



Top 5 Tax and Legal Issues Affecting the Construction Industry

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Today's Road Map

- Tax Benefits
- Construction Trust Fund Act
- Tax Traps
- State Taxes
- Retainage & Trapped Funds



TAX PERKS



Tax the Rich – Budget Reconciliation Act



Tax the Rich – Budget Reconciliation Act

Highlights:

- 1) Individual Income Taxes
- 2) Capital Gains Taxes
- 3) Estate and Gift Taxes
- 4) Pass-Through Business Taxes
- 5) Corporate Taxes
- 6) Tax Credits



Choice of Entity

What is the best entity for my business?

- State Law Considerations

- 1) Ease of Management
- 2) Asset Protection
- 3) Ownership
- 4) Corporation, LLC, LP?

- Tax Considerations

- 1) C-Corp
- 2) S-Corp (must pay reasonable wage)
- 3) Partnership (active must pay Self-Employment Tax)

Tax Rate Differential

- C-Corporations
 - 1) 21% Flat Rate (Is it going up?)
 - 2) Dividends (Max of 23.8%)

C-Corporation	
Income	\$ 400,000.00
Corporate Tax @ 21%	\$ 84,000.00
After-Tax Cash	\$ 316,000.00
Dividend Tax @ 23.8%	\$ 75,208.00
Total Tax	\$ 159,208.00
Estimated Tax Rate	39.8%

Tax Rate Differential

- S-Corporations
 - 1) No Corporate Tax
 - 2) Individual Max Tax (37%)

S-Corporation	
Income	\$ 400,000.00
Shareholder Wages	\$ 142,800.00
ER FICA Tax on Shareholder Wages @ 7.65%	\$ 10,924.20
Taxable Income	\$ 246,275.80
Income Tax @25%	\$ 61,568.95
Income Tax on Wages @25%	\$ 35,700.00
EE Employment Tax on Wages	\$ 10,924.20
Total Tax	\$ 119,117.35
Estimated Tax Rate	29.8%

Tax Rate Differential

- Partnerships

- 1) No Corporate Tax
- 2) Individual Max Tax (37%)

Partnership	
Income	\$ 400,000.00
1/2 SE Tax Deduction	\$ 14,210.00
Taxable Income	\$ 385,790.00
Employment taxes	\$ 28,420.00
Income Tax @25%	\$ 96,447.50
Total Tax	\$ 124,867.50
Estimated Tax Rate	31.2%

