

# CORRECTING UNPAID PAYROLL TAXES

A TIME BOMB YOU CAN DEFUSE



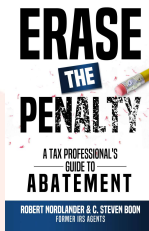
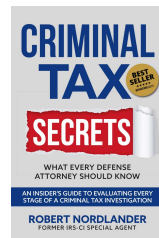
# WHO IS YOUR PRESENTER?

He is a retired special agent with the Internal Revenue Service, Criminal Investigation (IRS-CI). He has over 20 years of experience conducting federal criminal investigations to include tax evasion, money laundering, and other white-collar crimes.

After a successful law enforcement career, he started a boutique forensic accounting and tax resolution firm. He speaks nationally on topics regarding forensic accounting, criminal tax investigations, and solving IRS problems.

He is a CPA and CFE. He has a Bachelor's degree in Accounting and a Master's degree in Business Administration.

He is an author of three Amazon books.



**Robert Nordlander**, CPA, CFE

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# LEARNING OBJECTIVES



- Recall the common statutes guiding the assessment and collection of payroll taxes
- Recognize when someone is a candidate for the Trust Fund Recovery Penalty
- Create a plan to defend a taxpayer against the TFRP
- Identify the criteria the IRS uses to evaluate collection potential
- Implement a strategy to resolve tax debts





## WHY IS THIS IMPORTANT



- » It is a symptom of a problem
  - Lack of cash flow
  - Personnel problems
- » It is not taught in colleges
- » It is not tested on CPA exams
- » Large part of the government's income
- » The penalties are large against the business
- » The penalties can be against others personally
- » IRS has broad powers to collect
- » The penalties can carry imprisonment



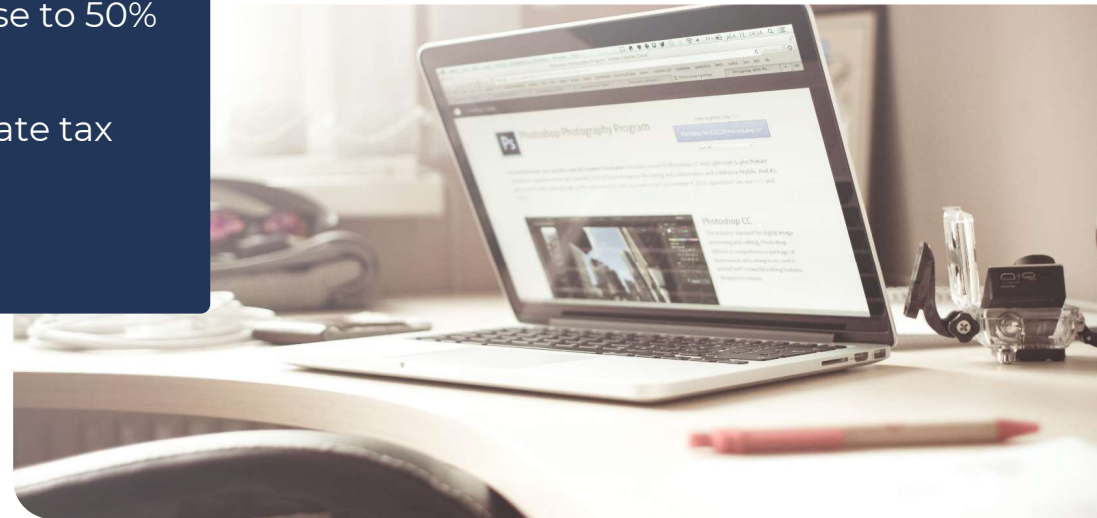
# UNPAID PAYROLL TAXES ARE A TIME BOMB



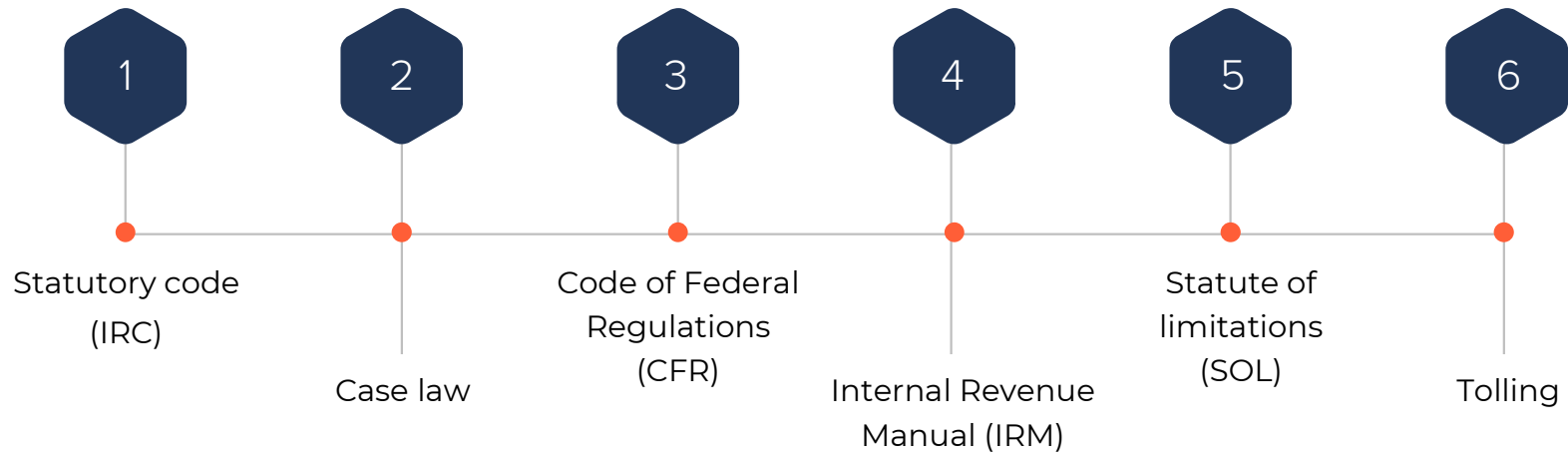
- Small business owner fails to report and pay the taxes
- Non-compliance is not caught for months and maybe years
- The penalties on failing to file and pay can be close to 50%
- The longer it is ignored, the larger the problem
- Once IRS discovers non-compliance, it can estimate tax loss

