TAMARA W. ASHFORD
Acting Assistant Attorney General

KAYCEE M. SULLIVAN
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683, Ben Franklin Station
Washington, D.C. 20044-0683
Telephone: (202) 514-9593
Attorneys for the United States of America

JOHN S. LEONARDO
United States Attorney
District of Arizona
Of Counsel

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF ARIZONA

IN RE: MEMIE BURTON, Debtor.	Case No. 2:10-bk-34288-GBN CHAPTER 11 UNITED STATES' MOTION TO WITHDRAW THE REFERENCE OF THE DEBTORS' OBJECTION TO IRS PROOF OF CLAIM

MOTION

The United States of America, by and through undersigned counsel and pursuant to 28 U.S.C. § 157(d), Federal Rule of Bankruptcy Procedure 5011(a), and Local Bankruptcy Rule 5011-2, hereby moves the District Court to withdraw the reference of the contested matter initiated by Debtors' Objection to Proof of Claim by the IRS (Doc. No. 10-5), filed December 13, 2011.

Debtor filed the instant bankruptcy on October 25, 2010. On February 2, 2011, the IRS filed a Proof of Claim in the amount of $176,680.99 (Claim 10), but has since amended this claim several times. The current Amended Proof of Claim was filed on December 13, 2011, and it consists of unsecured priority claims for 26 U.S.C. § 6672 Trust Fund Recovery Penalties against Debtor Memie C. Burton as a responsible person for Kennedy Restaurants, LLC for all four quarters of the 2007 tax year, the second and fourth quarter of the 2008 tax year, and all four quarters of the 2008 tax year. (Claim 10-5).

ARGUMENT

The United States District Court has jurisdiction over all cases arising under the Bankruptcy Code. 28 U.S.C. § 1334. Pursuant to 28 U.S.C. § 157(d), a district court may refer bankruptcy cases to the bankruptcy judges for that district. The district court may withdraw reference of a case or proceeding referred to the bankruptcy court, in whole or in any part, upon a timely motion for withdrawal of the reference of a party for good cause shown. 28 U.S.C. § 157(d). In determining whether cause exists, a district court should consider the efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors. *Security Farms v. International Bhd. of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997).

The tax liabilities at issue in this case arise under Section 6672 of the Internal Revenue Code, also known as the trust fund recovery penalty. Under that provision, one or more persons who are responsible for collecting, accounting for, and turning over to the United States taxes withheld from the wages paid to employees of a corporation, who willfully fail to collect, account for or turn over those taxes, may be held personally liable for a penalty equal to one hundred percent of the taxes that should have been paid over. 26 U.S.C. § 6672. Because there are frequently multiple persons with such responsibilities, often more than one person is assessed and may be found liable for the penalty. *See Turner v. United States*, 423 F.2d 448, 449 (9th Cir. 1970); *Hartman v. United States*, 538 F. 2d 1336, 1340 (8th Cir. 1976).

In a typical trust fund recovery penalty case, a person against whom a penalty has been assessed pays a small portion of the tax and files a claim for refund with the Internal Revenue Service followed by a civil action for refund under 26 U.S.C. § 7422(a) in the United States District Court. The United States then usually counterclaims for the entire remaining amount of the unpaid penalty. Where, as in this case, more than one person was assessed the penalty with respect to the corporation and/or tax quarters, the other persons are then added to the civil action as counterclaim defendants pursuant to Rules 13(h), 19 and 20 of the Federal Rules of Civil Procedure.

The addition of all interested parties in one proceeding clearly serves judicial economy, by consolidating all the assessed persons in one action rather than litigating their respective liabilities piecemeal. *See In re Eichelberger*, 1990 U.S. Dist. LEXIS 4217 (D. Iowa March 27, 1990), *8 (Court found that withdrawal of the reference and consolidation with a District Court case filed against the other responsible party promoted judicial economy). It also protects the interests of the United States because the various assessed parties cannot take inconsistent positions in different civil actions concerning the same penalties, and the possibility of the United States being "whipsawed"—*i.e.* obtaining inconsistent results in separate actions—is eliminated. *See id.*

However, this normal procedure is complicated when one or more of the parties commences bankruptcy proceedings. Although the bankruptcy court has jurisdiction over the tax matters of the debtor, it has no jurisdiction over the tax liabilities of the non-debtors. *See American Principles Leasing Corp. v. United States*, 904 F.2d 477, at 481 (9th Cir. 1990); *In re Wolverine Radio Company*, 930 F.2d 1132 (6th Cir. 1991); *In re Quattrone Accountants, Inc.*, 895 F.2d 921 (3rd Cir. 1990); and *United States v. Huckabee Auto Company*, 783 F.2d 1546 (11th Cir. 1986). As a result, when the bankruptcy debtor contests the trust fund recovery penalty determination in Bankruptcy Court, the United States cannot bring the other assessed parties in as parties to the bankruptcy litigation, nor can it initiate proceedings in District Court, as the debtor is protected by the automatic stay.

The counterclaim that would normally be brought by the United States against the other assessed persons does not fall within the Bankruptcy Court's jurisdiction, since it is neither a case under Title 11 nor a civil proceeding arising under Title 11, or arising in or related to cases under Title 11. *See* 28 U.S.C. § 1334(a); 28 U.S.C. § 1334(b). Original jurisdiction in the United States District Court over the counterclaim against other assessed persons is based upon other, non-bankruptcy jurisdictional statutes, such as 28 U.S.C. §§ 1331, 1340, or 1345, and is not referrable to the Bankruptcy Court under 28 U.S.C. § 157(a).