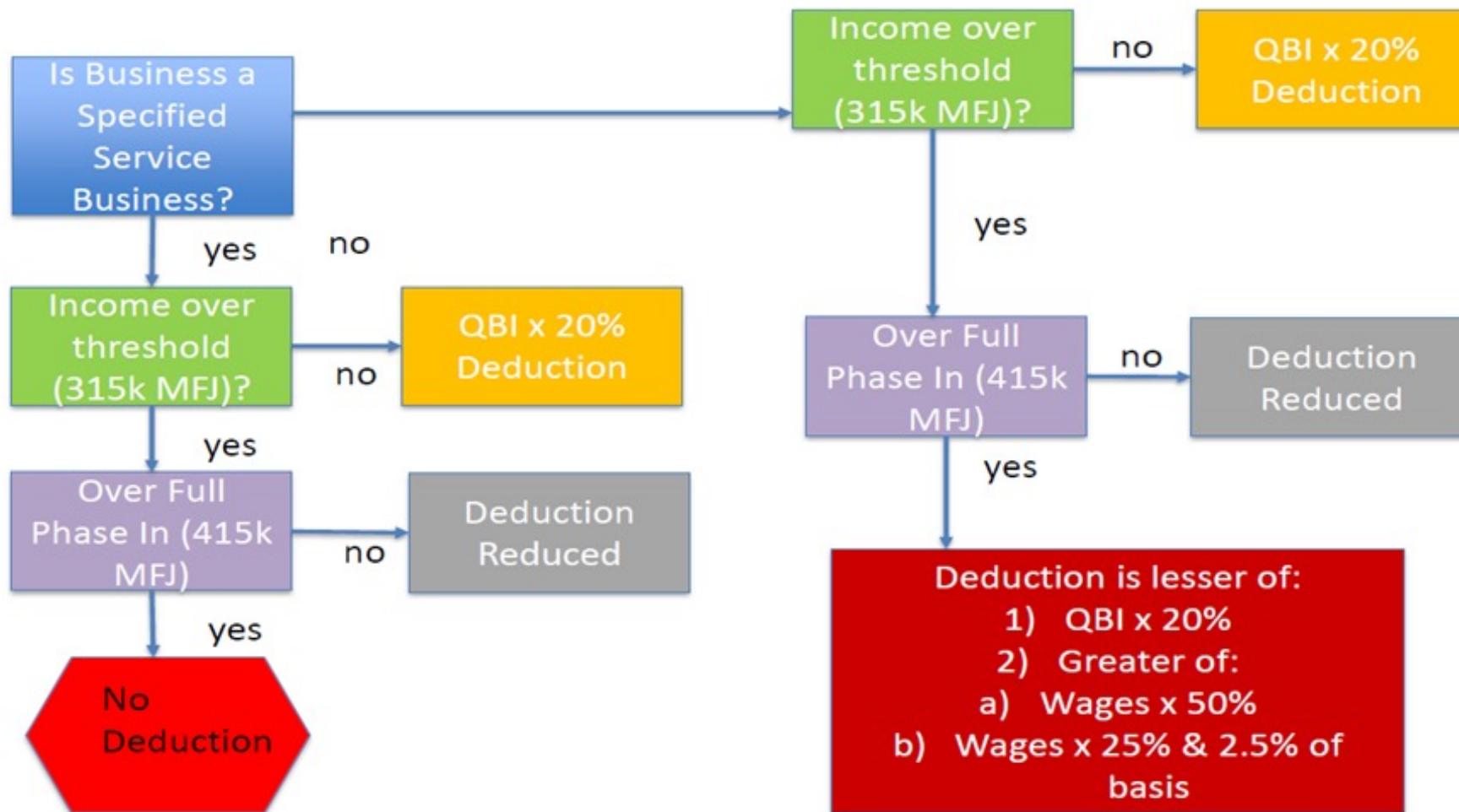


Section 199A

Overview of Section 199A



- Effective Dates: 2018-2025
- Applicability: non C-Corp taxpayers
- Deduction: 20% of qualified business income





Section 179D

What it is:

- Tax deduction for owners of energy efficient buildings.
- Made permanent by the Consolidated Appropriations Act of 2021.
- Basic deduction is \$1.80 per square foot for qualified buildings.
- Any accrued deduction can be carried forward up to 20 years.

What Qualifies:

Energy efficient improvements to a commercial building's:

- HVAC system;
- Interior lighting systems; and
- Building envelope

Must have third party review of energy savings.



Public Property

- Federal, state or local government.
- Can allocate deduction to person **primarily responsible** for designing property.



Home Builder Credit

Energy Efficient Homes Tax Credit

- \$2,000 credit for builders of new energy efficient homes.
- Home qualifies for the credit if it:
 - Is located in the U.S.;
 - Construction is substantially complete before December 31, 2021;
 - Meets certain energy savings requirements; and
 - Is acquired from the contractor for use as a residential property by December 31, 2017.
 - Must be certified.



COVID-19 Era Perks

COVID-19 Era Perks

- NOLS arising in 2018, 2019, and 2020 can be used for a five year carryback period to fully offset taxable income.
- PPP Loans
 - Forgiven loans are not income; and
 - Purchases made with those funds are still deductible.

Payroll Credits

- Employee Retention Credit;
- Sick and Family Leave Credit; and
- Work Opportunity Tax Credit.

Credits are fully refundable.





CONSTRUCTION TRUST FUND ACT



Texas Property Code Chapter 162

The Basics

- **Trust Funds**

- Construction payments made to a contractor or subcontractor under **a construction contract**, including funds borrowed by a contractor, subcontractor, or owner in connection with the improvement of specific real property for the benefit of persons furnishing the labor or material. Tex. Prop. Code § 162.001(a).
- Loan receipts, if the loan is secured in whole or in part by a lien on the property. Tex. Prop. Code § 162.001(b).

- **Beneficiaries**

- Artisans, laborers, mechanics, contractors, subcontractors, and materialmen who labor or furnish labor or materials for the construction or repair of any improvement of any specific real property. Tex. Prop. Code § 162.003(a).
- Property owner, in connection with a residential construction contract. Tex. Prop. Code § 162.001(b).

- **Trustees**

- A contractor, subcontractor, or owner **or an officer, director, or agent** of a contractor, subcontractor, or owner, who receives or has control of trust funds. Tex. Prop. Code § 162.002.

