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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PUONGPUN SANANIKONE,
Plaintiff,

No. 2:07-cv-01434-MCE-EFB

v.

MEMORANDUM AND ORDER

UNITED STATES OF AMERICA,
Defendant.

AND RELATED COUNTERCLAIMS

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Plaintiff Puongpun Sananikone ("Sananikone"), a former official of American Steel Frame, Inc. ("ASFI"), has sued the government for (1) a refund of taxes that were assessed against and collected from him; and (2) the abatement of the Trust Fund Recovery Penalty under 26 U.S.C. § 6672 ("TFRP") that was imposed upon him. (ECF No. 1.)

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1 In its Answer, Defendant/Counterclaimant United States of America
2 ("United States" or "government") counterclaimed against
3 Counterclaim Defendant Michael Goodman ("Goodman"), another ASFI
4 executive, to reduce to judgment an outstanding tax assessment
5 made against him pursuant to the TFRP for ASFI's withholding
6 income and social security taxes ("trust fund taxes"). Goodman
7 answered the United States' Counterclaim and counterclaimed for a
8 refund of overpaid income taxes for the calendar year 2006. (ECF
9 No. 22.)

10 Presently before the Court is a Motion for Summary Judgment
11 brought by the United States against Goodman pursuant to Federal
12 Rule of Civil Procedure Rule 56.¹ (ECF No. 84.) For the reasons
13 set forth below, the United States' Motion will be denied.²

14 15 **BACKGROUND**³ 16

17 ASFI was a commercial and residential light-gauge steel-
18 truss manufacturing and installation company based in Stockton,
19 California. On or around May 14, 2001, Jacob Intveld
20 ("Intveld"), then-President of ASFI, hired Michael Goodman to be
21 the Director of the Commercial Steel Truss Division.
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23
24 ¹ Unless otherwise noted, all future references to Rule or
Rules are to the Federal Rules of Civil Procedure.

25 ² Because oral argument will not be of material assistance,
26 the Court orders this matter submitted on the briefs. E.D. Cal.
Local Rule 230(g).

27 ³ The factual assertions in this section are found in the
28 non-moving party's Mem. P. & A. Opp'n Mot. Summ. J. (ECF.
No. 88.) unless otherwise specified.

1 According to the United States, on October 4, 2001, during a
2 meeting of ASFI's Board of Directors ("Board"), Goodman was
3 appointed President, filling the vacancy Intveld created when he
4 resigned. Def.'s Mem. P. & A. Supp. Mot. Summ. J. 7.

5 Goodman states that his appointment as interim president was
6 never made official or memorialized with an employment contract.
7 Instead he maintains simply that he was "thrust in the position
8 if only as the titular head and assumed certain functions as
9 interim president." Mem. P. & A. Opp'n Mot. Summ. J. 4-5.

10 Goodman admits to signing "certain documents which need[ed] the
11 signature of an officer" but denies he was ever "involved in the
12 company's finances." Id. at 5. To support his position that his
13 duties did not include collecting and paying employment taxes,
14 Goodman relies on the deposition of ASFI's former bookkeeper,
15 Charlene Amarante. Amarante Dep. 205:12-206:7, Aug. 25, 2009.
16 (ECF No. 88-3.) On the other hand, as proof of Goodman's
17 financial authority at ASFI, the government cites a letter from
18 Goodman to Board Chairman Sananikone dated October 9, 2001, in
19 which Goodman expressed hope to work out ASFI's vendor problems,
20 "includ[ing] the IRS." Def.'s Mem. P. & A. Supp. Mot. Summ. J.
21 9. (ECF No. 84-1.) Goodman counters that he did not have the
22 authority to decide which creditors were to be paid or release
23 payment for the checks he signed because those decisions were
24 made exclusively by the Board.

25 On October 2, 2006, the United States, through its agent,
26 the Secretary of the Treasury, made an assessment of \$75,632.53
27 against Goodman pursuant to the TFRP for the tax period ended
28 December 31, 2001.

1 The assessment was made due to Goodman's "willful failure to
2 collect, truthfully account for, and pay over the withheld Trust
3 Fund taxes of [ASFI]." Id. at 6. The government alleges that
4 Goodman is liable for the tax assessment because as President of
5 ASFI during the fourth quarter of 2001, he bore the
6 responsibility to ensure the corporation paid its required trust
7 fund taxes. While Goodman acknowledges that he signed documents
8 as ASFI's President, he claims he was only a titular president
9 and had no authority over financial matters of the corporation.
10 Therefore, he denies being responsible for ASFI's delinquent
11 taxes.