## Lasting effects if not solved:

- Loss of business
- Loss of relationships
- Loss of assets
- Loss of income
- Loss of liberty



# BASIC CONCEPTS





# THE IRS IS SECRETIVE

**01**

IRC 6103  
(Regulates Disclosure)

**02**

IRC 6103(c)  
• Designee

**03**

IRC 6103(e)  
• Taxpayer  
• “Material Interest”

**04**

Role of transcripts

# REPRESENTING CLIENTS IRC 6103(c)



- 1 • Qualifications  
(attorney, CPA, EA)
- 2 • Form 2848  
(Power of Attorney)
- 3 • Form 8821  
(Receiving tax info)
- 4 • CAF number  
(Central Authorization File)



# COMMON CIVIL STATUTES



## Statutory Authority

- IRC 7803 – Appointment of Commissioner
- IRC 7801 – Authorizes the IRS



## FICA and Federal Tax Withholdings

- IRC 3102 and 3402 requires employers to withhold
- IRC 7501 classifies withheld taxes as trust fund taxes



## Required to be filed

IRC 6011 - quarterly



## Required W-2

- IRC 6051
- 26 CFR 31.6051-1 and 2 – where to be filed

# TRUST FUND RECOVERY PENALTY



IRC 6672 (TFRP)  
Assessed personally



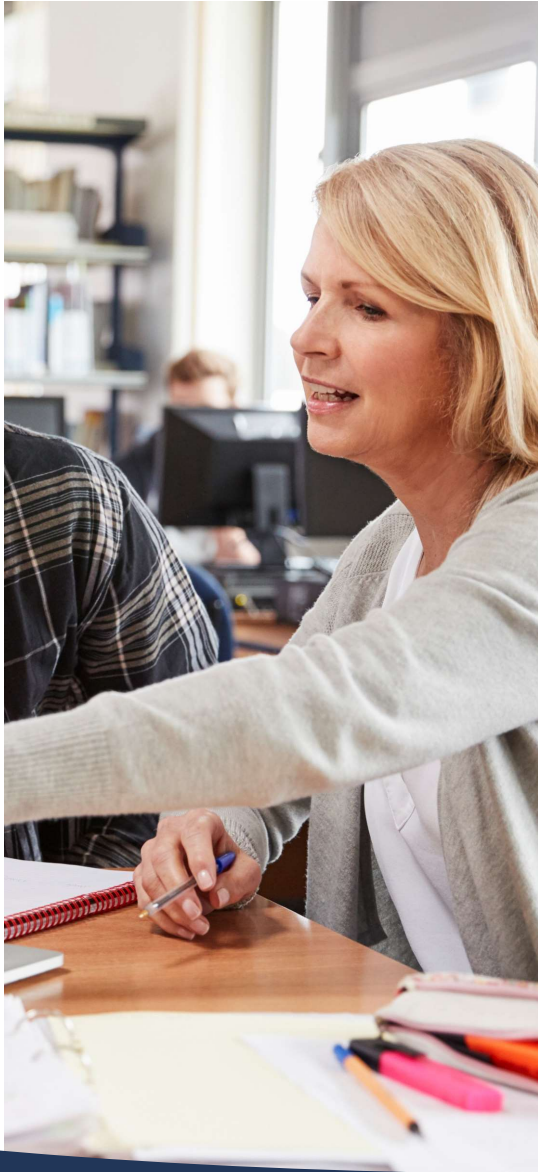
IRS can make tax returns  
IRC 6020(b)



Lenders can be responsible  
IRC 3505

Not dischargeable  
in bankruptcy  
11 USC 523(a)(1)(A)





# STATUTE OF LIMITATIONS



1

## IRC 6501

ASED (Assessment Statute Enforcement Date)

- 3 years from tax return filed date
- Unlimited for fraud or non-file
- 6 years from 25% underreporting gross income

2

## IRC 6502

CSED (Collection Statute Enforcement Date)

- 10 years from date of assessment

3

## IRC 6503

- CSED can be extended
- Examples: outside country, bankruptcy filing, CDP, OIC

# RESPONSIBLE PARTY AND WILLFULNESS



## » TFRP assessment requires:

### » Responsible party

- » Based on job function, not title
- » Officer, employee, another corporation, payroll service provider
- » Duty to perform, power to direct collecting trust fund taxes
- » Examples: signature authority, signing payroll documents, controlling/prioritizing expenditures
- » Can be more than one person

### » Willfulness

- » IRM 8.25.1.3.2 – attitude of responsible person, including knowledge, action on prior notices, actions to resolve problems, deception/fraud

# COMMON TFRP QUESTIONS



What if I only have enough  
to cover net payroll?

