IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

VIRGIL D. MOORE, Plaintiff/Counterclaim Defendant, vs. UNITED STATES OF AMERICA, Defendant/Counterclaimant.	No. 4:07-cv-00180-JAJ **ORDER**

This is an action to recover taxes paid to the United States. The IRS determined that plaintiff Virgil Moore was responsible for his company's failure to remit "trust fund" taxes withheld from its employees' paychecks. The company is insolvent and unable to pay those taxes. The IRS assessed those taxes to Mr. Moore for five quarters, four of which were at issue in the July 2009 jury trial before this court.

The matter now before the court is Plaintiff Virgil Moore's ("Moore") August 14, 2009, Motion for Judgment as a Matter of Law (dkt. 101). Moore argues that he did not receive proper notice of the IRS intent to assess the taxes at issue for the first quarter of 2003 and therefore, he cannot be held liable for that quarter. On August 14, 2009, United States of America filed a post-trial brief on the same issue of whether Moore received notice of the tax assessment (dkt. 100). For the following reasons, the court denies Moore's Motion for Judgment as a Matter of Law.

The jury found that Moore is responsible for paying trust fund taxes and that he willfully failed them for four quarters – the first and second quarters of 2003 and the first and fourth quarters of 2004. At issue in this motion is whether the IRS properly gave Moore notice of their intent to assess tax penalties for the first quarter of 2003. Pursuant to 28 U.S.C.§ 6672(b)(1) the IRS must give notice, in writing or by mail, to any person against whom they will assess a tax penalty. Pursuant to 26 U.S.C. § 6672(b)(2), such

notice must precede a demand for payment by sixty days. The preferred procedure for notice is by mailing or delivering in person a Form 1153(DO) which includes information about the amount to be assessed, the taxpayer's ability to contest the assessment, and appeal rights.

At trial, the jury found that Moore did not receive a Form 1153(DO) for the first quarter of 2003. However, there was uncontradicted evidence that Moore signed a Form 2751, which also puts a taxpayer on notice of the quarters, and amounts to be assessed. The form states, "I consent to the assessment and collection of the total penalty shown. . . ." Form 2751 (see dkt. no. 102 at 2). The form also states, "I waive the 60 day restriction on notice and demand set forth in Internal Revenue Code 6672(b)." Id. IRS Officer Rebecca Denning delivered the Form 2751 in person on July 30, 2003, and Moore signed it on that date. The jury specifically found that Moore signed Form 2751 voluntarily, without duress or coercion. The parties dispute whether this form acted as a waiver for the 60-day notice or whether notice by Form 1153(DO) is required for a trust fund penalty claim. The issue of whether Form 2751 satisfies the notice requirement under § 6672(b)(1) is a matter of law to be decided by the court. Capetta v. United States, 2006-1 U.S. Tax Cas. (CCH) P50, 174 (N.D. Ill. 2006). The court finds that Form 2751 signed by Mr. Moore waives the notice requirement.

The parties agree that Form 1153(DO) is the routine method for providing notice to a taxpayer pursuant to the Internal Revenue Manual ("IRM") 5.4.7.4. However, the Government argues that it is not the only method and that § 6672(b)(1) does not describe a specific method of notice to be used. Moore argues that before a taxpayer signs a 2751, he or she should first receive Form 1153(DO), which puts the taxpayer on notice of potential penalties and also advises him of appeal rights. Moore argues that "[e]ven if a taxpayer can arguably waive the 60 day period [outlined in § 6672(b)(2)] by signing Form 2751, the taxpayer does not waive the I.R.C. § 6672(b)(1) notice." (Moore Br., dkt. 101-

2 at 3). Moore is making a highly technical argument. Section 6672(b)(1) requires that the taxpayer receive notice and § 6672(b)(2) states that the "mailing of the notice described in (1) . . . shall precede any notice and demand of any penalty . . . by at least 60 days." To argue that Moore only waived the 60-day notice period but did not waive the actual notice would render the waiver useless. It is clear that Moore not only waived the 60-day period but also the notice.

While there is little case law discussing whether signing Form 2751 can act as a waiver of the § 6672(b)(1) notice requirement, the IRM makes clear that it does. See United States v. Seidel, 102 A.F.T.R2d (RIA) 5774, at 19 (N.D. Cal. 2008) ("[T]here appear to be very few cases addressing the requisite contents of a notice under § 6672(b)."). "The current version of the IRM explicitly provides that a Form 2751 does waive the subject notice requirement." United States v. Seidel, 102 A.F.T.R2d (RIA) 5774, at 19 (N.D. Cal. 2008) (citing Internal Revenue Manual 5.7.4.7(2)). The IRM states, "The 60 day rule does not apply . . . If the responsible person signs Form 2751, Proposed Assessment of Trust Fund Recovery Penalty, *waiving the restriction on notice and demand set forth in IRC 6672(b)*." Internal Revenue Service, Notification of Proposed Assessment, 5.7.4.7, *available at* http://ftp.irs.gov/irm/part5/irm_05-007-004.html #d0e775 (last visited August 24, 2009) (emphasis added).

While the court in Seidel found that the IRM is clear that Form 2751 waives notice, the court went on to apply traditional principles of waiver – whether the waiver was intentionally and voluntarily given. See, e.g., Puckett v. United States, 129 S. Ct. 1423 (2009). Here, the jury found that Moore signed Form 2751 voluntarily, without duress or coercion. Moore claimed at trial that he had no choice but to sign it and that the revenue agent threatened to somehow shut down the business if he refused to do so. The jury rejected this claim.

The court finds that Form 2751 is, as a matter of law, a waiver of the notice

requirement. The jury determination that it was voluntarily signed fulfills the § 6672(b)(1) requirement. Accordingly, the court denies Moore's Motion for Judgment as a Matter of Law.

Moore also argues that the claim is barred by the statute of limitations. This argument is based on his notice argument and therefore fails. He argues that since the Government failed to give him proper notice under I.R.C. § 6672(b)(1), the Government is prohibited from assessing tax penalties against him. He argues that were the Government to assess penalties now, the assessment would be barred by the statute of limitations. Accordingly, the court denies his Motion for Judgment as a Matter of Law on this issue.

Upon the foregoing,

IT IS ORDERED

That Moore's August 14, 2009, Motion for Judgment of Matter of Law (dkt. 101) is denied.

DATED this 27th day of August, 2009.

JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA