UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

ROBERT G. GUBBE,

Debtor.BKY 4-92-8014

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER GRANTING
MOTION FOR SUMMARY JUDGMENT

At Minneapolis, Minnesota, June 7, 1994.

The above-entitled matter came on for hearing before the undersigned on the 6th day of April, 1994, on the motion by the United States for summary judgment. Appearances were as follows: S. Hollis Fleischer for the United States; and Mary Langan and Mark Pridgeon for the debtor, Robert Gubbe ("Debtor").

The Court, having considered the pleadings in the action, memoranda of law, all affidavits, and the arguments of counsel, concludes that the motion by the United States for summary judgment should be granted and makes the following:

FINDINGS OF FACT

1. Debtor is an attorney practicing law in the state of Minnesota. Debtor's partner was Robert Frisbee ("Frisbee"). Debtor's brother, Larry Gubbe ("Gubbe"), is an electrical engineer who leased office space from Debtor and Frisbee.

2. On May 8, 1982, Debtor, Frisbee and Gubbe established Modern Crane & Wrecking Company ("Modern Crane"), a Minnesota corporation. Modern Crane was a crane rental business that did contract lifting for other companies.

3. Debtor, Gubbe and Frisbee all served on the Board of Directors of Modern Crane. Debtor was President and owned 48% of the stock; Frisbee was Vice-President an owned 18% of the stock; and Gubbe was Secretary and Treasurer and owned 24% of the stock. Gubbe and Frisbee were officers and directors in name only. They were not actively involved in the daily operations of the business. As Secretary and Treasurer, Gubbe did not keep any records or minutes from any of the informal shareholder meetings.

4. Soon after its incorporation, Modern Crane hired William Tokash ("Tokash") as the general manager. Tokash also served on the Board of Directors as Executive Vice-President, and owned 10% of the stock. Tokash left Modern Crane on approximately July 12, 1983.

5. Both Debtor and Tokash considered Debtor to be Tokash's boss.

6. Up until his departure in July, 1983, Tokash ran the daily operations of the business. Tokash oversaw the employees. He also oversaw general financial matters, such as when and what creditors would be paid. In addition, Tokash co-signed all the checks for Modern Crane including the payroll checks.

7. Debtor was also actively involved in the business.(FN1) While Debtor did not have an office at Modern Crane(FN2), he visited it frequently, or he went to the job sites. From January through March, 1983, Debtor was at Modern Crane at least once a week. During April and June, 1983, Debtor came around more than twice a week. After Tokash left in July, 1983, Debtor started drawing a salary from Modern Crane.

8. Debtor visited Modern Crane to "sign checks and just generally look around and see how things were going." He, along with Tokash, was an authorized signatory on both the payroll checking account and the general corporate checking account. Debtor and Tokash both signed the majority of all checks. Frisbee and Gubbe were also authorized signatories, but they rarely signed any checks. At all times during Modern Crane's existence, Debtor had access to the checkbooks.

9. Debtor was involved with other activities besides signing checks. While Tokash oversaw the daily operations, Debtor structured the more important financial matters. Debtor's duties included setting up the checking accounts and setting up the federal depository account where the employees' withholding and Federal Insurance Contributions Act ("FICA") taxes (collectively the "payroll taxes") were to be deposited for the benefit of the Internal Revenue Service ("IRS").

10. Debtor also decided which creditors were to be paid. While Debtor insists that Tokash made these decisions when Tokash was General Manager, Tokash insists that Debtor made the final decision when there was not enough money to pay all the bills. Regardless of who actually made the decisions, Debtor admits that he had the authority to decide which creditors were to be paid, but that he did not always exercise such authority.

11. Modern Crane was not a successful business. At the outset it was in desperate need of working capital. This led Debtor, on behalf of Modern Crane, to get an operating loan and a line of credit from First Bank Minneapolis ("the Bank"). As part of the loan, he arranged the subordination of a creditor's interest in the company's assets for the benefit of the Bank. Debtor also executed a personal guarantee. Debtor insisted on structuring the loan with the Bank since he had a prior relationship with the Bank. Debtor was involved with all the dealings with the Bank.

12. Despite the operating loan, Modern Crane continued to be plagued by insufficient working capital. Also, within one year of its incorporation, Modern Crane failed to pay the IRS the payroll taxes that had been deducted from the employees' paychecks. It is unclear when the IRS first approached Modern Crane regarding the tax deficiencies.