Misappropriation

- A trustee who, intentionally or knowingly or with intent to defraud, directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust funds, has misapplied the trust funds. Tex. Prop. Code § 162.031.
- Examples
 - Using funds to pay personal expenses or bills. *See e.g., Consolidated Electrical Distributors, Inc. v. Cook*, 2006 WL 470586, *5 (S.D. Tex. 2006)
 - Withdrawing capital. *In re Swor*, 347 Fed. Appx. 113 (2009).
 - Cash withdrawals. *See e.g., Bolding v. State*, 2016 Tex. App. LEXIS 6878 (Tex. App.—Corpus Christi June 30, 2016, no pet.).
 - Not maintaining a separate account is *not* a violation for a commercial project. *See e.g., Bolding*, 2016 LEXIS 6878.

Mechanics of Proving Misappropriation

1. Comingling does not defeat a trust fund claim. Tex. Prop. Code § 162.031(d).
2. To get around difficulties or tracing, courts scrutinize the expenses of the trustee. *Bolding*, 2016 WL 3626224, *8.
3. Money in versus money out.
4. Lowest Intermediate Balance Test – Increase with trust fund deposits. Decrease when account balance drops below the trust amount.

Why this Matters

- **Personal liability** – officers, directors, agents, who receive or have “control” over funds may be liable. *Holladay v. CW&A, Inc.*, 60 S.W.3d 243 (Tex. App.—Corpus Christi 2001, pet. denied); *Consolidated Elec. Distribs., Inc. v. Cook (In re Cook)*, 2006 U.S. Dist. LEXIS 10508 (S.D. Tex. Feb. 27, 2006).
- **Contractual privity between beneficiary and trustee** – contractual relationship is not necessary. *Taylor Pipeline Const. v. Directional Road Boring*, 438 F. Supp. 2d 696,716 (E.D. Tex. 2006).
- **Bankruptcy protections** - (1) may not be dischargeable in bankruptcy if heightened burden is met. *In re Thornhill*, 2019 Bankr. LEXIS 3052 (E.D. Tex, 2019) and (2) funds are not property of the estate. Tex. Prop. Code § 162.001(d).
- **Separate and independent from liens** - Subcontractors/suppliers are not required to perfect lien or bond claim to be eligible. *Encana Oil & Gas, Inc. v Zayler, et al (In re TSC Sieber Services, L.C.)*, 2012 Bankr. LEXIS 3417 (Bankr. E.D. Tex. July 26, 2012), *aff’d*, 2013 U.S. Dist. LEXIS 136306 (E.D. Tex. Sept. 24, 2013), *vacated on other grounds*, 771 F.3d 246 (5th Cir. 2014).
- **It’s a crime.** Tex. Prop. Code § 162.032.
 - Misapplication of \$500 or more → Class A misdemeanor
 - Intent to defraud → Third degree felony

The Defenses

- Use of funds for actual project expenses.
- Reasonable belief beneficiary not entitled to funds.
- Payment of funds after notice of criminal complaint.



Actual Project Expenses

- “..the trust funds not paid to the beneficiaries of the trust were used by the trustee to pay the trustee's actual expenses **directly** related to **the** construction or repair of the improvement”. Tex. Prop. Code § 162.031(b).
- Does this include overhead?
 - Most courts say yes
 - Based on Texas Attorney General's Opinion No. JM-945 (1988).
 - Recent discussion. *In re Allen*, 2014 Bankr. LEXIS 4535 (Bankr. S.D. Tex. Nov. 4, 2014).
 - Some say no
 - *In re Coley*, 354 B.R. 813, 816 (Bankr. N.D. Tex. 2006).

Overhead Continued

- The current state of play: the majority view has likely prevailed.
- What is overhead?

Texas AG: Overhead is “directly related if the job could not have been obtained or completed without them.”

Allocation: whether “the method used to allocate expenses to each job proper”?

- Fifth Circuit’s expansion? “Nor must these funds be spent only on the project for which they were received – they may be spent on other projects or on expenses related to several business overhead.” *In re Swor*, 347 Fed. Appx. 113, 115 (5th Cir. 2009).
- Current uncertainty: commentators and lower courts raised concerns. Texas state courts have not addressed.

Overhead Takeaways

- Document expenses.
- Document and allocate overhead in a reasonable manner.
- Project funds need to be used on project expenses.
- Don't rob Peter to pay Paul.
- Be careful about timing of owner distributions.
- Comingling funds is generally ok unless it is a residential project.
- No liability if beneficiaries are all paid.

Reasonable Belief Beneficiary Not Entitled to Funds

- REASONABLE belief.
- Trustee must give notice to the beneficiary.
- Trustee retains funds until entitlement is resolved or litigated.
- Tex. Prop. Code § 162.031(b).



Payment of Funds After Notice of Criminal Complaint

This defense applies if the Trustee paid beneficiaries all trust funds no later than 30 days following written notice to the trustee of a criminal complaint or investigation. Tex. Prop. Code § 162.031(c).





