxes and Amount of Liability

Like the variety of standards states employ to impose responsible person liability, states also use different approaches to determine the amount of that liability. These materials discuss these different approaches to determining the periods for which a responsible person may be liable, the types of taxes involved, and the amount of potential responsible person liability.
1. **Periods for Which Responsible Person May Be Held Liable**

   **a) Generally**

   A responsible person’s liability for an entity’s taxes generally includes both trust fund taxes that are withheld or collected, and those previously withheld or collected that become due, during that person’s tenure of responsibility. E.g., Fla. Stat. §213.29 (Any person 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 such tax or the payment thereof; or any officer or director of a corporation who has administrative control over the collection and payment of such tax and who willfully directs any employee of the corporation to fail to collect or pay over, evade, defeat, or truthfully account for such tax”); *Heinemann v. Testa*, Oh. Bd. Tax App., Case No. 2013-1985 (6/23/15). In the case of the former, this liability rests on the person’s responsibility to ensure that the taxes collected on his or her “watch” are remitted and is imposed regardless of whether the person holds that position at the time the taxes are required to be paid to state; in the case of the latter, this liability rests on the person’s responsibility to ensure that trust fund taxes in hand are remitted and is imposed regardless of whether the person held that position at the time the taxes were withheld or collected.

   However, a state may limit liability to taxes that became due during the period of responsibility. E.g., Calif. Rev. & Tax. Code, ch. 6, art. 8, §6829(b)(“The officer, member, manager, partner, or other person shall be liable only for taxes that became due during the period he or she had the control, supervision, responsibility, or duty to act for the [entity]”). For example, in *State Board of Equalization v. Wirick*, 93 Cal. App. 4th 411 (2001), the court held that a former corporate officer who willfully failed to pay sales tax was personally liable, even though he was no longer an officer at time the corporation dissolved. See also, *Beltram v. So. Car. Dept. of Rev.*, Docket No. 13-ALJ-17-0244-CC (3/25/15) (former president of company was not liable for sales tax accrued after he no longer had control of company).

   **b) Statutes of Limitations**

   States differ in their approaches to determining the limitations period that applies to responsible person liability assessments. Some states apply a limitations period based on the entity’s assessment, while others apply a distinct “stand-alone” limitations period.

   **(1) Derivative of Entity’s Assessment.**

   For example, under Miss. Code Ann. §27-65-55(2), responsible person liability is derivative of the entity, and the 36-month period within which to assess responsible person liability begins to run after the entity’s assessment becomes final. Similarly, in *Beltram v. So. Car. Dep’t of Revenue*, Docket No. 13-ALJ-17-0244-CC (3/25/15), the Administrative Law Judge held that, because a corporate president’s personal liability was derived from his role in the corporation, timely notices of assessment issued to the corporation also constituted notices of assessment to him personally and the law did not require a separate notice of responsible person liability assessment; however, expiration of the 10-year tax lien for corporate assessments likewise meant those assessments could not be collected from the corporate president under the guise of responsible person liability.
(2) **Stand-Alone Limitations Period.**

Several states add a separate limitations period for purposes of assessing responsible person liability. E.g., N.C. Gen. Stat. §105-242.2(e)(1 year added from expiration of entity’s statute of limitations); Tex. Tax Code §111.016(limitations period for responsible person liability tolled for 1 year after entity liability becomes final or entity’s bankruptcy proceeding is closed or dismissed).

In California, a notice of deficiency for responsible person liability must be mailed within 3 years of the last day of the calendar month following the quarter in which the State Board of Equalization obtains actual knowledge through its audit or compliance activities, or by written communication with the entity or its representative, of the termination, dissolution, or abandonment of the business of the entity, or within 8 years of last day of calendar month following the quarter in which the entity is terminated, dissolved or abandoned, whichever is earlier. Calif. Rev. & Tax. Code, ch. 6, art. 8, §6829(f).