13. The payroll tax problems were reflected in the monthly financial statements prepared by Mark Cram ("Cram"), a certified public accountant for Modern Crane. Six financial statements, dating from December, 1982 through June, 1983, contained the category "Accrued payroll taxes and withholding". Regarding this category, the financial statements provided:

Financial Statement Date	Amount
12/31/82	$9,287
2/28/83	$17,088
3/31/83	$24,880
4/30/83	$33,536
5/31/83	$40,801
6/30/83	$58,061

After Cram prepared the financial statements, Debtor, Gubbe, Frisbee and Tokash would informally meet at Debtor's law firm to discuss the statements. Debtor testified that he does not recall these meetings and does not recall seeing a financial statement reflecting the payroll tax problem until late June, 1983.

14. In apparent response to both the need for capital and the

payroll tax problems, Tokash wrote a series of letters to Debtor, Gubbe and Frisbee requesting more capital. By letter dated April 19, 1983, Tokash requested that the shareholders either infuse more capital in Modern Crane, sell the entire or part of Modern Crane, or request the resignation of Tokash. He wrote this letter "as a means of retaining salvageable credit with the business world." No one responded, and by letter dated April 26, 1983, Tokash again requested that the shareholders contribute capital. In neither of these letters did Tokash specifically mention the outstanding payroll tax obligations. On June 21, 1983, Tokash again wrote the shareholders outlining the need for capital. Some of the problems Tokash enumerated included: (1) primary accounts that were ninety days past due and that were in jeopardy of becoming COD-based accounts; (2) an increasing payroll coupled with a decreasing receivables base; and (3) a $10,000 overdraft of an account. Finally, the letter explicitly mentioned the tax obligations: "The IRS and the State of Minnesota are demanding payment of withholding taxes. The bank is considering raising our borrowing limit by the $22,000 needed to satisfy the governments."

15. Upon receipt of the June 21, 1983 letter, the shareholders held an informal meeting. At the meeting, they discussed the outstanding tax obligations. They also decided to "get rid of" Tokash. Tokash left Modern Crane on approximately July 12, 1983 and Modern Crane hired George Constans ("Constans") to look into the payroll situation.

16. According to Debtor, while he was aware that Modern Crane was undergoing financial problems, he did not know how severe they were until late June, 1983, when he received the letter from Tokash. It was at this time, according to Debtor, that he first learned of the payroll tax problems.

17. After Tokash left in July, 1983, Debtor alone signed the checks and determined which creditors were to be paid. Debtor admits that, while he had knowledge of the delinquent payroll taxes after June, 1983, he continued to pay other creditors and the employees with unencumbered funds at the expense of paying the IRS. The loan from the Bank was paid off, and the employees were continuing to be paid.

18. In early 1984, Modern Crane made three payments to the IRS totalling $34,600. The checks, dated between late December, 1983 and January, 1984, were in the amounts of $15,000, $9,600, and $10,000. According to Debtor, these payments were to be applied to Modern Crane's outstanding payroll tax, interest, and penalty liabilities. Debtor insists that Modern Crane made the notation "ee' Part" on the checks, which indicated to the IRS that the funds be applied to the trust fund portion.(FN3) According to the IRS, Modern Crane made no such designation. Debtor has submitted photocopies of three cashier's checks purchaser's receipts reflecting these checks. No "ee' Part" notation appears on the checks. Debtor has not produced the original checks sent to the IRS or any cover letters sent to the IRS accompanying the cashier's checks.

19. The IRS applied a portion of these payments to the non-trust fund liabilities and the remainder to the trust fund liabilities.(FN4)

20. In 1984, Modern Crane made two other payments to the IRS. On May 29, 1984, Modern Crane submitted a check in the amount of $9,882.26. Modern Crane sent another check, dated June 29, 1984, in the amount of $3,121. The latter check was a personal check from Debtor that clearly noted in the lower left hand corner, "Modern Crane & Wrecking Trust Fund Taxes". Accompanying the check

was a letter dated July 2, 1984 signed by Constans that provided: "Enclosed please find a check for $3121.00 to be applied to the trust portion of the outstanding payroll taxes of Modern Crane and Leasing Inc. 41-1426566." The IRS applied this payment to the trust fund portion.