Waiver – a New Defense?

Recent Case on Waiver

Mesa Southern CWS Acquisition, LP v. Deep Energy Expl. Partners, LLC, 2019 Tex. App. LEXIS 10107 (Tex. App.—Hous. [14th Dist.], no pet.):

- Contractor entered agreement with oil and gas operator to provide labor and materials; operator filed for bankruptcy and suit was filed against the **parent company** to collect based on the trust fund statute and mineral liens; contract provision between Contractor and operator stated:

CONTRACTOR irrevocably waives any and all rights to lien, sequester, attach, seize or assert a privilege over the Work performed by CONTRACTOR, the real property upon which the Work is located and any hydrocarbon product associated with the Work. CONTRACTOR acknowledges that in entering into this Agreement, CONTRACTOR is relying on the creditworthiness of COMPANY and shall look solely and exclusively to COMPANY for payment and shall not rely on any statutory, common law or other right to seize, attach, sequester, assert a privilege, lien or otherwise encumber the real property of COMPANY or upon which the Work is located or any hydrocarbon associated therewith.

Mesa Southern CWS Acquisition, LP v. Deep Energy Expl. Partners, LLC, 2019 Tex. App. LEXIS 10107 (Tex. App.—Hous. [14th Dist.], no pet.)

The Court held:

- “A party may assert waiver as an affirmative defense against another who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right.”
- Contractor CHOSE to rely on operator’s general creditworthiness
- Waiver “necessarily precludes recovery on all of [the contractor’s] claims, which seek satisfaction of the alleged debt from [the parent company.]”

Other Issues to Consider:

- Unlike the prompt pay and lien statutes, the trust fund act does not have an anti-waiver provision.
- But....“enforcing a provision to allow one party to intentionally injure another with impunity violates the law.” *Zachry Const. Corp. v. Port of Houston Auth, of Harris Cty.*, 449 S.W.3d 98, 116 (Tex. 2014).

AIA – Subcontract Form – Waiver?

ARTICLE 11 PAYMENTS

§ 11.1 Progress Payments

§ 11.1.1 Based upon Applications for Payment submitted to the Contractor by the Subcontractor, corresponding to Applications for Payment submitted by the Contractor to the Architect, and Certificates for Payment issued by the Architect, the Contractor shall make progress payments on account of the Subcontract Sum to the Subcontractor as provided below and elsewhere in the Subcontract Documents. Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments received by the Contractor and Subcontractor for Work properly performed by their contractors and suppliers shall be held by the Contractor and Subcontractor for those contractors or suppliers who performed Work or furnished materials, or both, under contract with the Contractor or Subcontractor for which payment was made to the Contractor by the Owner or to the Subcontractor by the Contractor, as applicable. Nothing contained herein shall require money to be placed in a separate account and not commingled with money of the Contractor or Subcontractor, shall create any fiduciary liability or tort liability on the part of the Contractor or Subcontractor for breach of trust, or shall entitle any person or entity to an award of punitive damages against the Contractor or Subcontractor for breach of the requirements of this provision.

Recent Cases: Trend?

- No attorneys' fees. *Dudley Constr. Inc. v. ACT Pipe & Supply, Inc.*, 545 S.W.3d 532 (Tex. 2018).
- Does not apply to factoring companies. *Dakota Util. Contractors, Inc. v. Sterling Commercial Credit, LLC*, 583 S.W.3d 199 (Tex. App— Corpus Christi 2018, pet. denied).
- May be contractually waived? *Mesa Southern CWS Acquisition, LP v. Deep Energy Expl. Partners, LLC*, 2019 Tex. App. LEXIS 10107 (Tex. App.—Hous. [14th Dist.] no pet.)
- May not apply to contracts merely related to construction? *H&H San and Gravel, Inc. v. Suntime Sandpit, Inc.*, 2019 Tex. App. LEXIS 4399 (Tex. App. Corpus Christi 2019, no pet.) (Court held that that the act did not apply where the prime contract with the city was solely for the supply of sand and not construction even though the sand was to be used in connection with construction.)