(3) **Types of Taxes Which May Be the Subject of Responsible Person Liability**

State responsible person liability laws commonly apply to sales and use tax collected from customers that is not remitted to the state. E.g., Ga. Tax Code §48-2-52 (applies to persons having control or supervision of “collecting from purchasers” and of accounting for and paying over taxes); Mich. Code §205.27a(5)(trust fund taxes collected from third parties and not remitted); Mo. Rev. Stat. §144.157.1 (willful failure to collect and pay over sales or use tax); Miss. Stat. Ann. §27-65-55(2)(applies to “sales taxes levied by this chapter”); Tex. Tax Code §111.016 (any person who receives or collects a tax or any money represented to be a tax).

But many state responsible person liability statutes potentially have much broader application. For example, California law imposes responsible person liability on any person who “willfully fails to pay or to cause to be paid any taxes due from the [entity] to this part,” which includes the full spectrum of both sales and use taxes. Calif. Rev. & Tax. Code, ch. 6, art. 8, §6829(a). The statute further explains that this liability may be imposed where the entity “included tax reimbursement in the selling price of, or added tax reimbursement to the selling price of, tangible personal property sold in the conduct of its business, or when it can be established that the [entity] consumed tangible personal property and failed to pay the tax to the seller or has included use tax on the billing and collected the use tax or has issued a receipt for the use tax and failed to report and pay use tax.” Id. at §6829(c). Thus, liability may be imposed not only for sales and use tax that was not collected and remitted, but also for sales and use tax that the entity failed to pay to its vendors. See also, Co. Rev. Stat. §39-21-116(2)(applies to any of 13 taxes administered under Article 21, including sales and use taxes); Fla. Stat. §213.29 (“any tax enumerated in … chapter 212 [Florida sales and use tax act]”); Va. Code Ann. §58.1-1813 (applies to any of 23 taxes administered by Department of Taxation, including sales and use taxes). Other states’ laws specifically provide that responsible person liability extends to use tax that is required to be self-accrued and remitted by an entity under its direct-pay authority. E.g., Oh. Admin. Code §5703-9-49.
(4) Amount of Entity Taxes That May Be the Subject of Responsible Person Liability

Many states impose responsible person liability for the full amount of the entity’s tax, penalty and interest liability during the period in question. E.g., Calif. Rev. & Tax. Code, ch. 6, art. 8, §6829(b)(taxes that became due during the period person had control, supervision, responsibility, or duty to act for entity, plus interest and penalties on those taxes); Tex. Tax Code §111.016.

Other states impose such liability based on some multiple of the entity’s tax liability. For example, Colorado imposes responsible person liability for 150% of the tax due from the entity. Co. Rev. Stat. §39-21-116.5. Florida, in contrast, imposes a penalty in the amount of “twice the total amount of the tax evaded or not accounted for or paid over.” Fla. Stat. §213.29.

Responsible persons may also be liable for penalties in addition to these amounts (as well as criminal liability, as noted at the outset). E.g., Conn. Gen. Stat. §§12-414a & 12-419(a)(responsible person liable for 15% late-filing penalty + interest at 1%/mo. from due date of entities’ taxes); Fla. Stat. §213.29 (200% responsible person penalty “shall be in addition to any other penalty imposed or that should have been imposed under the revenue laws of this state”); Miss. Code Ann. §27-65-55(2)(DOR may assess taxes, “damages” and interest against responsible person, and collect by same procedures as for collection of all taxes).

(5) Nature of Responsible Person Liability

Once responsible person liability has been assessed, a secondary issue is the nature of that liability. The characterization of a responsible person liability assessment as a penalty or some combination of tax, penalty and interest may affect the grounds for challenging the assessment and for potential compromise of the assessment, as further discussed below.

In many states, a responsible person liability assessment presumably retains the same character as the amounts assessed as tax, penalty and interest against the entity. E.g., Calif. Rev. & Tax. Code, ch. 6, art. 8, §6829(b)(taxes that became due during the period person had control, supervision, responsibility, or duty to act for entity, plus interest and penalties on those taxes); Miss. Code Ann. §27-65-55(2); Tex. Tax Code §111.016.