21. Modern Crane terminated its operations sometime in 1984.

22. On December 3, 1992, Debtor filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code.

23. On February 3, 1993, the IRS filed a proof of claim in the amount of $84,575.37. The claim represents $39,724.85 in unpaid penalties assessed against Debtor pursuant to Section 6672 of the Internal Revenue Code ("IRC") as a responsible person who willfully failed to pay over the payroll taxes withheld from the wages of the employees of Modern Crane. The remainder of the claim represents $44,850.52 in prepetition interest.(FN5)

24. The penalties assessed correspond to the following quarters: October 1, 1982 through December 31, 1982 ("Fourth Quarter 1982"); April 1, 1983 through June 30, 1983 ("Second Quarter 1983"); July 1, 1983 through September 30, 1983 ("Third Quarter 1983"); and October 1, 1983 through December 31, 1983 ("Fourth Quarter 1983").

25. On November 12, 1993, Debtor filed an objection of the Proof of Claim, disputing both its amount and its validity.

POSITION OF THE PARTIES

Debtor first disputes the validity of the claim, arguing that he is not a "responsible person" for the Fourth Quarter of 1982 and the Second Quarter of 1983. Debtor also insists that, even if he was a responsible person for these relevant periods, he did not willfully fail to pay the payroll taxes since he did not have knowledge of the tax problems. Debtor does admit Section 6672 liability for the Third and Fourth Quarters of 1983--after Tokash left Modern Crane. Debtor also disputes the amount of the claim. Debtor contends that, even if he is liable, the IRS failed to properly credit the three payments made by Modern Crane in early January, 1984 to the trust fund portion of the company's outstanding payroll taxes.

In response, the IRS contends that Debtor was a responsible person and that he willfully failed to remit the payroll taxes to the IRS. The IRS also contends that Debtor failed to properly designate the payments that were not applied to the trust fund portion, and thus the amount of the claim is correct. Specifically, the IRS argues that Debtor has no proof that he marked the checks with "ee' Part", and that, even if he did, this designation was not adequate as a matter of law.

CONCLUSIONS OF LAW

A. Standards for Summary Judgment

Summary judgment is governed by Federal Rule of Civil Procedure 56, made applicable to this adversary proceeding by Bankruptcy Rule 7056. Federal Rule 56 provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, in any, show that there is no genuine issue as to any material fact and that moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party on summary judgment bears the initial burden of showing that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party is the plaintiff, it carries the additional burden of presenting evidence that establishes all elements of the claim. United Mortgage Corp. v. Mathern (In re Mathern), 137 B.R. 311, 314 (Bankr. D. Minn. 1992), aff'd, 141 B.R. 667 (D. Minn. 1992). The burden then shifts to the non-moving party to produce evidence that would support a finding in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-52 (1986). This responsive evidence must be probative, and must "do more than simply show that there is some metaphysical doubt as to the material fact." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In weighing the evidence, the court may address whether the respondent's theory on the facts is "implausible." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1480 (6th Cir. 1989). The court may also gauge the reasonableness of competing inferences asserted on the same basic evidence. Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 681 (9th Cir. 1985); Mathern, 137 B.R. at 322. The reasonableness of asserted inferences is measured against the viability of the legal theory which they are asserted to support, and is also controlled by the weight and probity of the evidence advanced to support them. Mathern, 137 B.R. at 322-23. The ultimate question is whether reasonable minds could differ as to the factual interpretation of the evidence of record. Id. at 323 (citing Liberty Lobby, 477 U.S. at 250-52). Thus, in some instances, a court may rely on inferences to grant a motion for summary judgment, even where subjective intent is an issue. Id. at 322.ford & Co., 886 F.2d 1472, 1480 (6th Cir. 1989). The court may also gauge the reasonableness of competing inferences asserted on the same basic evidence. Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 681 (9th Cir. 1985); Mathern, 137 B.R. at 322. The reasonableness of asserted inferences is measured against the viability of the legal theory which they are asserted to support, and is also controlled by the weight and probity of the evidence advanced to support them. Mathern, 137 B.R. at 322-23. The ultimate question is whether reasonable minds could differ as to the factual interpretation of the evidence of record. Id. at 323 (citing Liberty Lobby, 477 U.S. at 250-52). Thus, in some instances, a court may rely on inferences to grant a motion for summary judgment, even where subjective intent is an issue. Id. at 322.