Alexander v. Kent

The Dangers of Signing Pay Apps

- **Issue:** Is signing a pay application that contains incorrect statements about subcontractors being paid fraud? *Alexander v. Kent*, 480 S.W.3d 676 (Tex. App.—Fort Worth 2015, no pet.)
- **Pay App Language:** “The undersigned Contractor certifies that to the best of the Contractor’s knowledge, information and belief...that all amounts have been paid by the Contractor for Work for which previous Certificates of Payment were issued and payments received from Owner, and that current payment shown herein is now due.”
- **Alexander (officer) argues:**
 - Language of certification was not an “affirmative statement of fact actionable for fraud”
 - Kent had equal access to knowledge of whether the subcontractor’s were paid
 - No individual liability because the pay applications were signed in his corporate capacity.
- **Court rejected Alexander’s arguments:**
 - The language of the Certification in pay application was a misrepresentation constituting fraud.
 - Alexander reassured Kent about payments to subcontractors.
 - Alexander was the only person with check-writing authority and the only person able to know what payments were made.
 - Law is well settled employees can be liable for fraud even when done in course and scope of employment.

Alexander v. Kent: Takeaway

- Officer of general contractor acting in his representative capacity signed pay applications with false statements was held personally liable



- TAKEAWAY → It is critical to know what the pay application says when signed.

TAX TRAPS



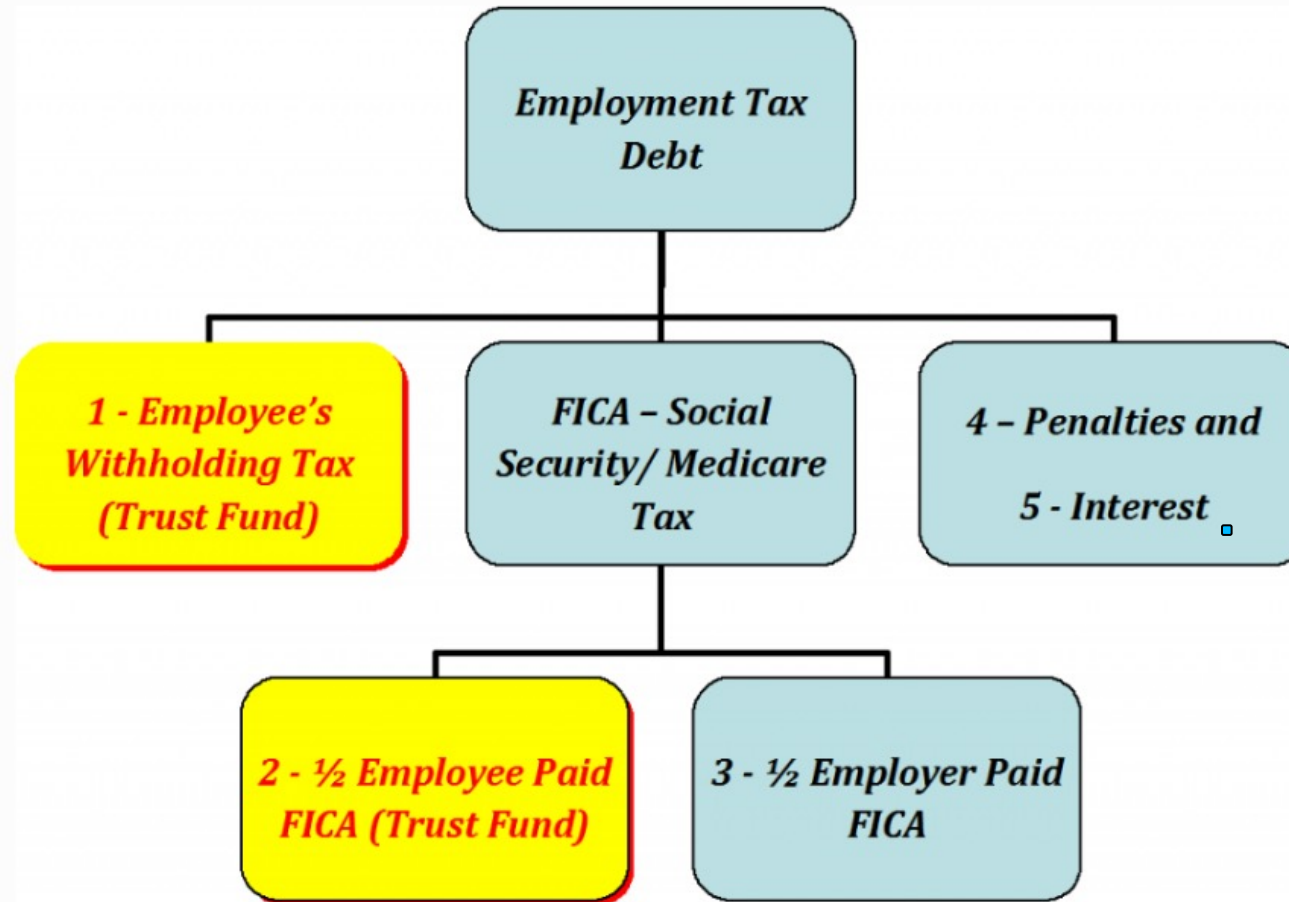


Employment Taxes

- Trust Fund Recovery Penalty
- Elements: Responsibility and Willfulness



What is the Trust Fund?