Other states, consistent with IRC §6672(a), deem the responsible person assessment to be a penalty. Fla. Stat. §213.29 (responsible person is “liable to a penalty equal to twice the total amount of the tax evaded or not accounted for or paid over”). The statute provides that the penalty “shall be abated to the extent that the tax is paid” and that “[a]ny penalty may be compromised by the executive director of the Department of Revenue as set forth in s. 213.21.” Fla Stat. §213.21(3)(a) provides that a taxpayer’s liability for these penalties may be compromised if the “noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud” and that the facts and circumstances are subject to de novo review in any administrative or judicial challenge to the assessment. Theoretically, at least, by treating the responsible person liability assessment as a penalty, the law affords a responsible person with leeway in the potential grounds to challenge the assessment.
D. Measure of liability

1. Joint & several liability

Joint and several liability means that the state can collect the entire amount due from any individual assessed with the liability and, even if several individuals are assessed, may collect the full amount due from any or all of them, disproportionately and without regard to degree of culpability as between the tax debtors. The individuals who pay the liability may have recourse against their co-debtors for disproportionate amounts paid. Examples include:

- WVa Code of State Rules §110-15-4a.6.3. Officer liability is joint and several so more than one officer may be held liable for the total amount of tax for the same period.

- La. Rev. Stat. Ann. § 47:337.46 permits collection of the entire amount due from any one or any combination of officers or directors, or managers or members of an entity who willfully fail to remit or account for taxes collected but not remitted.

- Under W. Va. Code §11-15-17; Code of State Rules §110-15-4a; Code of State Rules §110-15-17, the officers of a corporation or association that is required to pay sales tax may be held personally liable for the corporation's or association's failure to pay tax, additions to tax, penalties or interest.

E. When Does Liability Attach?

1. Any Time Tax Collected But Not Remitted

   a) Failure by Entity to Respond to DOR Inquiry Regarding Unpaid Taxes

- AL: Admin. Code 810-12-1-.02 provides assessment procedures for a 100% Penalty against a responsible corporate officer of a corporation or member of a partnership that has failed to pay over designated, trust-fund taxes as set forth in §40-29-73 and treats the assessment as an assessment of tax.

   b) As an Alternative to Collection from the Entity

- LA: La. Rev. Stat. Ann. § 47:337.46 provides that notwithstanding any other provision of law to the contrary, if any corporation, limited liability company, or limited partnership fails to file returns or to remit either state or local sales and use taxes collected from purchasers or consumer, the collector may, as an alternative means of enforcing collection, hold those officers or directors, or those managers or members as defined in R.S. 12:1301(A)(12) and (13), having direct control or supervision of such taxes or charged with the responsibility of filing such returns and remitting such taxes and who willfully fail to remit or account for such taxes collected, personally liable for the total amount of such taxes collected, and not accounted for or not remitted, together with any interest, penalties, and fees. Collection of the total amount due may be made from any one or any combination of such officers or directors, or managers or members as defined.
in R.S. 12:1301(A)(12) and (13), who willfully fail to remit or account for such taxes collected, by use of any of the alternative remedies for the collection of taxes as provided in R.S. 47:337.45.

2. Only After Entity Assessment Unsatisfied

- WVa Code of State Rules §110-15-4a.4. Officer liability arises when (1) tax is shown due on a return and a corporation or association fails to pay tax within 15 days after notice and demand for payment; (2) a final assessment is made against a corporation and the corporation does not pay the tax within 15 days after notice and demand for payment; or (3) the corporation or association fails to file a return after notice is given of the failure to file. Lien filing may not be required and liability also attaches even if the state has not attempted to collect the tax from the corporation. WVa Code of State Rules §110-15-4a.4.1; Code of State Rules §110-15-4a.4.2.

- Conn. Gen. Stat. § 12-414a. Persons who, on behalf of a retailer, are required to collect, truthfully account for and pay over tax and willfully fail to do so or who willfully attempt in any manner to evade or defeat the tax or the payment thereof, are made liable for a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over, including penalties and interest but only if the amount due cannot otherwise be collected from the retailer itself.

3. Whether or Not Entity Assessment Satisfied or Lien Filed

- Nev. Rev. Stat. § 360.297 makes officers, members or employees of a business entity personally liable if the individual willfully fails to collect or pay to the Department any tax or fee required to be paid to the Department or who attempts to evade the payment of any such tax or fee if the individual’s job or duty is to collect, account for or pay the tax or fee.