12
13 **STANDARD**
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15 The Federal Rules of Civil Procedure provide for summary
16 judgment when "the pleadings, depositions, answers to
17 interrogatories, and admissions on file, together with
18 affidavits, if any, show that there is no genuine issue as to any
19 material fact and that the moving party is entitled to a judgment
20 as a matter of law." Fed. R. Civ. P. 56(c). One of the
21 principal purposes of Rule 56 is to dispose of factually
22 unsupported claims or defenses. Celotex Corp. v. Catrett,
23 477 U.S. 317, 325 (1986).

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1 Rule 56 also allows a court to grant summary adjudication on
2 part of a claim or defense. See Fed. R. Civ. P. 56(a) ("A party
3 seeking to recover upon a claim...may...move...for a summary
4 judgment in the party's favor upon all or any part thereof.");
5 see also Allstate Ins. Co. v. Madan, 889 F. Supp. 374, 378-79
6 (C.D. Cal. 1995); France Stone Co., Inc. v. Charter Township of
7 Monroe, 790 F. Supp. 707, 710 (E.D. Mich. 1992).

8 In considering a motion for summary judgment, the court must
9 examine all the evidence in the light most favorable to the non-
10 moving party. U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).
11 Once the moving party meets the requirements of Rule 56
12 by showing that there is an absence of evidence to support the
13 non-moving party's case, the burden shifts to the party resisting
14 the motion, who "must set forth specific facts showing that there
15 is a genuine issue for trial." Anderson v. Liberty Lobby, Inc.,
16 477 U.S. 242, 256 (1986). Genuine factual issues must exist that
17 "can be resolved only by a finder of fact, because they may
18 reasonably be resolved in favor of either party." Id. at 250.
19 In judging evidence at the summary judgment stage, the court does
20 not make credibility determinations or weigh conflicting
21 evidence. See T.W. Elec. v. Pac. Elec. Contractors Ass'n,
22 809 F.2d 626, 630-631 (9th Cir. 1987), citing Matsushita Elec.
23 Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

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1 **ANALYSIS**

2 **A. Responsible Person Under 26 U.S.C. § 6672**

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4 Employers are required to withhold federal income and social
5 security taxes from employees' wages for each pay period and
6 remit those withheld taxes to the Internal Revenue Service
7 ("IRS"). See 26 U.S.C. §§ 3102(a), 3402(a); see also Davis v.
8 United States, 961 F.2d 867, 869 (9th Cir. 1992). Employers hold
9 the withheld amounts in trust for the government between the time
10 the taxes are withheld from the employees and the time the
11 employer remits them to the IRS. 26 U.S.C. § 7501. Employers
12 may not use withheld funds to pay other business expenses. See
13 26 U.S.C. §§ 3102(b), 3403, 7501(a). Regardless of whether or
14 not the employer actually remits the withheld taxes to the IRS,
15 employees are credited with the amounts for income tax and social
16 security purposes. See Slodov v. United States, 436 U.S. 238,
17 243 (1978); Davis, 961 F.2d at 869. To prevent the government's
18 loss of withheld amounts not paid by the employer but credited to
19 the employee, 26 U.S.C. § 6672 provides that:

20 Any person required to collect, truthfully account
21 for, and pay over any tax imposed by this title who
22 willfully fails to collect such tax, or truthfully
23 account for and pay over such tax, or willfully
24 attempts in any manner to evade or defeat any such tax
or 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.

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1 26 U.S.C. § 6672(a). It is well-settled law that a person liable
2 under this section need not be a person who performs all three
3 functions (collecting, accounting for, and paying over), but
4 rather need only be a person responsible for the collection of
5 third-party taxes. Slodov, 436 U.S. at 250.

6 There is a two-step inquiry when determining liability under
7 Section 6672. First, a court must determine whether the assessed
8 person meets the "responsible person" test. If that test is met,
9 a court must then determine whether the responsible person
10 "willfully fail[ed] to collect, ...account for, and pay over the
11 tax[es]." § 6672(a). The government bears the initial burden of
12 proof when it brings suit to collect taxes. Palmer v. United
13 States, 116 F.3d 1309, 1312 (9th Cir. 1997). However, there is a
14 presumption of correctness applied to tax assessments, so long as
15 such assessments are supported by a "minimal fact foundation."
16 Id. Here, the United States has established its prima facie case
17 through its production of IRS Forms 4340, Certificates of
18 Assessments and Payments. See Koff v. United States, 3 F.3d
19 1297, 1298 (9th Cir. 1993); Hughes v. United States, 953 F.2d
20 531, 535 (9th Cir. 1992). The burden of persuasion accordingly
21 shifts to Goodman to prove that either (1) he is not a
22 responsible person under the statute; or (2) he did not willfully
23 fail to collect, account for, or pay over the trust fund taxes.

