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Holding back on trust tax will come back to haunt

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- Bear Stearns

Like so many regular folks, Bay State companies large and small are juggling finances while waiting for the economy to start moving forward again.

Some cash-strapped CFOs, in an effort to keep their firms afloat until the economy improves, are paying bills in the order of how quickly trouble will come if they don't. That usually means determining an order of wages, suppliers, vendors, rent, utilities and lines of credit to be paid. And sometimes, at the end of line, are the Internal Revenue Service and the Massachusetts Department of Revenue.

Area attorneys say they've seen an uptick in the number of companies putting off paying trust fund taxes as the economy weakened, and they warn that there could be severe consequences for those directly involved in this practice.

"In going after companies that have not paid their trust fund taxes, we go after the RPs — responsible parties," said DOR communications director Bob Bliss. "Just because you have a corporation doesn't mean you're not personally liable."

Trust fund taxes are monies withheld from an employee's wages by an employer — income tax, Social Security and Medicare — and are held in "trust" to be paid to the government.

"The IRS and DOR view trust fund taxes as their money, and you've taken that money and converted it to your own use," said Laura Brown, a Rockland-based tax attorney. "You have embezzled."

So the individuals who decide which, when and in what order outstanding debts or taxes are paid, sign checks, or oversee bank accounts and disbursement records might be on the hook for the company's tax liability — plus stiff penalties and interest. This can include anyone from the bookkeeper to the board of directors.

"A lot of time financial officers feel like they're in control of the cash flow and they'll have the ability to pay, and then some precipitous event (liens, unpaid invoices) will occur," said Chris Panos of Craig and Macauley PC. "Then they go

after the persons who were in control at the time the taxes were supposed to be remitted.”

Delaying trust fund taxes is tempting for many company officers, simply because the government agencies are the slowest to react.

It often takes “over a year before the IRS or the DOR come after you,” said Brown, who works with many small and family-owned businesses. “It’s the easiest thing to not pay, because it’s not an immediate impact — but the penalties are severe.”

Brown says that she noticed an increase in these cases “around the time when **Bear Stearns** went down, because that’s when the banks started clamping down on credit.”

This delaying tactic is not confined to small businesses. Peter Banis and Paul Reska of **Banis, O’Sullivan & McMahon** in Boston handled about a hundred such cases per year during the recession, mostly with officers from mid-size to large corporations.

“It’s always a surprise to us that someone in that position suddenly gets this brilliant idea of ‘We’ll make it up later,’ ” said Banis. “We get a lot of shocked faces when these people find out that the liability is against them personally. The shame element is huge.”

Reska, who spent 20 years with the IRS, says that one of the biggest mistakes responsible parties make is ignoring certified mail from the IRS. “Our experience is that mail from the IRS that comes certified – it often goes unopened,” he said. “The letter gives you a chance to appeal that decision.”

After the appeal period — which is usually 30 to 60 days — “they get ugly in a hurry,” according to Reska. The IRS can file a federal tax lien and take enforced collection action on personal property and real estate belonging to responsible parties. The commonwealth can take similar harsh actions.

And with the recession, the agencies have become more diligent.

“The tone of the IRS and the DOR collection has become more aggressive due to the size of the (state and federal) deficits,” Banis said. “The best defense is to not get into the situation.”