

The Form 4180 Memorandum

The twelve questions that determine whether the company's unpaid payroll taxes become your personal debt — and what the revenue officer is establishing with each one.

For corporate officers, controllers, and owners facing assessment under Internal Revenue Code § 6672.

NYAR TAX

Federal Payroll Tax Defense — Nationwide

Authorized to represent taxpayers before the Internal Revenue Service in all 50 states under Treasury Department Circular 230
Admitted, Illinois State Bar and United States Tax Court

What This Interview Actually Is

Form 4180 is presented as a routine questionnaire, but it is far from routine. When a business fails to remit withheld income and employment taxes, the IRS may collect the withheld portion a second time — personally — from the individuals it determines were responsible. The Form 4180 interview is how the revenue officer builds that case, and your answers become the record supporting the assessment against you.

*If you have a Form 4180 interview scheduled and intend to answer these questions without counsel, the interview is not an interview. **It is testimony.***

The Two Elements the Government Must Prove

Liability under § 6672 requires both. Neither is presumed. Both are contestable, and they are proven by entirely different facts.

- Responsibility — that you had the status, duty, and authority to direct payment of the company's obligations, including its federal tax deposits.
- Willfulness — which does not mean what most people assume. See below.

One point that changes the number in dispute: the assessment reaches only the trust fund portion — withheld income tax and the employees' share of FICA. It does not reach the employer's matching share, nor the penalties and interest accrued at the entity level. Your personal exposure is materially smaller than the balance on the company's account. Many people negotiate for months against a figure that was never theirs.

The Responsibility Questions

The revenue officer is not interested in your title. Responsibility turns on actual authority over funds. A controller with signature authority may be liable; a majority owner who genuinely delegated all financial control may not be. Responsibility is also not exclusive — several people can be liable for the same quarter.

1. Did you have authority to sign company checks?

Establishing: Direct control over disbursements — the most heavily weighted factor in most cases. The question is about authority, not practice. Signature cards matter even if you rarely signed.

2. Could you hire and fire employees?

Establishing: Operational control. Weak alone, used cumulatively to show your authority was genuine rather than nominal.

3. Did you determine which creditors were paid, and in what order?

Establishing: The core of responsibility. Deciding the equipment lessor gets paid this week and the landlord waits is exactly the discretion § 6672 targets. Often asked in casual, conversational form.

4. Did you sign or authorize the Forms 941?

Establishing: Knowledge of the liability. A signature on a return showing a balance due is close to conclusive on awareness.

5. Did you make or authorize federal tax deposits?

Establishing: Direct involvement with the specific obligation at issue.

6. Could you open or close bank accounts, or borrow for the company?

Establishing: Financial policy authority. Also probes for personal guarantees, which the Service reads as principal-level involvement.

7. What was your ownership interest, and who else held authority?

Establishing: The universe of potential respondents. Your answer determines whose file the revenue officer opens next.

The Willfulness Questions

This is where most cases are lost. Willfulness under § 6672 requires no dishonesty and no intent to defraud. It requires only a voluntary, conscious decision to pay other creditors while knowing the withheld taxes were unpaid. Reckless disregard of an obvious risk also satisfies it.

You can be entirely honest, entirely well-intentioned, and still willful within the meaning of the statute. Most people held personally liable were trying to keep the company alive.

8. When did you first learn the payroll taxes were unpaid?

Establishing: The date willfulness begins. Everything after it is potentially fatal. You will be asked this in several different ways, and your answers will be compared.

9. After you learned, which creditors did the company pay?

Establishing: Willfulness itself. Suppliers, rent, the lender — or, most commonly, net wages to employees. Continuing to pay staff so the business could survive and eventually pay the tax is the most sympathetic fact pattern imaginable, and it is a textbook demonstration of willfulness.

10. Did anyone instruct you not to pay the taxes?

Establishing: Whether liability might shift to a superior — and simultaneously, whether you had knowledge. Courts often reject a “following orders” defense where you retained actual authority. Where genuine subordination existed it can be decisive, and it should be developed, not volunteered.