What if it is because  
of a lack of oversight?

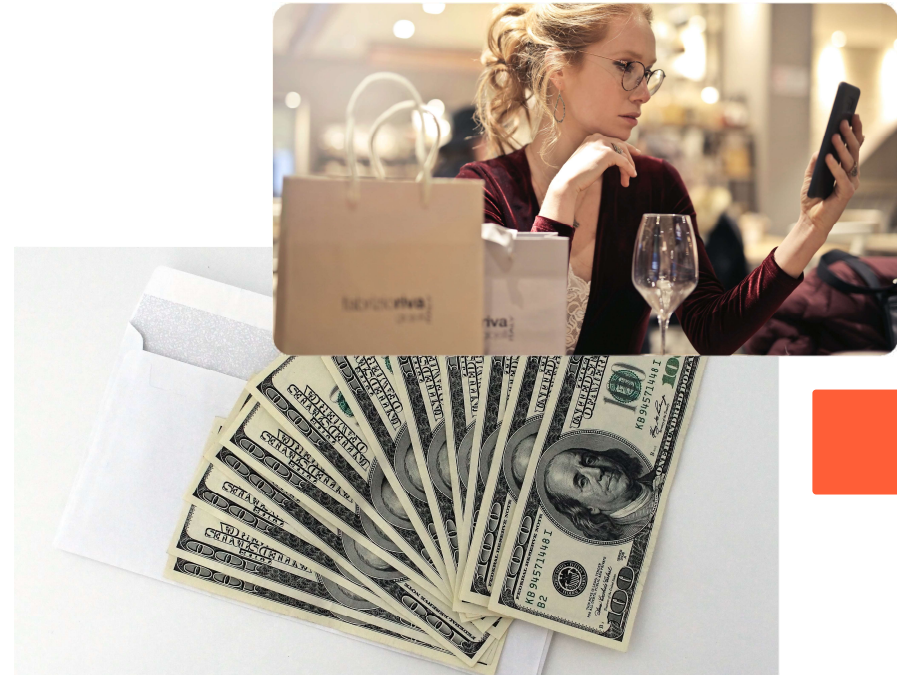


What if I hired a third party?  
IRM 5.7.3.3

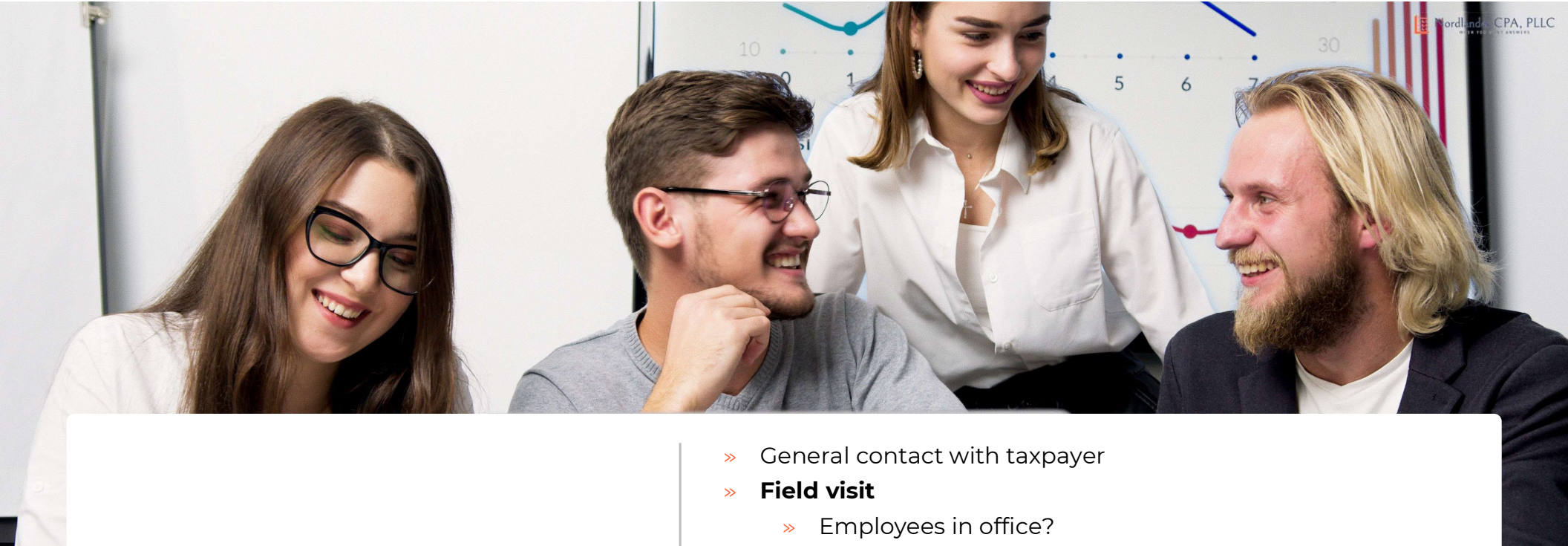
# TFRP CALCULATION



- » IRM 8.25.1.1.2 – penalty against responsible person
- » Trust Fund only
- » No employer match
- » Precision not required
- » IRC 6020(b) is allowable
  - » 20% federal withholding estimate







# TFRP PROCESS



- » General contact with taxpayer
- » **Field visit**
  - » Employees in office?
  - » Cars parked in parking lot?
  - » Going concern?
  - » Office have multiple businesses?
  - » Alter ego?
  - » Who appears to be in charge?