4. Entity Dissolution, Termination Or Abandonment Of Business

- CA Sales & Use Tax Law, ch. 6, §6829: Officer, member, manager, partner “or other person” having control or supervision of, or who is charged with responsibility for, filing returns or paying tax, or who is under a duty to act for entity in complying with “any requirement” of the sales and use tax laws. Evidence that partners were responsible for or willfully failed to pay over sales taxes collected was not required because §6829 does not operated as a shield against the otherwise applicable joint and several liability of general partners. SBE v. Leal, B.A.P. (9th Cir.), Dkt. No. CC-06-1207-MoDK, 03/16/2007.

5. Bankruptcy of Entity

The state had a valid claim for a responsible-person penalty against the bankrupt president of a defunct corporation for failure to pay use tax on an airplane. The burden of proof applicable outside of bankruptcy applied in the bankruptcy proceedings. Raleigh v. Illinois

IV. Defending Responsible Person Assessment

A. Best defense is a good offense

- Make paying over trust fund taxes your #1 priority
- Always allocate “voluntary” tax payments to trust fund taxes first
- Do not ignore DOR inquiries – foster cooperative working relationship
- Have adequate and reasonable internal controls
  - Outside auditors
  - Checks and balances over payment of trust fund taxes
  - Oversight over tax collection and remittance functions
- Don’t put both H & W (and their joint assets) in harm’s way
  - Make sure both are not officers and/or directors, and both do not have control over entity funds or check-writing authority
  - Personal liability puts your assets at risk
  - Most marital property protected from creditors of only one spouse
- Segregated bank account for each trust fund tax
  - E.g., Subway franchisee
  - Indemnification agreement
- Instruction letter or agreement upon termination re: payment of trust fund taxes during period of responsibility
- Responsible person should protect against liability in event entity fails to pay over taxes withheld during period of employment
- Contemporaneous file memos of your instructions to pay trust fund taxes

B. Defenses

- Circumstances beyond your control prevented compliance
- Intervening event: Unknown theft or embezzlement by someone else
• Financial institution take-over
  o Ex: floorplan financing

• Someone else – in a position of authority -- made the decision – and you couldn’t stop it

• The devil made me do it – someone else in a position of greater authority directed you to do it

• Control vs. ministerial check-writing duty

C. Collateral Attack on Entity Assessment

1. Burden of Proof
   a) Assessment prima facie correct. E.g., FL: responsible person assessment is prima facie correct in any proceeding to collect - §213.29, F.S.

2. Burden of persuasion

3. Should You Hire A Tax Representative?
   a) WA: Coffman v. Washington Department Of Revenue, Respondent, 85111; 85911; 86924, 03/11/2015

   b) IA: In the Matter of Dennis D. Nowell , Iowa Dept. of Inspections and Appeals, Administrative Hearing Division, 14DORFC006, 01/07/2015

D. Alternative Payment Options: Address the Entity’s Tax Debts to Avoid Personal Liability or, in Some Cases, Address Personal Liability

Either with respect to responsible person liability or, in the right circumstance, to address the liability of an entity so as to avoid responsible person liability, alternative payment options may be considered.

1. Installment Agreements

In situations in which the tax liability is final but the taxpayer is unable to pay it in full, the tax collector may offer programs under which the liability can be paid over time. See, e.g., Ala. Code § 40-2A-4(b)(6); Cal. Rev. & Tax Cd. § 6832; Tenn. Comp. R. & Regs 1320-2-1-.01. The degree to which supporting documentation (financial statements, bank records, income and expense information) must be disclosed to the tax collector and the degree to which supporting documentation must be provided depend on the rules of the jurisdiction seeking to collect the tax. A down payment, the execution of guarantees by principles of the business and automatic monthly bank account withdrawals may be required. In general, agreements to pay amounts due more quickly and smaller amounts due will require less paperwork and disclosure of financial
information. Liens may be filed and will not be released until the amount due is paid and the installment payments will generally take into account the accrual of penalty and interest over the term of the agreement. In general, the taxpayer must stay compliant with current payment and filing obligations over the course of the agreement or it will be considered defaulted and enforced collection activity will start again. See Va. Code Ann. § 58.1-1817; N.C. Gen. Stat. § 105-237(b). On the other hand, if the taxpayer remains compliant with current obligations during the term of the agreement and all payments are made timely pursuant to the agreement, all enforced collection activity (seizure of bank accounts and personal property, etc.) should stop.