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1 To prove Goodman was a responsible person under the statute,
2 the government relies on Purcell v. United States, 1 F.3d 932
3 (9th Cir. 1993). In that case, the United States Court of
4 Appeals for the Ninth Circuit held that if a person "had the
5 authority required to exercise significant control over the
6 corporation's financial affairs, regardless of whether he
7 exercised such control in fact," then that person was
8 "responsible" under the statute. Purcell, 1 F.3d at 937. The
9 government also cites a long line of cases establishing the
10 factors courts use when determining whether a particular person
11 had significant control, including:

- 12 1. The ability to sign checks on behalf of the
13 corporation or to prevent a check's issuance;
- 14 2. The authority to control distributions of payroll;
- 15 3. The authority to control payroll accounts;
- 16 4. The authority and control to pay the payroll
17 taxes;
- 18 5. The authority to sign and prepare corporate tax
19 returns;
- 20 6. The authority to hire and fire employees;
- 21 7. The authority to control the financial affairs of
22 the corporation;
- 23 8. An individual's status as an officer, shareholder,
24 or director of the corporation; and
- 25 9. An individual's entrepreneurial stake in the
26 corporation.

27 See Def.'s Mem. P. & A. Supp. Mot. Summ. J. 21 (internal
28 citations omitted).

29 On October 5, 2001, ASFI's Board appointed Goodman President
30 and Advisory Director of the company. In a document titled "Job
31 Duties of President of ASFI, his duties included the following:
32 "[e]valuate techniques and strategies to minimize the company's
33 tax liabilities,...[r]eview monthly financial statements for all
34 department activities,...and [c]oordinate and review an overall
35 compensation plan." Id. at 23.

1 The government claims that Goodman "was significantly involved in
2 the finances of the company...[with] check signing authority. "
3 Id. at 24. Goodman signed payroll and reimbursement checks to
4 himself. He signed a contract amending company obligations (with
5 Schuler Homes, Inc.) and also signed a Chapter 7 Bankruptcy
6 Petition on behalf of ASFI. Goodman signed IRS Form 4180, Report
7 of Interview with Individual Relative to Trust Fund Recovery
8 Penalty or Personal Liability for Excise Tax on August 1, 2003,
9 which states that he was "[r]esponsible for all financial
10 obligations of [ASFI] During October 2001 thr[ough] December
11 2001." Finally, at least three administrative employees tendered
12 their letters of resignation to Goodman during the fourth quarter
13 of 2001.

14 In assessing the propriety of summary judgment, however, the
15 court must credit all inferences supported by [the non-moving
16 party's] evidence. Blackhorn v. City of Orange, 485 F.3d 463,
17 470 (9th Cir. 2007) (quoting Anderson v. Liberty Lobby, Inc.,
18 477 U.S. at 255). Goodman denies that he possessed any "power to
19 authorize the payment of any funds on behalf of ASFI," nor the
20 "authority to determine which creditors should be paid." Mem. of
21 P. & A. Opp'n Mot. Summ. J. 9. Goodman had not seen the document
22 titled "Job Duties of President of ASFI" until it was shown to
23 him during the discovery stage of this suit, therefore, he claims
24 he should not be held responsible for duties found within it. He
25 did not learn of ASFI's substantial trust fund tax liability
26 until a revenue agent contacted him on August 1, 2003.

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1 While he admits that he was named interim President by the ASFI's
2 Board, he denies being given any additional authority at that
3 time or ever. Instead, his duties remained basically the same as
4 those he had before being appointed President, namely, directing
5 manufacturing operations. Goodman signed documents needing an
6 officer's signature only when he was specifically directed to do
7 so by the ASFI's Board or Controller. The Board asked Goodman to
8 meet with Schuler Homes because he had a good working
9 relationship with them, so he complied.

10 Goodman insists that he did not participate in the decision-
11 making process at ASFI. Staff left resignation letters on his
12 desk because he was the only person left in the company, not
13 because of his level of authority. Further, he was the only
14 person left in the company because he agreed to stay on to help
15 close the company and file for bankruptcy.

16 After the resignation of ASFI's Controller on November 30,
17 2001, Goodman found tax returns on the Controller's desk. He
18 immediately called Long Truong ("Truong"), a Director of ASFI to
19 tell him about the tax returns. Truong said he would take care
20 of them and came to the office within fifteen minutes of
21 Goodman's call, whereupon he took the returns with him and left.
22 The Board maintained complete authority over all financial
23 matters of ASFI, deciding who would be paid and when. Even after
24 Goodman become an authorized check co-signer on December 13,
25 2001, all checks required Truong's approval before being released
26 for payment. The only checks Goodman signed were for salaries or
27 reimbursements for Goodman and the bookkeeper while closing down
28 the business.

1 Finally, Goodman had no financial stake as either an investor or
2 stockholder in the business either before or after being
3 appointed interim President.

