

21-1203

No. _____

In The
Supreme Court of the United States

FILED
FEB 23 2022
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SUPREME COURT, U.S.
ORIGINAL

IN RE ROGER ROWE,

Petitioner

On Petition For Writ Of Mandamus & Prohibition
To The United States District Court
For The Eastern District Of New York
Decision & Order Filed On 12/17/21
Hon. William F. Kuntz, II U.S.D.J.
Case 2:19-CV-05770-WFK-VMS

**PETITION FOR
WRIT OF MANDAMUS & PROHIBITION**

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QUESTIONS PRESENTED

1. Whether Petitioner is entitled to relief from a judgment and orders from the Second Circuit court, which conflicts with a decision of this Court or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court?
2. Whether the District Court violated Petitioner's substantive and procedural due process when it presided over an action to reduce a lien to judgment beyond the 6-year statute of limits and its corresponding 10-year collection extension period?
3. Did the Government deprive Petitioner of his due process when it failed to timely notify him (within 60-days of the assessment) of its intent to assess corporate tax liability against him or give him the opportunity to timely challenge the liability (provide 90-day demand notice)?
4. Whether the record met the substantial evidence threshold that a reasonable mind could accept as adequate to support its conclusion, relative to the accuracy of dueling assessments and the agencies confirmation that the lien statute had expired?
5. Whether the Government is subject to damages under *Biven's* for clearly violating established statutory or constitutional rights when it failed to disclose exculpatory evidence and release an improper lien.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Roger Rowe (Petitioner).
2. United States of America (Respondent).
3. Internal Revenue Service ("IRS") (Respondent).
4. Hon William F. Kuntz II, U.S.D.J. (Respondent).
5. Thelma A. Lizama, Trail Attorney, Tax Department (Respondent).
6. Kathleen A. Baiata, "Revenue Officer" (Respondent).
7. S. McLaughlin, "Revenue Officer" (Respondent).

As prescribed under S.C. Rule 29(4)(a) if the United States or any federal department, office, agency, officer, or employee is a party to be served, service shall be made on the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530-0001.

LIST OF ALL PROCEEDINGS

- *United States of America v. Roger Rowe*, No. 19-cv-05770, District Court for the Eastern District of New York. Order entered Sep. 16, 2020.
- *United States of America v. Roger Rowe*, No. 19-cv-05770, District Court for the Eastern District of New York. Order entered Sep. 17, 2020.
- *United States of America v. Roger Rowe*, No. 19-cv-05770, District Court for the Eastern District of New York. Order Dkt. 32 entered Oct. 1, 2020.
- *United States of America v. Roger Rowe*, No. 19-cv-05770, District Court for the Eastern District of New York. Order Dkt. 33 entered Oct. 1, 2020.
- *United States of America v. Roger Rowe*, No. 19-cv-05770, District Court for the Eastern District of New York. Judgment entered Oct. 15, 2020.
- *United States of America v. Roger Rowe*, No. 20-3409-cv, Court of Appeals for the Second Circuit. Order entered Jun. 1, 2021.
- *United States of America v. Roger Rowe*, No. 20-3409-cv, Court of Appeals for the Second Circuit. Mandate entered Jun. 28, 2021.
- *United States of America v. Roger Rowe*, No. 20-3409-cv, Court of Appeals for the Second Circuit. Order entered Oct. 14, 2021.
- *United States of America v. Roger Rowe*, No. 19-cv-05770, District Court for the Eastern District of New York. Order entered Dec. 17, 2021.

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**PETITION FOR WRIT OF
MANDAMUS & PROHIBITION**

As permitted under 28 U.S.C. § 1651(a), 28 U.S.C. § 3904(b), 5 U.S.C. § 702 and S.C. Rule 20, Petitioner respectfully seeks a writ of mandamus and prohibition to review the December 17, 2021, decision and order of the Hon. William F. Kuntz II, U.S.D.J., United States District Court of the Second Federal Circuit as well as all related judgment and orders included in the appendix.

OPINION STATEMENT

Petitioner respectfully ask this Court to review the following unpublished judgment and orders: (1) the December 17, 2021 District Court final order denying Defendant's motion to dismiss the October 15, 2020 judgment which granted the Government's motion to strike as well as denying the Government's motion for a writ (Pet. App. A 1a), (2) the October 14, 2021 Court of Appeals denial of Defendant's motion to recall and stay its mandate (Pet. App. B 9a), (3) the June 28, 2021 Court of Appeals affirmation of the District Courts judgment and issuance of a mandate (Pet. App. C 10a), (4) the June 1, 2021 Court of Appeals affirmation of the District Courts Judgment (Pet. App. D 19a), (5) the October 15, 2020 District Court amended judgment (Pet. App. E 28a), the October 1, 2020 District Court denial of Petitioner's motion for leave to rehear (Pet. App. F 29a), (6) the October 1, 2020 District Courts granting of Plaintiff's motion to amend the judgment (Pet. App.

G 31a), (7) the September 17, 2020 District Court granting of Plaintiff judgment (Pet. App. H 33a) and (8) the September 16, 2020 District Courts granting of Plaintiff summary judgment (Pet. App. I 34a).