# RESPONSIBLE PARTY INTERVIEW



- » Form 4180
  - » Determines financial policy?
  - » Authorizes payments of bills and creditors?
  - » Prepares, signs, or authorizes submission of tax returns?
  - » Knowledge of taxes were not paid?
  - » Authorizes payroll?
  - » Authorizes to make federal tax deposits?
  - » **Leading question – “Did you prepare, review, sign, or authorize transmission of payroll tax returns?”**





# TFRP CALCULATION



- » Revenue officer has latitude in assessing TFRP
  - IRM 5.7.5.1.1 – no present or future collection potential
- » Requires supervisor's approval
- » Notification of TFRP calculation
  - Form 2751 – don't sign, admits liability
  - Have 60 days to appeal penalty

## BEST PRACTICES TO REFUTE TFRP



- Show not responsible party
- Show no willfulness
- Look at calculation
- 3 ring binder
  - Evidence of checks, payroll forms, affidavits, job duties

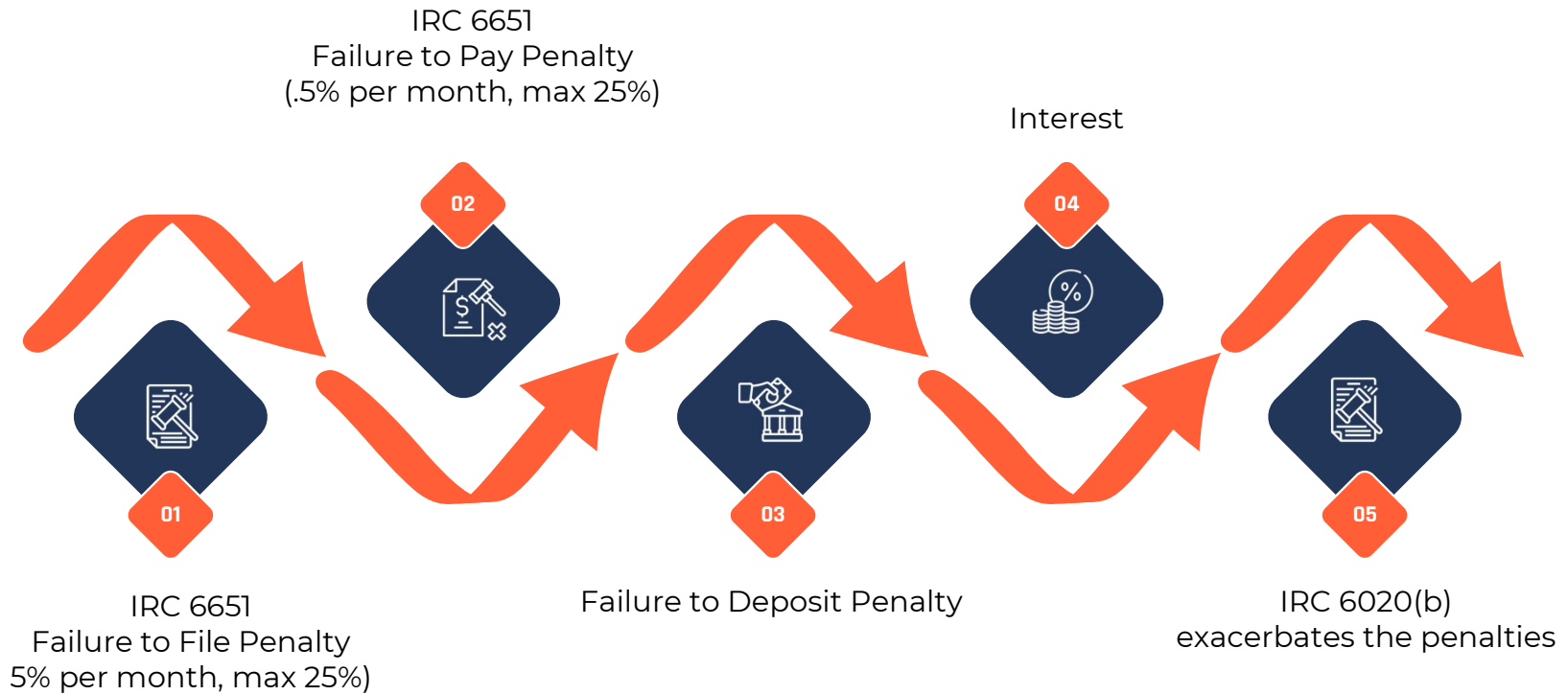
# TFRP APPEALS



- » Within 60 days (75 days if out of country)
  - » If late, Form 843 (Abatement of penalty)
- » Small Case Request (<\$25,000 each period)
- » Formal Written Request (IRM 8.25.2.3.3.2.2)
- » Appeals will review package
- » If TFRP is later reversed (IRM 8.25.2.3.2.4)
  - » **Can file claim within two years (exception for medical impairment)**