4 Taking the aforementioned evidence in the light most
5 favorable to Goodman, the trier of fact may conclude that he was
6 not a "responsible person" according to Section 6672. As the
7 starkly contrasting arguments outlined above illuminate, any
8 number of disputed facts on the issue of Goodmans's true
9 authority prevent the government's motion from being granted.⁴

10
11 **B. Willful Failure to Truthfully Collect, Account for, or**
12 **Pay Over Trust Fund Taxes Under 26 U.S.C. § 6672**

13 The Ninth Circuit has "construed the term 'willfulness' for
14 purposes of failing to pay over withholding taxes as a
15 'voluntary, conscious and intentional act to prefer other
16 creditors over the United States.'" Phillips v. United States,
17 73 F.3d 939, 942 (9th Cir. 1996) (quoting Klotz v. United States,
18 602 F.2d 920, 923 (9th Cir. 1979); Davis v. United States,
19 961 F.2d 867, 871 (9th Cir. 1992)). The court distinguishes
20 "reckless disregard" from actual knowledge of whether the trust
21 fund taxes are being paid, saying reckless disregard may
22 sufficiently establish willfulness. Id. (citing Sorenson v.
23 United States, 521 F.2d 325, 329 (9th Cir. 1975); Teel v. United
24 States, 529 F.2d 903, 905 (9th Cir. 1976).

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27 ⁴ Despite Goodman's reference in his opposition that summary
28 judgment be granted in his favor sua sponte, that request is not
properly before the Court.

1 Recklessness will be found if a responsible person "fails to
2 investigate or correct mismanagement after being notified of a
3 default in the payment of withholding tax." Phillips, 73 F.3d at
4 943.

5 According to the government, the undisputed facts show that
6 Goodman allowed other creditors of ASFI to be paid after he knew
7 of ASFI's delinquent trust fund tax liability. Def.'s Reply
8 Supp. Mot. Summ. J. 6. Goodman disputes that he allowed other
9 creditors of ASFI to be paid, and further disputes that he knew
10 of the delinquent trust fund tax liability while employed at
11 ASFI. Instead, Goodman claims he had no financial duties or
12 responsibility in his role of interim President. Significantly,
13 he states that he did not learn of the delinquent taxes until a
14 revenue agent visited him on August 1, 2003.

15 The United States goes on to argue that Goodman's "failure
16 to investigate and correct ASFI's failure to pay its taxes
17 [c]onstitute[s] reckless disregard sufficient to establish
18 willfulness in this context." Def.'s Reply Supp. Mot. Summ. J.
19 7. See Phillips, 73 F.3d 939, 942-43 (9th Cir. 1996). The
20 government omits the remainder of the quote, however, which makes
21 it clear that "failure to investigate and correct...
22 [c]onstitute[s] reckless disregard...after being notified of a
23 default in the payment of withholding tax." Id. (emphasis added).
24 Goodman, for his part, denies being notified of a default in the
25 payment of withholding tax until August 1, 2003, over two and a
26 half years after he left ASFI's employment.

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1 The government attempts to bring that claim into question by
2 citing a report of an IRS interview of Goodman, who admitted that
3 he was "advised of the payroll taxes due" when he was appointed
4 President, and was "[r]esponsible for all financial obligations
5 of [ASFI]" during his time as President. Def.'s Reply Supp. Mot.
6 Summ. J. 13. That statement, however, was not signed under oath
7 and the government does not unequivocally attest to any knowledge
8 by Goodman that the taxes were not only due but delinquent.
9 Subsequently, Goodman declared under penalty of perjury that he
10 (1) had no knowledge that ASFI was delinquent in employment taxes
11 until August 1, 2003; and (2) had no involvement in the company's
12 finances. Answer Countercl. & Countercl. 3 (ECF No. 22-1);
13 Goodman Decl. 19-23, Sept. 20, 2010 (ECF No. 88-4).

14 The Court must credit all inferences supported by the non-
15 moving party's evidence when deciding a motion for summary
16 judgment. See supra. Here, 26 U.S.C. § 6672 requires a
17 responsible person willfully fail to collect, account for or pay
18 over trust fund taxes or exercise reckless disregard for the
19 payment of the taxes in order to be found liable. The government
20 fails to resolve genuine disputes of material fact as to when
21 Goodman learned of ASFI's delinquent tax liability. The United
22 States argues that Goodman learned of the delinquency during the
23 fourth quarter of 2001. Goodman testifies he did not learn of
24 the delinquency until August 1, 2003. Given that stark
25 discrepancy, the issue of willfullness cannot be resolved at the
26 summary judgment stage.

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1 **CONCLUSION**

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3 Based on the foregoing, the Defendant/Counterclaimant United
4 States is not entitled to summary judgment as to its
5 counterclaim. The United States' Motion for Summary Judgment is
6 accordingly DENIED.

7 IT IS SO ORDERED.

8 Dated: December 2, 2010

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11 MORRISON C. ENGLAND, JR.
12 UNITED STATES DISTRICT JUDGE
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