JURISDICTION

Pursuant to 28 U.S.C. § 2101(b) “Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.” Rule 18 of the Supreme Court states that “the appeal is commenced by filing a notice of appeal with the clerk of the district court within the time provided by law after the entry of the judgment sought to be reviewed” (Pet. App. J 44a). Rule 13.3 states that the time to file any petition for a writ of certiorari runs from the date of the entry of the judgment or order.

Moreover, “The All Writs Act” (“The Act”), 28 U.S.C. § 1651(a), confers the power of certiorari, mandamus and prohibition on the United States Supreme Court. The Act provides in relevant part that “the Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” Under this authority, the writs serve to correct errors of law, *Dube v. Mayor of City of Fall River*, 308 Mass. 12, 30 N.E.2d 817, 818;

to restrain excesses of jurisdiction, *Stacy v. Mayor of City of Haverhill*, 317 Mass. 188, 57 N.E.2d 564; to review erroneous or unwarranted acts or proceedings, *State ex rel. Allen v. Rose*, 123 Fla. 544, 167 So. 21, 24; to review questions of law, *Public Welfare Commission v. Civil Service Commission*, 289 Mich. 101, 286 N.W. 173, 175; where circumstances are so exceptional that an immediate review is in the interest of justice, *Vinci v. Read*, 68 R.I. 484, 29 A.2d 637, 639; where judgment is a miscarriage of justice or will result in substantial injury to legal rights, *Goodkind v. Wolkowsky*, 151 Fla. 62, 9 So.2d 553, 562; or where applicant for writ lost right of appeal through no fault of his own, *McCain v. Collins*, 204 Ark. 521, 164 S.W.2d 448, 451.

This Court also has mandamus and prohibition authority to review under 5 U.S.C. § 702 where "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule Civil Procedure Rule 56(d):

WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by

affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

Notice 26 U.S.C. § 6303(a):

Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

RULE 20.1 STATEMENT

Mandamus may be granted when (1) the writ will be in aid of the Court's appellate jurisdiction (2) exceptional circumstances warrant the exercise of the Court's discretionary powers (3) adequate relief cannot be obtained in any other form or from any other court. *See Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380–381 (2004). “The traditional use of the writ in aid of appellate jurisdiction both at common

law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Id.* at 380 (quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943)) or in simpler terms "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."

STATEMENT OF THE CASE

On July 6, 2009, the Internal Revenue Service (IRS) mailed Petitioner an untimely notice of potential corporate tax liabilities related to trust fund recovery penalties (TFRP) assessed against Integrated Construction Management Corp. (ICM) for tax period ending December 31, 2007, March 31, 2008, June 30, 2008 and September 30, 2008 (Pet. App. K 47a). The Letter 1153 and Form 2751 denotes the following assessments dates and penalties: August 18, 2008 for \$65,666.48, August 18, 2008 for \$63,071.12, June 30, 2008 for \$72,837.87 and December 29, 2008 for \$8,317.15 (Pet. App. K 56a).

On September 16, 2020 the District Court erroneously extended the collection period of a corporate tax beyond the ten-year statute which attaches a debt as a whole to a tax liability ("Updike's principle"). The District Court incorrectly assumed that the October 19, 2009 assessment performed by a delegate of the

Secretary of the Treasury was a proper assessment *see* (Pet. App. I 36a).

In *United States v. Updike*, 281 U.S. 489 (1930), the Court, interpreting a predecessor to § 6502, held that the limitations period resulting from a proper assessment governs “the extent of time for the enforcement of the tax liability,” *id.*, at 495. In other words, the Court held that the statute of limitations attached to the debt as a whole. The basis of the liability in *Updike* was a tax imposed on the corporation, and the Court held that the same limitations period applied in a suit to collect the tax from the corporation as in a suit to collect the tax from the derivatively liable transferee. *Id.*, at 494–496. *See also United States v. Wright*, 57 F.3d 561, 563 (7th Cir. 1995) (holding that, based on *Updike*’s principle of “all-for-one, one-for-all.”

The record clearly indicates that the assessments to collect the corporate tax were performed between August 18, 2008 and December 29, 2008 (as outlined in (Pet. App. K 56a)) and that the October 19, 2009 is merely a derivative of the debt as a whole. Therefore, the District Court erred when it utilized the October 19, 2009 date to calculate the collection statute expiration.

The Second Circuit’s decisions, orders and judgment improperly extended the 10-year collection period and violated Petitioners right to due process as prescribed under the Fifth and Fourteenth Amendments. The Government’s actions are outside the

sanction of law and conflict with prior rulings of this Court, which violates the “Equal Protection Clause.”

Furthermore, this Court has consistently determined that Section 6501(a) of the Internal Revenue Code provides that “the amount of any tax imposed [by the Code] shall be assessed within 3 years¹ after the return was filed.” 26 U.S.C. § 6501(a). “The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary [of the Treasury] in accordance with rules or regulations prescribed by the Secretary.” § 6203. Within 60-days of the assessment, the Secretary is required to “give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof.” § 6303(a). If the tax is properly assessed within 3 years, the limitations period for collection of the tax is extended by 10 years from the date of the assessment. § 6502.