Who is, “Any person who is required...”, i.e. a “Responsible Person”?

A "responsible person" is anyone who:

- has the duty to perform; or
- the power to direct
- the act of collecting, accounting for, or paying over trust fund taxes.

Who is a Responsible Person?

Most TFRP cases involve officers of corporations. However, a responsible person may be one or more of the following:

- An employee of a corporation
- A partner or employee of a partnership
- A director or shareholder of a corporation
- A related controlling corporation

Who is a Responsible Person?

- The IRS' view is that anyone with signatory authority over the business' bank accounts is “responsible”.



What is Willfulness?

“Willfulness” is the intentional act of paying other creditors instead of the IRS.

See, e.g.:

Howard v. United States, 711 F.2d 729, 736 (5th Cir. 1983)

Hypothetical

You are the CFO of a company and the CEO instructs you NOT to pay the IRS and instead take care of other bills.

What should you do?

Could I go to Jail?

By way of background and introduction:

- IRC § 6672 saddles a taxpayer with personal civil liability for the trust fund portion of unpaid payroll taxes.
- IRC § 7202 (a five-year felony) has jumped from a seldom-used offense reserved for truly egregious cases, to a criminal tool that the IRS is actively encouraged to use in payroll tax deficiencies that would previously have been viewed as “routine”.



Worker Classification

Worker Classification: Statutory Employees

IRC section 3121(d) contains four categories of employee for purposes of the FICA. A worker is an employee if he or she is one of the following:

- 1) a common law employee
- 2) a corporate officer
- 3) an employee as defined by statute, commonly referred to as a "statutory employee"
- 4) an employee covered by an agreement under Section 218 of the Social Security Act

Worker Classification: The Common Law Standard

- Factors
 - 1) the degree of control exercised by the principal over the worker;
 - 2) which party invests in the work facilities used by the worker
 - 3) the worker's opportunity for profit or loss
 - 4) whether the principal can discharge the worker;
 - 5) whether the work is part of the principal's regular business;
 - 6) the permanency of the relationship.

No single factor is dispositive, and all facts and circumstances must be considered.

What Happens When You Fail to Properly Classify a Worker/s?

Where Employer filed 1099s:

- i. income tax collected at source: 1.5% of wages; and,
- ii. 20% of Employee's portion of FICA. Plus, employer remains fully liable for its portion of FICA.

Where Employer failed to file 1099s:

- i. income tax collected at source: 3% of wages; and
- ii. 40% of Employee's portion of FICA. Plus, employer remains fully liable for its portion of FICA.

Section 530 Relief

- Section 530 provides businesses with relief from federal employment tax obligations if certain requirements are met. It terminates the business's, **not the worker's**, employment tax liability under Internal Revenue Code and any interest or penalties attributable to the liability for employment taxes (Rev. Proc. 85-18, 1985-1 C.B. 518).

Section 530 Relief

- In order for Section 530 relief to apply the business must meet both:
 - Consistency requirement (filing 1099 and treating all workers the same), and
 - Has a reasonable basis (prior audit, judicial precedent, industry practice, reliance on professional).

Voluntary Classification Settlement Program

- The VCSP is a voluntary program that provides an opportunity for taxpayers to reclassify their workers as employees for employment tax purposes for future tax periods with partial relief from federal employment taxes.

Voluntary Classification Settlement Program

Eligibility:

- 1) A taxpayer must have consistently treated the workers to be reclassified as independent contractors
- 2) filed all required Forms 1099 for the workers to be reclassified
- 3) Not under IRS, DOL or state audit



State Taxes

Sales Tax vs. Use Tax

- Texas imposes a *sales tax* on the sale and rental of most tangible personal property and some services in Texas.
- Texas imposes a *use tax* on items purchased outside of the state and brought into Texas for use.
 - If sales tax is paid on an out-of-state purchase, Texas will grant a credit for the sales tax paid to the other state.
 - If no sales tax was paid on the purchase, the buyer must accrue and remit a use tax to the Texas Comptroller.

What is Taxable?

- **Sale, lease or rental of tangible personal property**
 - Materials used in construction
 - Consumable supplies
 - Equipment and tools
- **Specified services**
 - Landscaping
 - Pest control
 - Janitorial
 - Property repair
 - Property remodeling
 - Equipment repair



What is Not Taxable?