B. Statutory Background

Pursuant to the IRC and the FICA, employers are required to withhold federal income and FICA taxes from the wages paid to their employees and to pay back the amounts withheld to the IRS on at least a quarterly basis. Honey V. United States, 963 F.2d 1083, 1087 (8th Cir. 1992), cert. denied, __U.S. __, 113 S. Ct. 676 (1992); Emshwiller v. United States, 565 F.2d 1042, 1044 (8th Cir. 1977). Pursuant to IRC Section 7501(a), the amounts so withheld are deemed to be held in trust for the benefit of the United States. Kizzier v. United States, 598 F.2d 1128, 1132 (8th Cir. 1979); Kalb v. United States, 505 F.2d 506, 509 (2d Cir. 1974), cert. denied, 421 U.S. 979 (1975). As such, these withheld sums are commonly referred to as "trust fund taxes." Slodov v. United States, 436 U.S. 238, 243 (1978). If the trust fund taxes are not paid over, the United States suffers a loss. Id.

IRC Section 6672 was enacted to protect the United States against such losses by providing it with another source to collect the withheld taxes. This section provides:

> 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.

26 U.S.C Section 6672(a).

In order for liability under Section 6672 to attach, the individual must: (1) be a person required to collect, truthfully account for and pay over the federal employment taxes ("responsible person"); and (2) willfully have failed to pay over the taxes to the United States. Olsen v. United States, 952 F.2d 236, 238 (8th Cir. 1991); Hartman v. United States, 538 F.2d 1336, 1340 (8th Cir. 1976).

Once a party is determined to be liable for the withholding taxes, the IRS can assess a penalty that is 100% of the taxes due against the responsible person. The IRS may assess and collect the penalty in the same manner as taxes. 26 U.S.C. SectionSection 6671, 6672. Once the IRS makes the assessment of liability, the taxpayer bears the burdens of production and persuasion as to all issues, including the lack of willfulness. Honey, 963 F.2d at 1087; Olsen, 952 F.2d at 239.

C. Debtor's Liability for the Fourth Quarter of 1982 and the Second Quarter of 1983

1. Debtor was a "responsible person"

The term "person", as used in Section 6672, includes an officer or employee of a corporation who was under a duty to collect and remit the taxes to the United States. 26 U.S.C. Section 6671(b). Although the statute is phrased in the conjunctive, it is not necessary that the person assessed be responsible for all the duties set forth in the statute. Slodov, 436 U.S. at 250.

Responsibility for purposes of IRC Section 6672 is a matter of status, duty and authority. Howard v. United States, 711 F.2d 729, 734 (5th Cir. 1983). It is not necessary that an individual have the specific ministerial duties of preparing the tax returns, keeping the books or records, or paying the wages and withholding the taxes in order to be subject to liability of Section 6672. Hartman, 538 F.2d at 1340. Recognized indicia of status as a responsible person includes membership on the board of directors, ownership of stock in the corporation, the authority to write and sign checks on the corporate accounts, and other significant authority such as the authority to hire and fire personnel. Hartman, 538 F.2d at 1340; Kelly v. Lethert, 362 F.2d 629, 634 (8th Cir. 1966); Datlof v. United States, 252 F. Supp. 11, 13 (E.D. Pa. 1966), aff'd, 370 F.2d 655 (3rd Cir. 1966), cert. denied, 387 U.S. 907 (1967).

Exclusive control over the disbursement of corporate funds is not required to establish the responsibility under Section 6672. Significant control is all that matters. Caterino v. United

States, 794 F.2d 1, 5 (1st Cir. 1986); Kizzier, 598 F.2d at 1132; Donelan Phelps & Co. v. United States, 681 F. Supp. 615, 619 (E.D. Mo. 1987), aff'd, 876 F.2d 1373 (8th Cir. 1989). The fact that there may be other persons who were responsible is no defense; there may be, and frequently is, more than one responsible person. Sinder v. United States, 655 F.2d 729, 731 (6th Cir. 1981); Hartman, 538 F.2d at 1340. Furthermore, a responsible person may not relieve himself of that duty by delegation to other persons. Harrington v. United States, 504 F.2d 1306, 1311 (1st Cir. 1974). As long as the right and significant authority to control corporate financial decisions are retained, responsibility is established even if such rights are not exercised and there is a lack of involvement in day-to-day affairs. White v. United States, 372 F.2d 513, 518 (Ct. Cl. 1967) (emphasis added).