2. **Offers in Compromise**

Some states have legislative or administrative programs to allow taxpayers to compromise a tax liability for less than the full amount due. See, e.g., FL §213.21, F.S.; La. Rev. Stat. § 47:1578 (allowing for compromises on tax liability of $500,000 or less); N.Y. Tax Law § 171; Nev. Rev. Stat. § 360.263. Like the federal government which allows the filing of an offer to compromise tax based on doubt as to liability as well as to doubt as to collectability, state programs may provide for the compromise of amounts due based on both doubt as to liability and doubt as to collectability. That is, the tax collector may be authorized to accept less than the full amount of tax, penalty and interest due if certain conditions apply, including:

- When there is serious doubt as to the collectability of the outstanding judgment or assessment;
- When there is serious doubt as to the taxpayer's liability for the outstanding judgment or assessment;
- When the administration and collection costs involved would exceed the amount of the outstanding liability; or,
- When it is in the best interest of effective tax administration.

This authority is generally wholly discretionary and there may be administrative or statutory limits on how frequently a taxpayer may apply for an offer.


a) **Pro Rata Reduction For Amounts Collected From Entity Or Other Responsible Persons** - FL: responsible person liability abated to extent entity assessment is paid - §213.29, F.S. Every dollar of entity assessment paid saves $2 in responsible person penalty.

3. **Tax Amnesties**

Tax amnesty legislation has become a popular mechanism for addressing state budget issues. A tax amnesty program, authorized by legislation and developed by the state tax collector, permit a taxpayer to receive, in exchange for payment of unpaid taxes, a waiver or abatement of all or of a portion of interest and/or penalties for the tax periods for which the
amnesty is applied. Amnesty programs are typically available during a limited window (or windows) of time (typically a few months of the amnesty year) and may involve incentives to claim amnesty during earlier offerings by reducing the applicable penalty and interest waiver for later windows. For example, during several Louisiana recent amnesty programs, if an application was approved, 50% of the interest and all of the penalties associated with the tax periods for which amnesty was applied were to be waived. La. Rev. Inf. Bull. No. 13-017 (Aug. 1, 2013); La. Rev. Inf. Bull. No. 14-017 (Aug. 21, 2014). Other states amnesty programs include Alabama (amnesty for eligible sellers using the simplified use tax remittance program effective October 1, 2015) and Indiana (the department must create an amnesty program for certain listed taxes that were due and payable before January 1, 2013). Ala. Code § 40-23-199; Ind. Code § 6-8.1-3-17.

a) Eligibility and Requirements

In general, amnesty programs may limit the types of taxes, the taxpayers and the tax periods eligible for amnesty and may contain restrictions on tax issues that are currently in litigation. See, e.g., Ala. Code § 40-23-199 (creating amnesty for use tax only for certain eligible sellers participating in the simplified use tax remittance program). Taxpayers who seek amnesty with respect to trust fund assessments and who are also involved in audits or litigation may be required to include all issues and all eligible periods involved in the audit or litigation and agree to abide by the tax administrator’s interpretation of the law with respect to issues involved in the audit or litigation for the amnesty periods and possibly a limited number of subsequent years and on return filings, and, if involved in litigation, to pay the tax administrator’s attorney’s fees and their own costs of litigation, or if for final assessments, lien removal fees. If the entity qualifies for amnesty and completes its obligations under an amnesty program, this should relieve the responsible persons of further liability but this must be established at the time amnesty is sought. In the majority of states in which personal liability is not automatic, the resolution of the entity’s liability should prevent the subsequent assessment of responsible persons.

b) Effect of Filing

The filing of an amnesty application makes the tax, interest, and penalty immediately due and payable and no further appeal can be made. Nevertheless, taxpayers who file amnesty applications should retain their administrative and judicial rights of appeal with respect to any additional tax assessed by the tax administrator during an audit. That is, an amnesty does not necessarily close a tax year that is otherwise open. Taxpayers area also generally required to remain compliant for a period of tax years after the amnesty periods.