- Residential repairs and remodeling
 - Includes common areas in neighborhoods and apartment buildings
- New Construction



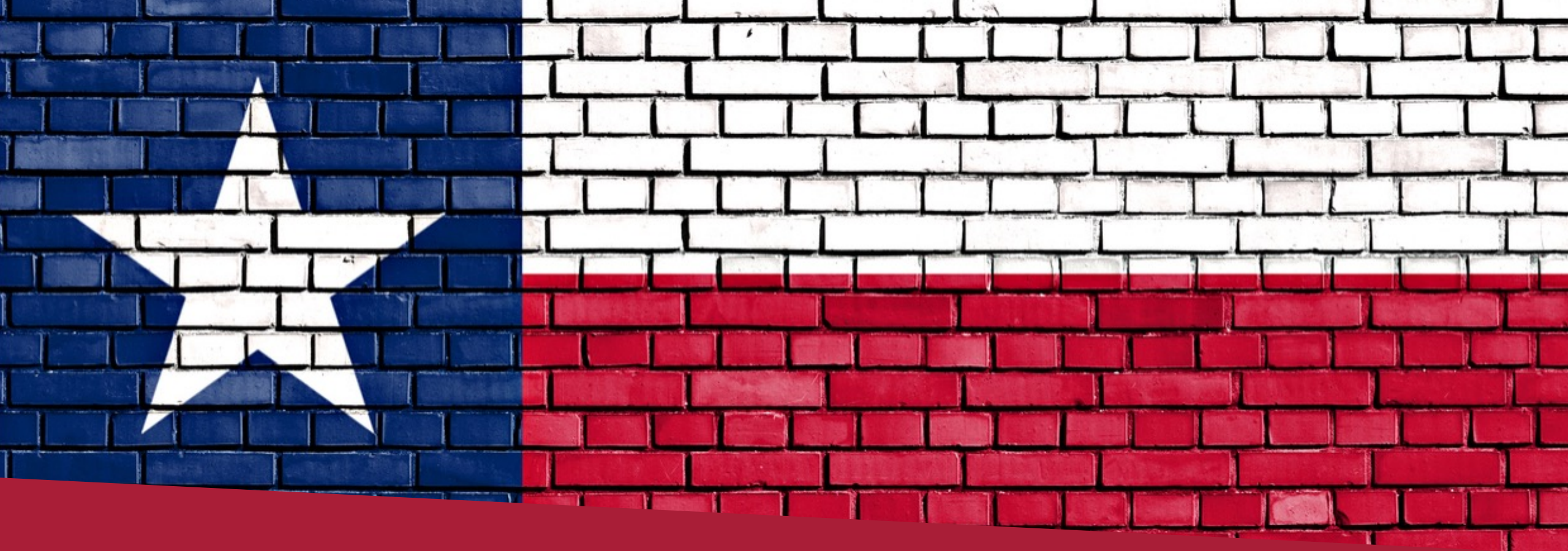
Issues to Avoid



- Charging the wrong sales tax rate.
- Charging sales tax to customers and not remitting to the Comptroller.
- Invalid resale or exemption certificates.

RETAINAGE AND TRAPPED FUNDS





Retainage: Texas Property Code Chapter 53

Basic Concepts

Owners have statutory rights (and obligations) to withhold two types of funds:

1. Retainage
2. Trapped Funds



Tex. Prop. Code § 53.101–106 as Updated per the 2021 Legislative Session

~~RETAINAGE~~

RESERVED FUNDS



Revised Statute

Sec. 53.101. FUNDS REQUIRED [~~RETAINAGE~~] TO BE RESERVED.

(a) During the progress of work under an original contract for which a mechanic's lien may be claimed and for 30 days after the work under such contract is completed, the owner shall [~~retain~~] reserve:

(1) 10 percent of the contract price of the work to the owner; or

(2) 10 percent of the value of the work, measured by the proportion that the work done bears to the work to be done, using the contract price or, if there is no contract price, using the reasonable value of the completed work.

Statutory Requirement to Reserve Funds

What needs to be retained/reserved?

10% of contract price of the work to the owner, or 10% of the value of the work. Tex. Prop. Code § 53.101.

What happens if Owner doesn't retain?

Claimants may perfect a lien against the project in the amount which should have been reserved. Tex. Prop. Code § 53.105.



How Long to Retain/Reserve

“During the progress of work under an original contract for which a mechanic’s lien may be claimed...”

And

“...for 30 days after the work under such contract is completed.”