11. Were company funds subject to a lender's control?

Establishing: The encumbered-funds question. Where a secured lender controlled disbursements through a lockbox, sweep, or approval requirement, the argument that you lacked practical ability to direct payment becomes stronger.

12. Who prepared payroll and made the deposits?

Establishing: Whether a payroll provider or bookkeeper stands between you and the failure. Where a provider was funded but failed to remit, or an employee diverted deposits, knowledge may be defeated for the period before discovery.

What Actually Defeats an Assessment

None of these works on assertion alone; each requires documentary development. They are listed so you can recognize whether your facts contain one.

- **Third-party diversion** — a payroll service funded but not remitting, or an employee misappropriating deposits. Defeats willfulness before the date of discovery.
- **Absence of actual authority** — where a parent entity, lender, receiver, or controlling principal held the power to direct payment, notwithstanding your title.
- **Encumbered funds** — funds subject to a perfected security interest and the lender's actual control may not be funds you were free to apply to the tax.
- **Post-delinquency assumption of control** — *Slodov v. United States*, 436 U.S. 238 (1978), limits the extent to which someone who took over an already-delinquent business must apply after-acquired funds to the prior liability.
- **Misallocation** — the proposed figure frequently includes employer FICA, penalties, and interest that are not personally assessable. Recomputation often reduces exposure substantially.
- **Duplicate collection** — the trust fund amount is collectible once in the aggregate. Amounts recovered from the entity or another responsible person must be credited to you and should be monitored rather than assumed.
- **Expiration of the assessment period** — always check the older quarters before discussing the merits.

The Deadline — and the Door That Stays Open

If assessment is recommended, you will receive Letter 1153 with Form 2751. You generally have sixty days to file a written protest and obtain Appeals consideration — the least expensive and most favorable forum available to you. The deadline is not casually extended. Signing Form 2751 consents to immediate assessment and should not be signed without understanding what is conceded.

If the window has closed, most people are told nothing further can be done. That is not correct. Ordinarily a disputed tax must be paid in full before suing for refund, but the trust fund penalty is a divisible tax — composed of the withholding for each individual employee for each quarter. The full-payment requirement can therefore be satisfied by paying the amount attributable to one employee for one quarter, often a few hundred dollars, after which a refund claim may be filed and suit brought under § 7422 in district court or the Court of Federal Claims.

A missed sixty-day window is a fundamental problem. It is not the end of the matter.

If You Are Making Payments Right Now

When a voluntary payment is submitted without written instruction, the Service applies it in the government's best interest — generally to the non-trust-fund components first. The trust fund portion, the only portion assessable against you personally, remains outstanding.

The company's balance goes down. Your personal exposure does not. That result is avoidable, and it is avoided in writing.

A voluntary payment may be designated in writing to a specific tax, period, and component. Directed to the trust fund portion, each dollar reduces your personal liability directly. Involuntary collections such as levy proceeds cannot be designated, and the instruction must accompany the payment — it is generally not applied retroactively.

General information regarding federal trust fund recovery penalty procedure. Not legal advice; addresses no particular facts; distribution creates no attorney-client relationship. Section 6672 determinations are intensely fact specific. Anyone who has received Letter 1153, Form 2751, or a request to appear for a Form 4180 interview should obtain counsel promptly — the deadlines are short and are not routinely extended.

If You Are Holding One of These Notices

Letter 1153 · Form 2751 · A scheduled Form 4180 interview · Letter 1058 / LT11

Each carries a deadline measured in days. The first step is not representation — it is knowing what you are actually exposed to.

Trust Fund Exposure Analysis

A written attorney determination, within 5 business days of exactly how much of the company's federal payroll tax balance can reach you personally — and whether the Service can prove it.

- Transcripts pulled for every open quarter, balance split into trust fund and non-trust fund
- Responsibility and willfulness assessed separately against the Form 4180 question set
- Other potentially responsible parties, and the aggregate-collection consequences
- Your deadlines, and the options that survive if a window has closed

Credited in full against representation if we are engaged on the matter.

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