In this case, Debtor Memie Burton has initiated a contested matter challenging the Internal Revenue Service's determination of his liability for Trust Fund Recovery Penalties. Debtor's Amended Objection to Proof of Claim relies solely on his assertion that Debtor is not a responsible person liable for trust fund penalties under 26 U.S.C. § 6672.

In order to be liable for trust fund penalties under 26 U.S.C. § 6672, an individual must be a responsible officer. In determining responsibility, courts have considered various factors including (1) an individual's status as an officer, shareholder, or director of the corporation, (2) an individual's authority to sign and prepare corporate tax returns; (3) an individual's authority to hire and fire employees; (4) an individual's authority to control the financial affairs of the corporation; and (5) an individual's entrepreneurial stake in the corporation. *See, e.g., United States v. Jones*, 33 F.3d 1137, 1140 (9th Cir. 1994); *Williams v. United States*, 931 F.2d 805, 810 (11th Cir. 1991); *Thomsen v. United States*, 887 F.2d 12, *16 (1st Cir. 1989); *Thibodeau v. United States*, 828 F.2d 1499, 1503 (11th Cir. 1987); *George v. United States*, 819 F.2d 1008, 1011 (11th Cir. 1987); *Godfrey v. United States*, 748 F.2d 1568, 1576 (Fed. Cir. 1984). A responsible person need not actually exercise his control over corporate affairs; the mere ability to exercise that control establishes responsibility. *See Purcell v. United States*, 1 F.3d 932, 937 (9th Cir. 1993). Moreover, the fact that there were other persons responsible in the company is not a defense; more than one person may be held liable under Section 6672. *See U.S. v. Rem*, 38 F.3d 634, 642 (2nd Cir. 1994). "While it may be that [other corporate officials] were more responsible than plaintiff, and exercised greater authority, this does not affect a finding of liability against the plaintiff." *See Gephart v. U.S.*, 818 F.2d 469, 476 (6th Cir. 1987).

The penalties listed on the IRS Amended Proof of Claim arise from Kennedy Restaurants, LLC, of which Debtor is a member/owner. According to Bankruptcy Schedule B (Doc. No. 4), he holds an interest in the company. During his interview with an IRS Revenue Officer, Debtor stated that (1) he had money invested in the business; (2) he determined financial policy for the business; (3) he directed or authorized payment of bill/creditors; (4) he opened and closed bank accounts for the business; and (5) he signed checks for the business. He also stated that he authorized payroll on at least one occasion, that he guaranteed or co-signed loans during the periods at issue, and that he sometimes authorized or made federal tax deposits and prepared, reviewed, and signed payroll tax returns. He also shares a mailing address with the business. The IRS subsequently determined that he was a responsible person and added the trust fund penalties to the Amended Proof of Claim.

As is often the case, Debtor Memie Burton is not the only responsible person associated with Kennedy Restaurants, LLC; an additional responsible person, Sandra Kennedy, the debtor's wife, has been determined to be responsible persons under I.R.C. § 6672 for the same quarters and the same company. However, because Sandra Kennedy is not a party to the bankruptcy proceeding, the bankruptcy court has no jurisdiction to resolve her tax liabilities.

Cause exists to withdraw the reference for the Objection, because litigating the respective liabilities of all responsible persons in one civil action promotes judicial economy, avoids delay and costs to all parties, and minimizes the possibility of inconsistent outcome. Withdrawal of the reference allows the United States to assert a counter-claim against both debtor Memie Burton and Sandra Kennedy in one forum and to present all the issues in one action before a court of competent jurisdiction. This both promotes judicial economy and avoids unnecessary costs to all parties. The interests of the United States would be protected, because the risk of two inconsistent outcomes would be eliminated.

While it is true that withdrawal of the reference may cause some delay for the parties, the delay in this case would be minimal. Counsel for Memie Burton is aware of the United States' proposal to withdraw the reference and has agreed to this plan, in order to expedite resolution of the IRS' claims.

//

//

//

//

//

CONCLUSION

For the foregoing reasons, the United States respectfully requests that its Motion to Withdraw the Reference with respect to Debtors' Objection to the IRS Proof of Claim be granted.

Respectfully submitted this 5th day of September, 2014.

TAMARA W. ASHFORD
Acting Assistant Attorney General

By: /s/ Kaycee M. Sullivan
KAYCEE M. SULLIVAN
Trial Attorney, Tax Division
U.S. Department of Justice

Of Counsel:

JOHN S. LEONARDO
United States Attorney
District of Arizona

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 2014, I filed the foregoing UNITED STATES' MOTION TO WITHDRAW THE REFERENCE OF THE DEBTORS' OBJECTION TO IRS PROOF OF CLAIM, which will provide notice to the following counsel of record:

DEAN WILLIAM O'CONNOR
DEAN W. O'CONNOR PLLC
2850 E. CAMELBACK SUITE 200
PHOENIX, AZ 85016
Email: DWOConnor@aol.com
Counsel for Debtor

PATTY CHAN
OFFICE OF THE UNITED STATES TRUSTEE
230 N. FIRST AVE., #204
PHOENIX, AZ 85003
Email: patty.chan@usdoj.gov
Counsel for U.S. Trustee

/s/ Kaycee M. Sullivan
KAYCEE M. SULLIVAN
Trial Attorney, Tax Division
U.S. Department of Justice