# CIVIL PENALTIES



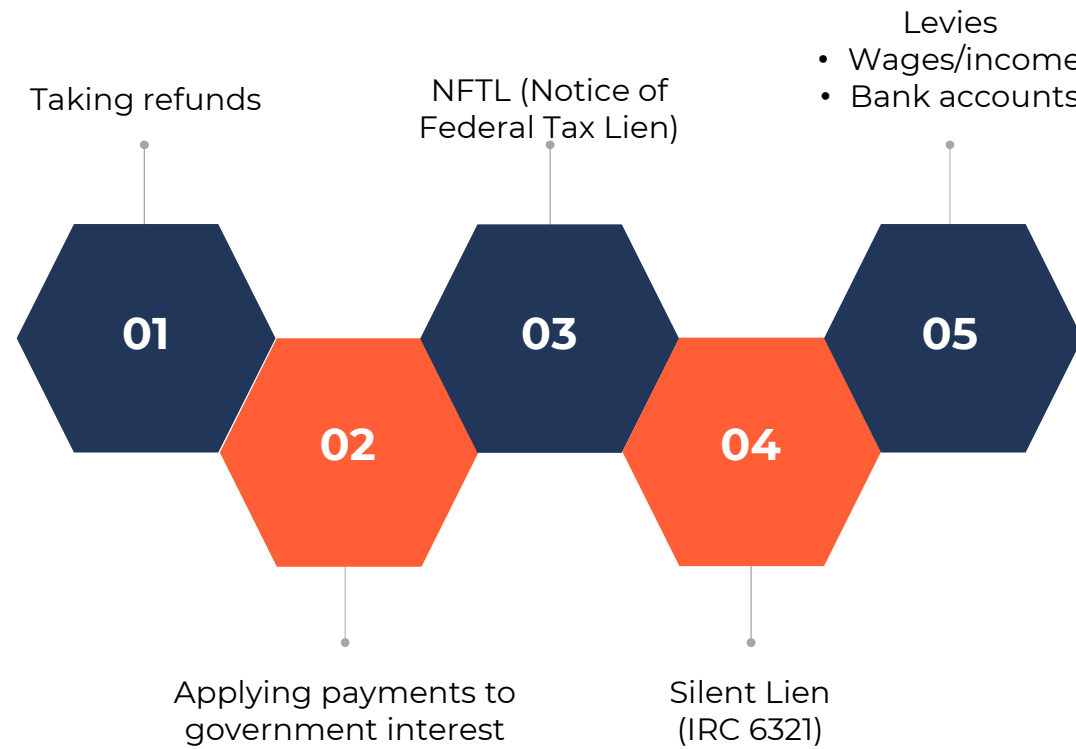


# Penalty Abatement



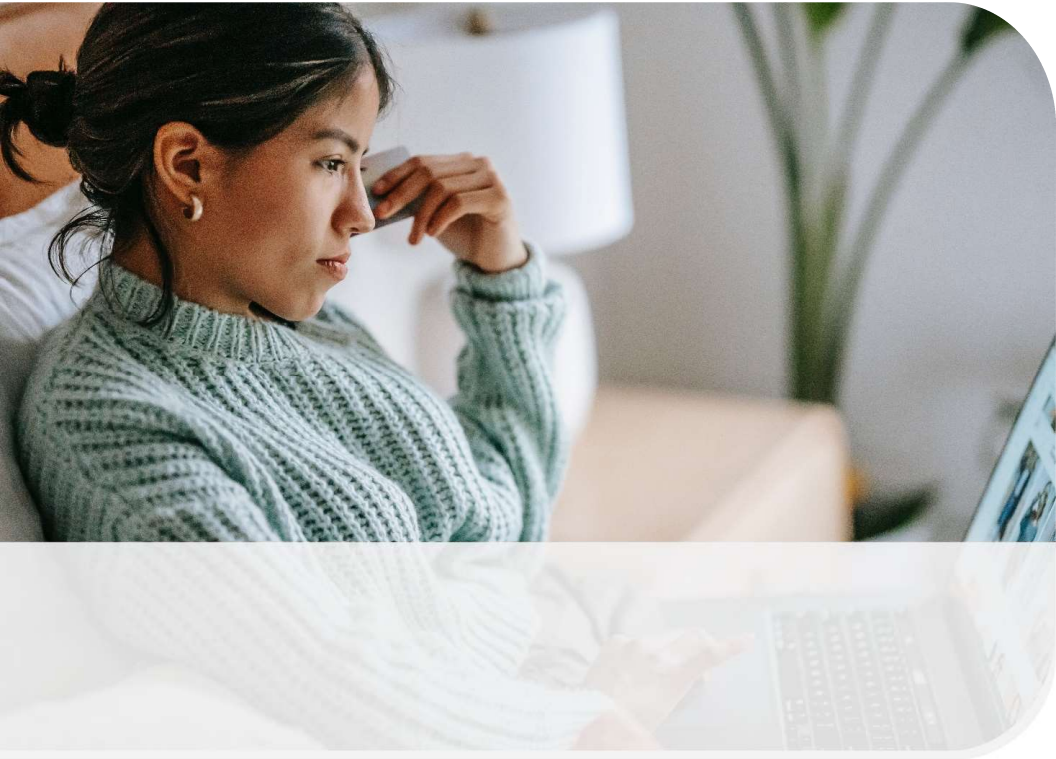
- » IRS grace – not mandatory
- » First time penalty abatement
  - » Must be in compliance per IRS Policy Statement 5-133 (6 years of filed tax returns, estimate tax payment for current year)
  - » Can be done per period, outside 3 years of last occurrence
- » Reasonable cause penalty abatement
  - » Depends on penalty and cause
  - » No one size fits all
  - » Common Causes – fire, natural disasters, inability to get records, death, medical, system issues, reliance on tax professional, lack of knowledge, steps taken to solve
- » Form 843 (Claim for Refund and Request for Abatement)
- » Interest from penalty is removed (sometimes)