Benefits and Consequences

- **For owners →**

- Benefit: (1) ensures a pool of money to deal with lien claimants; and (2) incentivizes the GC to finish.
- Consequence: if the owner does not withhold the funds, the owner's property is subject to a lien. This could mean double payment.

- **For contractors →**

- Benefit: similar to owners.
- Consequence: creates cash flow issues down the line. Common in residential.



Funds Trapping: Tex. Prop. Code § 53.081–85

Trapped Funds

Funds are “trapped” by the pre-lien notices. This triggers owner’s right to withhold funds from the general contractor.

Sec. 53.081. AUTHORITY TO WITHHOLD FUNDS FOR BENEFIT OF CLAIMANTS. [~~(a)~~] If an owner receives notice under Section 53.056 or 53.057 [~~, 53.058, 53.252, or 53.253~~], the owner may withhold from payments to the original contractor an amount necessary to pay the claim for which the owner receives notice. Such withholding can be in addition to any retainage.

Trapped Funds

The consequences are found in 53.084(b) – if an owner does not withhold the funds, then the owner may pay twice.

(b) If the owner has received [~~the~~] a notice[~~s~~] required by Section 53.056 or 53.057[~~subchapter C or K~~], if the lien has been secured, and if the claim has been reduced to final judgment, the owner is liable and the owner's property is subject to a claim for any money paid to the original contractor after the owner was authorized to withhold funds under this subchapter. The owner is liable for that amount in addition to any amount for which he is liable under Subchapter E.

How Long Must the Owner Withhold Trapped Funds

Sec. 53.082. TIME FOR WHICH FUNDS ARE WITHHELD. Unless ~~[payment is made under Section 53.083 or]~~ the claim is otherwise settled, discharged, indemnified against under Subchapter H or I, or determined to be invalid by a final judgment of a court, the owner shall retain the funds withheld until:

- (1) the time for filing the affidavit of mechanic's lien has passed; or
- (2) if a lien affidavit has been filed, until the lien claim has been satisfied or released.

Updates to Pre-Lien Notice Requirements

Effective January 1, 2022

- **No 2nd 15th Notice** - All tiers of subcontractors only need to send 3rd month notice (no 2nd month notice required). Because the 2nd month notice was for GCs, this change should not significantly impact funds trapping.
- **Simplified Forms** - New simplified forms of notice (both funds trapping and retainage) prescribed by statute
- **Means** - Notice may be sent certified mail or any private, traceable delivery service
- **Holidays** - If the 15th or 30th day falls on a weekend or holiday, then it is the next business day

How this Works in Practice: Case Law Examples and a Few Wrinkles

- If owner receives notice and the payments have already been made to the general contractor, the owner is not liable to the derivative claimant for any trapped fund claims. *Weaver v. King Ready Mix Concrete Inc.*, 750 S.W.2d 913 (Tex. App.—Waco 1988, no writ).
 - If the derivative claimant's project is incomplete, the owner is not liable to the initial sub for trapped funds paid to replacement contractors to complete the work. *Jewelry Mfrs. Exch. v. Tafoya*, 374 S.W.3d 639, 643 (Tex. App.—Dallas 2012, pet. denied).
 - After payment to all derivative claimants out of the reserved funds, the balance belongs to the contractor, not the owner. *Aiken v. State*, 36 S.W.3d 131 (Tex. App.—Austin 2000, no pet.).



What About Contractors?

- No statutory right or obligations.
- Its all a matter of contract.
 - General contractors generally withhold ten percent retainage from their subcontractors pursuant to the contract (i.e., contractual retainage).
 - Lien indemnity/defense and/or right to withhold.

Retainage

§ 11.1.8 Retainage

§ 11.1.8.1 For each progress payment made prior to substantial completion of the Subcontractor's Work, the Contractor may withhold the following amounts as retainage from the payment otherwise due:

(Insert a percentage or amount to be withheld as retainage from each Application for Payment. The amount of retainage may be limited by governing law.)

AIA Indemnity

§ 11.1.10 Provided the Contractor has fulfilled its payment obligations under the Subcontract Documents, the Subcontractor shall defend and indemnify the Contractor and Owner from all loss, liability, damage, or expense, including reasonable attorney's fees and litigation expenses, arising out of any lien claim or other claim for payment by any of the Subcontractor's subcontractors, suppliers, or vendors of any tier. Upon receipt of notice of such lien claim or other claim for payment, the Contractor shall notify the Subcontractor. If approved by the applicable court, when required, the Subcontractor may substitute a surety bond for the property against which the lien or other claim for payment has been asserted.

Thank you!



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