

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE;	)	Chapter 13 Case
	)	Number <u>90-10475</u>
THURMAN SOLES	)	
JANICE E. SOLES	)	
	)	
Debtors	)	
_____)	)	
	)	
THURMAN SOLES	)	FILED
JANICE E. SOLES	)	at 4 O'clock & 48 min. P.M.
	)	Date: 5-17-91
Movants	)	
	)	
vs.	)	
	)	
INTERNAL REVENUE SERVICE	)	
	)	
Respondent	)	

**MEMORANDUM AND ORDER**

Before the court is the objection of the debtors, Thurman Soles and Janice E. Soles to a portion of the claim of the United States of America acting through its agency, the Internal Revenue Service ("IRS"). From the evidence presented at hearing and briefs submitted I make the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

Debtors filed a voluntary Chapter 13 petition on March 21, 1990. In response to the filing of the IRS filed a proof of claim

to which the debtors object.

Subsequent to the objection, IRS amended its proof of claim asserting secured status in the amount of Thirty-Three Thousand Three Hundred Fifty-Five and 70/100 (\$33,355.70) Dollars. The claim now consists of the following components:

Kind of Tax    Tax Period    Tax Due    Penalty    Interest

Income	1984	\$224.24	\$56.06	\$150.70
Income	1985	1,511.00	362.64	749.42
Income	1986	558.00	100.44	203.30
IRC §6672	1983	15,686.23	0	13,753.67

Debtors object to the tax due and interest to date on assessment against Mr. Soles as a "responsible person" pursuant to 26 U.S.C. §6671 and 6672. The objected to amount of the claim totals Twenty Nine Thousand Four Hundred Thirty-Nine and 90/100 (\$29,439.90) Dollars. Debtors do not object to the income tax portion of the claim.

The penalties and interest claimed against Mr. Soles are for unpaid employee withholding taxes due from K.D.S. Corporation ("K.D.S."). K.D.S. incorporated in Orlando, Florida in 1978 and engaged in the business of erecting modular apartments. The sole officer, shareholder and director of the corporation was Edna L. Soles, the debtor Thurman Soles' then wife. Mr. Soles worked in the business as a construction overseer. He had no management or financial authority in the company. The Soles' were divorced in 1982. Thurman Soles married the codebtor Janice Soles in 1983.

Janice Soles never had any connection with K.D.S. The IRS assessed penalties against Thurman and Edna L. Soles as "responsible parties" for the unpaid employee taxes. Interest has accrued on that assessment. In 1987 a tax lien was filed against Mr. Soles in Coffee County, Georgia.

CONCLUSIONS OF LAW

The IRS contends that the claim represents validly assessed penalties and interest pursuant to 26 U.S.C.S. §6671<sup>1</sup> and

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<sup>1</sup>26 U.S.C.S. §6671 provides:

- (a) The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by

§6672.<sup>2</sup> The IRS is incorrect in its position that since with

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this subchapter.

(b) The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurred.

<sup>2</sup>26 U.S.C.S. §6672 provides:

(a) 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.

. . .  
(b) Extension of period of collection where bond is filed.

(1) In general. If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against the person, such person

(A) pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty,

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3), no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2).

Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in

thirty (30) days of notice and demand for the payment of the penalty Mr. Soles failed to protest the assessment this court lacks jurisdiction to determine his liability. The provision relied upon by the government, §6672(b), is not a bar to a taxpayer challenging the IRS' collection efforts. Action by the taxpayer

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force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) Suit must be brought to determine liability for penalty. If, within 30 days after the day on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States District Court (or in the Court of Claims) for determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.

(3) Bond. The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in an amount equal to 1 1/2 times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitations on collection. The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection. If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

within the thirty (30) day period following notice and demand of penalty bars the IRS from proceeding with levy or court action to collect such penalty pending resolution of the dispute. Section 6672(b)(2) provides that if the person against whom the penalty is assessed fails to bring a judicial proceeding for a determination of liability within thirty (30) days of denial of refund, then the IRS may proceed with levy or judicial proceeding to collect the penalty. Action by the taxpayer is required within thirty (30) days in order to stay any collection efforts by the government. The failure of the debtor to file a suit against the IRS does not bar the debtor from defending against the claim of the IRS in any subsequent collection action brought to collect the claim.

Whether the debtor brings suit to recover a refund or the IRS brings an action to collect its assessment the burden of proof remains the same. The IRS bears the initial burden of proof to establish that the debtor is a responsible party for the payment of the tax as defined under §6672(a). See e.g. George v. U.S., 819 F.2d 1008 (11th Cir. 1987); Thibodeau v. U.S., 828 F.2d 1499 (11th Cir. 1987); Causey v. U.S., 683 F.Supp. 1381 (M.D. Ga. 1988). "Once it is established that a taxpayer is a responsible person, the burden of proving lack of willfulness is on the taxpayer." Mazo v. U.S., 591 F.2d 1151, 1155 (5th Cir. 1979)<sup>3</sup>, cert. denied 444 U.S. 842, 100 S.Ct. 82, 62 L.E.2d 54 (1979).

The IRS has assessed a penalty pursuant to §6671 and §6672 and has filed its claim in this Chapter 13 proceeding to collect the debt. Once a claim is filed it is presumed valid and is prima facie evidence of validity of both the claim and amount. In re: The Securities Groups, 116 B.R. 839, 845 (Bankr. M.D. Fla. 1990). "A claim or interest, proof of which is filed under 501 of this title [11], is deemed allowed unless a party in interest . . . objects."

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<sup>3</sup>The Eleventh Circuit has adopted all decisions rendered by the Fifth Circuit on or before September 30, 1981 as binding precedent in this circuit. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981).

11 U.S.C. §502(a). In a hearing on an objection to claim such as now before the court, the burden is initially on the objecting party to put forth sufficient evidence to overcome the prima facie correctness of the claim. Securities Groups, supra. Once the objecting party comes forth with sufficient evidence to place the claims' allowability as filed at issue, the burden of going forward with evidence to sustain the claim shifts to the claimant. In re: Cherry, 116 B.R. 315, 316 (Bankr. M.D. Ga. 1990). The ultimate burden of persuasion rests with the claimant. id. This burden of persuasion does not shift even where the claimant is a state or federal tax authority. California State Board of Equalization v. Official Unsecured Creditors Committee (In re: Matter of Fidelity Holding Company Ltd.), 837 F.2d 696, 698 (5th 1988).

The evidence presented by the debtor is sufficient to overcome the presumption of validity of the claim regarding 6671 and 6672 penalties and interest. In order to sustain the claim, the IRS must first establish that the debtor was in fact a responsible person as defined under the Internal Revenue Code. The IRS has failed to meet this initial burden. The only evidence presented on the issue of responsible person was by the debtor and remains unrebutted. Mr. Soles testified that he was neither officer, director nor shareholder of K.D.S. Additionally, Mr. Soles testified that he had no financial or managerial authority in the corporation. The testimony of Mr. Soles is sufficient to

overcome the prima facie correctness of the claim and the IRS having failed to carry the burden of proof to establish Mr. Soles as a responsible person as defined under §6672 the debtors' objection to claim of the Internal Revenue Service is ORDERED sustained. The claim of the United States of America acting through its agency the Internal Revenue Service is ORDERED reduced to Three Thousand Nine Hundred Fifteen and 80/100 (\$3,915.80) Dollars.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 17th day of May, 1991.