# IRS COLLECTION PRACTICES



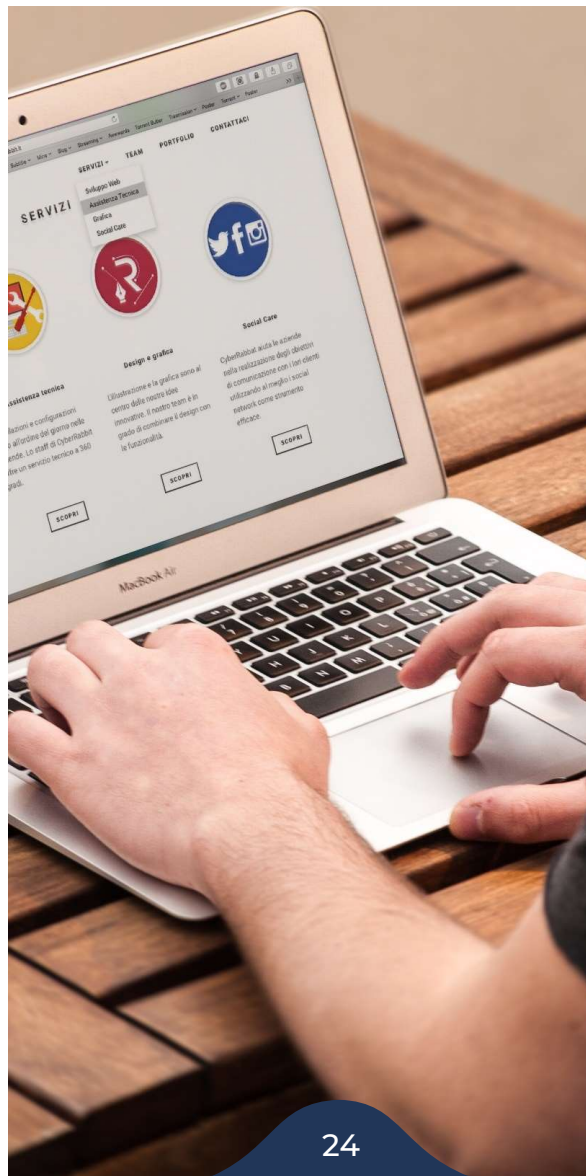


# COMMON SCHEMES TO AVOID PAYING



- » Moving assets
- » Reclassifying employees as independent contractors
  - Behavioral control
  - Financial control
  - Relationship of parties
- » Starting a new business
  - Business didn't stop underlying behavior
  - Assets not sold at FMV
  - Kept same employees and customers
  - Same business location

# PROTECT YOUR FIRM



## 01

Don't sign if tax due

## 02

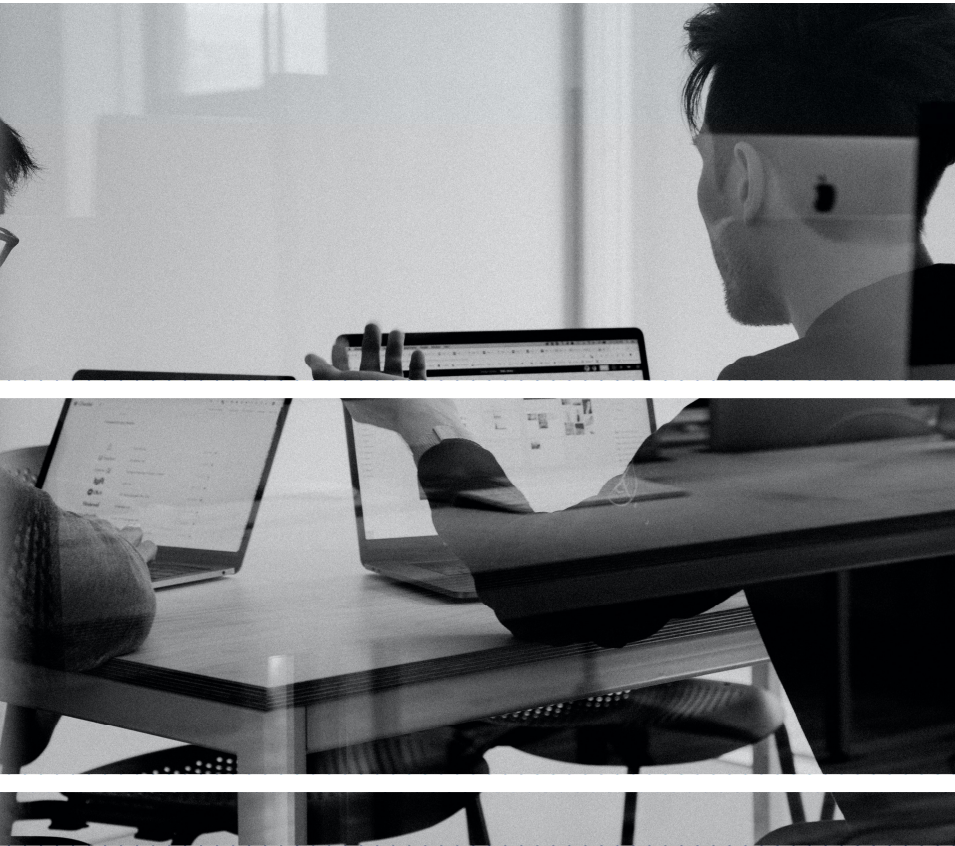
Verify payroll tax payments  
are made periodically