4. Voluntary Disclosure Agreements

Resolution of an entity’s liability under a Voluntary Disclosure Agreement should also prevent collection of unpaid liabilities from otherwise responsible persons. A VDA is a method whereby a taxpayer can contact a tax department anonymously through a third-party representative in order to settle past tax liabilities and to register with the state to pay future tax liabilities. See, e.g., Mich. Comp. Laws § 205.30c(1); La. Admin. Code 61:III.2103; D.C. Office of Tax and Revenue Publication (Jan. 8, 2001). These agreements are very useful in situations where taxpayers discover a tax liability and lack of compliance after the fact and in light of the
likely tolling of any applicable statute of limitations as the result of the nonfiling of returns. Through the use of a Voluntary Disclosure Agreement, a taxpayer may anonymously enter into an agreement with a tax administrator to voluntarily pay taxes with a reduced or eliminated penalty and possibly a waiver or reduction in interest, while hopefully enjoying a limited “look-back” period beyond which the years will be deemed or treated as closed for audit purposes. La. Admin. Code 61:III.2103; Mich. Comp. Laws § 205.30c(15). In general, the look-back period will be the period for which the statute of limitations would have run had returns been filed timely - generally the current calendar year and the three immediately preceding calendar years. La. Admin. Code 61:III.2103; Mich. Comp. Laws § 205.30c(15). To be eligible, the taxpayer must have a filing requirement, must not be currently registered for the same tax, and must not have been previously contacted by the tax administrator concerning the filing requirement (such as in connection with an audit). La. Admin. Code 61:III.2103; Mich. Comp. Laws § 205.30c(4).

Taxpayers are generally not eligible for both amnesty and a VDA for the same tax type and same tax period. While voluntary disclosure is a standing option for taxpayers, amnesty is only available during periods for which the legislature has enacted a tax amnesty program.

5. **Penalty Waivers and other Options Regarding Penalties**

Where the failure to make a timely or accurate return or the failure to remit the full amount due on the return is attributable not to the taxpayer’s negligence but to other causes determined to be reasonable by the tax department, the department may have the discretion to remit or waive payment of the whole or any part of the specific penalty provided for such failure. Alternatively, penalties may be at issue in litigation and a court or state tax tribunal or other independent appeals forum may order the waiver of penalties.

If state law and administrative rules permit it, a taxpayer may seek a waiver of penalties under certain circumstances. See, e.g., D.C. Code Ann. § 47-4221; N.C. Gen. Stat. 105-237(a) (granting secretary authority to waive penalties); La. Rev. Stat. Ann. § 47:1451. In instances where the tax department has the authority to waive penalties, such as where the taxpayer’s failure to accurately report or remit or to timely file is not due to negligence and is considered reasonable, the taxpayer is not considered to have acted in bad faith or with intentional disregard of the rules or regulations, a waiver is unlikely to be granted unless the taxpayer is current in filing all tax returns and paying all liabilities not in dispute. La. Admin. Code. 61.III.2101.

As mentioned above, if pleas for the waiver of penalties fall on deaf ears with the tax collector and the taxpayer still has appeal rights to the courts (judicial or an administrative tribunal), there are instances in which courts have waived penalties where justice and equity require it. See United Companies Printing Co. v. City of Baton Rouge, 569 So. 2d 186 (La. App. 1 Cir. 1990); McNamara v. Stauffer Chemical Co., 506 So. 2d 1987 (La. App. 1 Cir. 1987); Saia Elect., Inc. v. McNamara, 540 So. 2d 387 (La. App. 1 Cir. 1989); Consolidated Companies, Inc. v. Louisiana Dept. of Rev. and Tax’n, 572 So. 2d 169 (La. App. 1 Cir. 1990). Statutory or jurisprudential law may differ as to whether the taxpayer or the tax administrator has the burden of proof as to whether penalties apply. Taxpayers may be eligible to obtain relief from penalties through voluntary disclosure and/or amnesty programs offered by the state. These programs are discussed in more detail above.