Clearly, Debtor was a responsible person for the entire existence of Modern Crane. He was the President, the majority shareholder, and an investor. He signed checks and had access to the checkbook. Debtor made what essentially were all the large decisions concerning the governance of the corporation. He was intimately involved in all the dealings with the Bank, including the structuring of the loan. Moreover, Debtor was "the boss" and had the ultimate authority to determine which creditors were to be paid, and to override Tokash's decisions concerning the same.

The United States has met its initial burden--which, as the moving party, is to prove all the elements of the claim. Under the broad standards of Section 6672, the United States need only prove that the IRS made the assessments of liability. The burden then shifts to Debtor to show that he was not a responsible person. See Honey, 963 F.2d at 1087. Debtor has submitted no evidence upon which I could reasonably conclude that he was not a responsible person for the Fourth Quarter of 1982 and the Second Quarter of 1983. As such, there is no material issue of fact surrounding whether Debtor was a responsible person pursuant to Section 6672.

2. Debtor "willfully" failed to pay the employment taxes

The term "willful", as used in Section 6672, does not mean that the responsible person acted "with a bad motive or the specific intent to defraud the Government or deprive it of revenue." Braden v. United States, 442 F.2d 342, 344 (6th Cir. 1971), cert. denied sub. nom. Bonistall v. Braden, 404 U.S. 912 (1971); see also Emshwiller, 565 F.2d at 1045. It simply means that the responsible person "had notice of the tax delinquency and failed to rectify it when there were available funds to pay the Government." Builder's Finance Co., Inc. v. United States, 352 F. Supp. 491, 494 (E.D. Mich. 1970). All that is required to establish willfulness as a matter of law is: (1) the person's knowledge of the tax liabilities; and (2) the person's failure to pay the tax liabilities. Honey, 963 F.2d at 1087; Emshwiller, 565 F.2d at 1045.

As stated by the Eighth Circuit in Kizzier: "a responsible person acts willfully within the meaning of Section 6672 if he acts in a such a manner that he knows or intends that, as a consequence of his conduct, withheld employment taxes belonging to the government will not be paid over but will be used for other purposes." Kizzier, 598 F.2d at 1132. This includes favoring other creditors over the payment of the delinquent taxes to the IRS. Newsome v. United States, 431 F.2d 742, 745 (5th Cir. 1970); Stake v. United States, 347 F. Supp. 823, 827 (D. Minn. 1972).

The burden is on Debtor to establish lack of willfulness. See Honey, 963 F.2d at 1087. Debtor admits he knew of the payroll tax problems in late June, 1983. Based on the record before me, it is

implausible to suggest that Debtor did not know of the delinquencies well before that date. Debtor was an investor himself, the key person intimately involved with the corporation, and the key contact between the investors and management. He was regularly given financial statements which reflected unpaid tax liabilities and attended meetings where they were discussed. He is an attorney and sophisticated in business affairs. I can only reasonably infer that he reviewed the financial statements as soon as they were prepared and he received them. This would have been in the Second Quarter of 1983. This is particularly true given the poor condition of the corporate finances. Modern Crane was an investment to Debtor, Gubbe and Frisbee. It is implausible to suggest that Debtor did not monitor a significant investment which he viewed as a means of leaving the private practice of law.

For purposes of this motion, however, liability flows even if Debtor did not know of the accruing and unpaid taxes in the Fourth Quarter of 1982 and the Second Quarter of 1983. Debtor is still liable for the penalties. This is because Debtor failed to pay over money to the IRS once he became aware of the payroll tax problems. Instead, he authorized distribution of available corporate funds to other creditors. The Bank was paid off and payroll was met. Debtor himself was drawing a salary. These decisions were voluntary, conscious and intentional acts that preferred other corporate creditors to the IRS. As such, Debtor willfully failed to collect and turn over to the IRS the payroll taxes of Modern Crane for the Fourth Quarter of 1982 and the Second Quarter of 1983.

In Honey, the taxpayer was a responsible party at all times during which the delinquency accrued. The taxpayer, however, did not willfully fail to pay withholding taxes until learning of the delinquency at a later date. The Eighth Circuit held that the taxpayer was nonetheless liable for all periods that he was a responsible person so long as unencumbered funds existed to pay the taxes once he learned of the delinquency. Honey, 963 F.2d at 1089. See also Kinnie v. United States, 994 F.2d 279 (6th Cir. 1993); Davis v. United States, 961 F.2d 867, 871-78 (9th Cir. 1992), cert. denied, __ U.S. __, 113 S. Ct. 969 (1992); Garsky v. United States, 600 F.2d 86, 90-91 (7th Cir. 1979).