## 03

Don't have signature authority  
on bank accounts

## 04

Advise client to pay taxes



# PROTECT YOUR CLIENT



- » Advise client to file and pay payroll taxes
- » May need to reduce expenditures
- » Get a bank loan
- » Start complying with current forms and taxes
- » Negotiate an Installment Plan with IRS
- » Start thinking about protection against TFRP
- » Does business need to close?

# SEVEN ACTIONS TO SOLVE TAX PROBLEMS

**01**

Pay in full

**02**

Too poor to pay

**03**

Installment agreement

**04**

Partial pay installment agreement

**05**

Offer in compromise  
– Doubt to Collection

**06**

Offer in compromise  
– Doubt to Liability

**07**

Effective tax administration

# REASONABLE COLLECTION POTENTIAL (RCP)



- Basis is the Collection Information Statement (CIS)
  - Form 433A - personal
  - Form 433B - business
- Takes into consideration geography, dependents, income, and other circumstances
- IRS scrutinizes assets and liabilities, lifestyle
- Typically look at prior 6 months to estimate RCP





# REASONABLE COLLECTION POTENTIAL (RCP)



- » Allowable Living Expenses
  - » Food, clothing, and other items - national
  - » Out of pocket health care expenses – national
  - » Housing and utilities – local
  - » Transportation - local
- » Other necessary and other conditional expenses
  - » Accounting and legal fees
  - » Daycare expenses
  - » Education
  - » Court ordered payments
  - » Dependent care
  - » Credit card payments, school loan payments, term life insurance
  - » Delinquent state tax payments
- » One year rule (IRM 5.14.1.4.1) and six-year rule (IRM 5.14.1.4.1)
- » Shared expenses with non-liable party





# RCP CHART



Expense	Actual or Allowable
Food, Clothing, & Other	National Standard
Housing & Utilities	Lessor of Actual or Local Standard
Automobile - Ownership	Lessor of Actual or National Standard
Automobile - Operating	Lessor of Actual or Local Standard
Public Transportation	National Standard
Health Insurance	Actual
Out of Pocket Health Care	Larger of Actual or National Standard
Court Ordered Payments	Actual
Child & Dependent Care	Actual (Must be necessary)
Life Insurance	Actual (Must be reasonable)
Current Year Taxes	Actual Fed/State (Withheld or Estimated)
Secured Debts	Actual
Delinquent State or Local Taxes	Actual (% analysis)
Other	Actual (Facts & Circumstances)

