

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5108

Summary Calendar

IN THE MATTER OF: CHARLES G. VAGLICA,
Debtor.

CHARLES G. VAGLICA,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(90-CV-321)

(January 20, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

I.

A bankruptcy court overruled Charles Vaglica's objection to the IRS's proof of a claim for tax and interest. The claim

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

concerned unpaid employment taxes owed under section 6672 of the Internal Revenue Code by Vaglica's wholly-owned corporation for the third quarter of 1981 and the second and third quarters of 1982. Vaglica appealed to the district court, which affirmed the bankruptcy court. He appealed to this court. We affirm.

II.

Section 6672 makes an employer who fails to pay the IRS social security and income taxes withheld from employees under sections 3102 and 3402 of the Internal Revenue Code liable for a penalty equal to the amount of the unpaid taxes. Newsome v. United States, 431 F.2d 742, 745 (5th Cir. 1970). Section 6672 imposes liability upon a responsible person who acted willfully in not collecting, accounting for, or paying the owed taxes. Mazo v. United States, 591 F.2d 1151, 1153 (5th Cir.), cert. denied sub nom., Lattimore v. United States, 444 U.S. 842 (1979).

Vaglica does not contest that he was a responsible person under 6672, but argues that he did not act willfully in not paying the employment taxes. "Willfully" does not necessarily involve an evil motive or a specific intent to deprive the IRS of its taxes. Howard v. United States, 711 F.2d 729, 735 (5th Cir. 1983). The willfulness requirement includes a voluntary, conscious, and intentional failure to collect, truthfully account for, and pay the taxes withheld from the employees. Mazo v. United States, 591 F.2d at 1154.

The responsible person cannot make other use of funds that should have been paid to the IRS. The willfulness requirement is

satisfied if the responsible person becomes aware of unpaid withholding taxes and then pays other creditors. Barnett v. IRS, 988 F.2d 1449, 1458-59 (5th Cir. 1993), cert. denied, 62 U.S.L.W. 3375 (U.S. 1993). In addition, willfulness could involve the payment of regular wages without the withholding of employment taxes. Mazo, 591 F.2d at 1154.

Vaglica testified that he was not aware of the delinquency in employment taxes for the third quarter of 1981 until sometime in 1982. The IRS sent several notices of delinquency for the third quarter of 1981 to Vaglica's company in January 1982. The company received about \$150,000.00 in unencumbered funds from January 1981 to September 1982. It did not use this money to pay delinquent employment taxes, but used it to pay other claims, most notably those of its employees. This failure to pay the IRS establishes willfulness in this case.

III.

Vaglica argues for the first time on appeal that the bankruptcy court did not consider whether his failure to pay employment taxes was due to "reasonable cause" and that the bankruptcy court erred in placing the burden on him to prove that his failure to pay the taxes was not willful. The fact that Vaglica and the IRS agreed to a payment schedule might show "reasonable cause" for non-payment, but it is improper to challenge the bankruptcy court's judgment on new grounds not raised in the district court. We decline the invitation to consider these arguments.

IV.

Vaglica challenges the bankruptcy court's reliance on his failure to turn over to the IRS the remaining proceeds from an equipment sale in October 1982 as further evidence of his willfulness. In essence, he claims that he ensured that the proceeds would go to the IRS, but that the IRS failed to collect. The bankruptcy court heard testimony on this matter and found Vaglica's explanation wanting. He has provided no evidence suggesting a need to revisit this matter. At any rate, Vaglica makes an academic point because he paid employees with unencumbered funds that should have gone to the IRS, which proves willfulness as a matter of law.

V.

The district court rejected Vaglica's contention that the IRS stated a claim against him only with respect to the unpaid taxes for the third quarter of 1983 because the space marked "tax period" on that amended claim includes the notation "09/30/82." We agree that Vaglica's claim has no merit because section 6672 imposes a penalty equal to the total amount of unpaid employment taxes owed by the corporation. Section 6672 imposes a penalty for the total amount irrespective of the corporation's direct liability for the unpaid taxes.

As the IRS explains, though section 6672 involves no taxable period as such, it does concern employment taxes that have quarterly taxable periods. As a matter of administrative practice, when the IRS makes a section 6672 penalty assessment, it includes

the notice of assessment given to the taxpayer under the "tax period" heading. As the unpaid quarterly assessments often cover a period of years, the IRS often makes reference only to the last of the quarterly periods to which the section 6672 penalty relates.

At any rate, Vaglica should have been well aware before the IRS filed its proof of claim that it intended to hold him liable under section 6672 for the entire amount of unpaid employment taxes owed by the company: the IRS made a section 6672 assessment against him equal to the total amount of the unpaid taxes, provided him with notice of the assessment and demand for payment of the same, and filed notices of tax liens against his property reflecting the amount of the lump sum assessment.

AFFIRMED.