Here, Debtor was a responsible person through all periods in question and, after learning of the delinquency, he failed to pay the payroll taxes with available corporate funds and directed funds elsewhere. This establishes willfulness as to all time periods in question.

Accordingly, the United States has established that Debtor was a responsible person who willfully failed to pay over the payroll taxes with available corporate funds. Debtor has submitted no evidence upon which I could reasonably conclude that he did not willfully fail to pay over the payroll taxes to the IRS. Debtor is, therefore, liable for the penalties assessed plus the accrued interest.

D. Designation

Debtor lastly asserts that, even if he is liable as a responsible person for the penalties, the amount of the assessment is incorrect because the IRS did not credit three payments made by Modern Crane in early 1984 against the trust fund taxes. Debtor asserts that he properly designated the three payments with the notation "ee' Part".

In the case of payroll taxes, the taxpayer may designate to

which liability the voluntary payment is to be applied. Davis, 961 F.2d at 878; Rev. Rul. 79-284, 1979-2 C.B. 83; Rev. Rul. 73-305, 1973-2 C.B. 43. It is well-settled that absent a designation by the taxpayer, the IRS can apply a voluntary payment to any outstanding tax liability of the taxpayer. Davis, 961 F.2d at 878; Emshwiller, 565 F.2d at 1046. It is the policy of the IRS to credit undesignated payments first to non-trust fund liabilities and second to trust fund liabilities. Davis, 961 F.2d at 878; United States v. Schroeder, 900 F.2d 1144, 1149 (7th Cir. 1990).

However, in order for the taxpayer to choose the application of the payment, the designation must be "specific." While few reported decisions have addressed what is required for a specific designation, courts have found that ambiguous markings on checks are insufficient. In Wood v. United States, 808 F.2d 411, 417 (5th Cir. 1987), the court held that notations on check stubs "could be construed as serving [the taxpayer's] internal record keeping. They were too ambiguous and uncertain to serve as directions to the IRS." Id. In Hammon v. United States, 21 Cl. Ct. 14, 29 (1990), the court held that the procedure set forth in Rev. Rul. 73-305 "requires a taxpayer to make any specific allocation requests in writing." The court noted that "the checks contained some ambiguous markings, but nothing to indicate that plaintiff clearly intended a different allocation of the funds."

Here, Debtor insists that the cashier checks in question had the notation "ee' Part". On their face, the receipts for the checks show no designation of any kind. Nor has Debtor produced any competent and admissible evidence that establishes that someone at Modern Crane actually made notations on the checks. In light of the foregoing, it is clear that Modern Crane failed to designate that the three checks sent to the IRS in January, 1984 were to be applied to the trust fund portion of the company's outstanding liabilities.

Further, assuming that Modern Crane actually made the notation, it was not a clear, unambiguous notation required by law. A clear and unambiguous notation would have resembled the notation Debtor made on the check he submitted to the IRS on June 29, 1984, and the cover letter that accompanied this check.

Accordingly, Modern Crane failed to properly designate any checks that should have been payable to the trust fund portion of its payroll tax liabilities. It was proper, therefore, for the IRS to apply the January monies as it saw fit. As a result, the IRS' claim for Section 6672 penalties should be allowed in full.

ORDER FOR SUMMARY JUDGMENT

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. The United States' motion for summary judgment is GRANTED; and

2. The IRS' claim in the amount of $84,575.37 is allowed in full.

LET JUDGMENT BE ENTERED ACCORDINGLY.

_____

Nancy C. Dreher
United States Bankruptcy Judge

(FN1) Debtor acknowledged in his deposition he became disillusioned

with the practice of law, and therefore wanted to become more involved with Modern Crane.

(FN2) Debtor worked out of his law office that he shared with Frisbee and Gubbe. Most of the informal shareholder meetings were held at the law office.

(FN3) As discussed, infra, the "trust fund" payments relate to payments due for delinquent payroll taxes.

(FN4) It is unclear what portion of the payments the IRS applied to the trust fund liabilities. For purposes of this motion for summary judgment, however, it is irrelevant since I find that the IRS was not wrong in distributing the funds as it saw fit.

(FN5) The original Proof of Claim was for $86,575.37. Of this amount, $40,769.20 reflected the penalties assessed, and $45,890.30 reflected the prepetition interest. The IRS has since corrected this amount.