# OPTION #1 - PAY IN FULL



## Pay in full online or with check

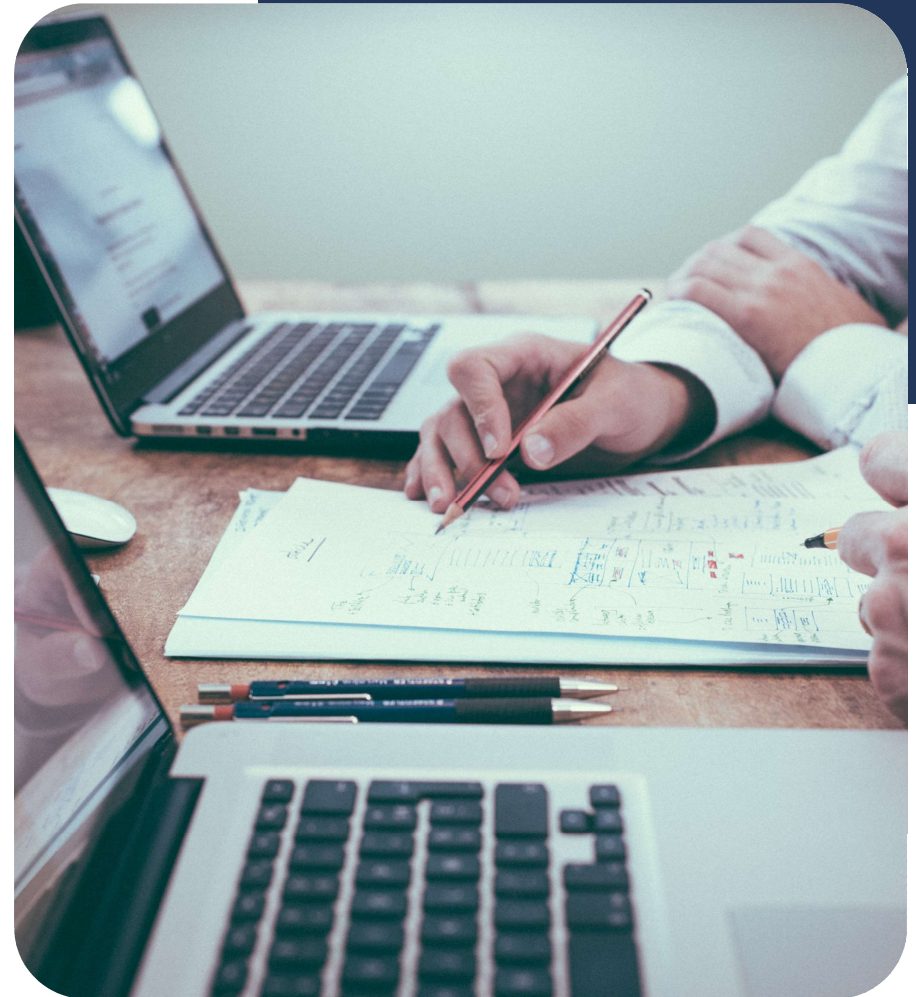
- » Online is best
- » Check can be lost in mail, or applied wrong
- » If writing a short letter, explain the purpose
- » Check should clearly state the SSN/EIN, type of tax, and period
- » Separate checks for each period
- » Keep record of when sent



## OPTION #2 - CURRENTLY NOT COLLECTIBLE (CNC)



- 2-year reprieve because RCP is too low
- Doesn't toll SOL
- RO has flexibility if obvious taxpayer can't pay
- Bankruptcy does have automatic stay
  - Reorg allows 60 months 11 USC 1129 (a)(9)(C)



## OPTION #3 - INSTALLMENT AGREEMENT (IA)

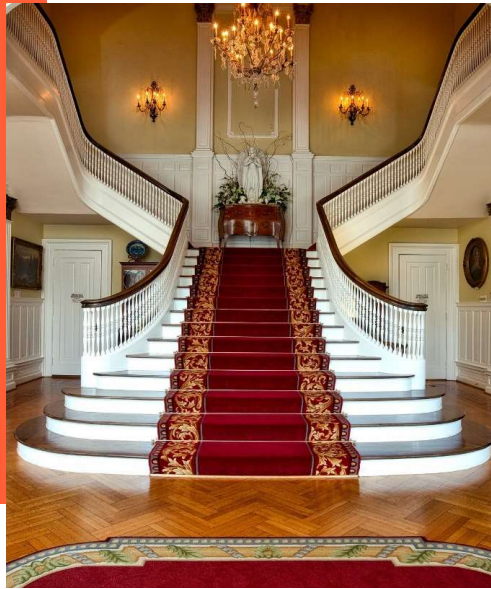


- » **Guaranteed IA**
  - IRC 6159(c) – Less than \$10,000 over 36 months
- » **Streamlined IA**
  - Taxes, penalties, and interest (<\$25,000) and within 72 months (individuals, businesses, and closed businesses)
  - Taxes, penalties, and interest (<\$50,000) and within 72 months (individuals, closed businesses)
- » **In-Business Trust Fund Express IA**
  - (<\$25,000) 24 months, no TFRP is assessed
  - (>\$25,000) doesn't qualify – must submit financial statements
- » **Not allowed to designate payments on IA**
- » **Calculate minimum payment over # of months, maximum payment per RCP, happy median**
- » **One year rule and six-year rule (IRM 5.14.1.4.1)**





# OPTION #4 - PARTIAL PAYMENT INSTALLMENT AGREEMENT (PPIA)



- IRC 6159 allows IRS to negotiate tax liability
- IRS not getting full payment within CSED
- Requires persuasion about reasonable expenses, assets not viable to sale
- Expect being asked more questions about income and assets



## OPTION #5 - OIC DOUBT TO COLLECTABILITY



- Seen on late night TV commercials
- Must be in compliance
- Complete a form to prove eligibility
- Takes into consideration the RCP and quick sale of some assets
- Quick sale is 80% of FMV of real estate, vehicles, etc.
- Lump sum - Total RCP per month for 12 months, plus total equity in assets, paid 20% down, balance within 5 months after approval
- Periodic Payment – same calculation but divided in 24 months
- Must be compliant for 5 years (file tax returns on time, no other taxes due)
- Future refunds will be kept



# OPTION #6 - OIC DOUBT TO LIABILITY



IRM 5.19.24 gives guidance



Small down payment  
with application



Disputes the liability



IRS has 24 months to  
review (IRC 7122(f))

# OPTION #7 - EFFECTIVE TAX ADMINISTRATION



# STEPS WHEN YOU GET THE PHONE CALL



**01**

Get a copy of the transcripts, estimate CSED

**02**

Get POA and contact IRS

**03**

Get into compliance; protect from adverse collections if possible

**04**

Get information to IRS

**05**

Calculate RCP

**06**

Determine which of the seven actions apply

**07**

Implement plan

# LEARNING OBJECTIVES



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