As such the improper October 19, 2009 assessment is void ad initio and any tax assessment performed on or before December 29, 2008 is unenforceable after December 29, 2018 which renders the circuit courts orders and judgment void as a matter of law.

¹ The 3-year period is altered by the issuance of a Letter 1153 to 30-days after a decision is made on a timely protest or 90-days if no demand was issued. It is the IRS’s procedure to issue the Letter 1153 with Form 2751, which effectively close the assessment period.

Expired 10-year collection period

In *United States v. Galletti*, 541 U.S. 114 (2004), this Court held that “for purposes of §§ 6501–6502 is the partnership, we hold that the proper assessment of the tax against the partnership suffices to extend the statute of limitations for collection of the tax from the general partners who are liable for the payment of the partnership’s debts. The Government’s timely assessment of the tax against the partnership was sufficient to extend the statute of limitations to collect the tax in a judicial proceeding, whether from the partnership itself or from those liable for its debts.”

In this instance Form 4183 (R. Dkt. No. 41 page 323), Form 2751 (Pet. App. K 56a) and the Letter 1153 clearly indicates the date the corporate taxes were assessed and Petitioner potential liability for a penalty if the business doesn’t pay the taxes (Pet. App. K 48a). However, the penalties noted in the Letter 1153 are subject to suspension due to the IRS’s failure to provide timely notify Petitioner as prescribed under 26 U.S.C. § 6404(g). Despite the clear and unambiguous statutory language barring the enforcement of these tax liabilities, the Court of Appeals sanctioned the lower court’s ruling (Pet. App. C 10a).

Six-year Limitation

The Second Circuit also failed to address the timeliness of a proceeding in court. The collection statute merely extends the time which the Government can collect on a judgment arising out of a timely cause of

action. In *United States v. Weintraub*, 613 F.2d 612, 620-21 (6th Cir. 1979) the court stated that (“[T]here is no time limit whatsoever on an action against the taxpayer to enforce a timely levy or judgment obtained in a timely filed court proceeding.”).² In this instance the Court failed to address whether a timely proceeding in court (yielding a judgment) was ever commenced, triggering the collection extension period.

Absent a judgment against the Petitioner the Government’s October 11, 2019 complaint fails to state a claim for there is no judgment to enforce at the time the action was brought. Moreover, the October 11, 2019 complaint was filed six-year after the expiration of the statute of limitation to reduce a tax lien to judgment.

In *U.S. v. Silverman*, 621 F.2d 961 (1980), the Second Circuit concluded that collection by the United States of its properly assessed tax was barred by the lapse of more than six years between the assessment and this suit. In reaching this result the district court applied section 6502(a) of the Internal Revenue Code, and found that under the facts, the United States had not within six years after the assessment either levied on the property of the Estate or “commenced a proceeding in court.”

Similar to *Silverman* the Government neither levied nor commenced a proceeding in court against Petitioner. As such the District Court erred as a matter of

² The Court clearly stated that the collection statute is based on the enforcement of a judgment obtained in a timely proceeding, which bars a judgment in an untimely proceeding.

law when it granted summary judgment in relation to an improper October 19, 2009 assessment. Even if we were to assume arguendo and use the October 19, 2009 secondary assessment as the trigger extending the 10-year collection period, the Government still failed to commence a proceeding within the six-year statute.

The October 19, 2009 assessment was improper

As evidenced by Form 2751 the last assessment against the corporation was December 29, 2008, however the Letter 1153 (Notice) was delivered on July 6, 2009 some 189 days after the Secretary's assessment. The Secretary clearly failed to provide notice to the person liable for the unpaid tax within 60-day of the assessment as requirement by law which would render the October 19, 2009 assessment time barred as a matter of law.

This Court has consistently ruled that the Letter 1153 is evidence of the IRS's formal notice to a taxpayer of its intent to impose a tax. It is also common practice for the IRS to issue the Letter 1153 as a combined notice with an embodied assessment. In this instance, the Letter 1153 notification was defective for two reasons (1) the notice was sent more than 60-days after the assessments (2) if the Letter 1153 is to be considered as a pre assessment notice, the Government failed to send the corresponding 90-day demand notice. Absent timely notices the IRS violated 26 U.S.C. 6672(b)(3)(A) which effectively closes the three-year

assessment period 90 days after the mailing of the pre-liminary penalty notice (“Letter 1153”).

If we were to assume that the Letter 1153 was a pre assessment notice the Government had until October 4, 2009 to present an assessment or demand payment. The Government claims that the assessment was performed on October 19, 2009 is eleven-days after the statutory limit. As such the pre assessment notice (letter 1153) effectively closed the assessment period 90-days after its mailing which would render the October 19, 2009 assessment void as a matter of law. For these reasons Petitioner should be granted certiorari, mandamus and prohibition and the October 15, 2020 judgement vacated.

Violation of Substantive and Procedural Due Process

The District Court violated Petitioner’s substantive and procedural due process when it granted summary judgment despite Petitioner’s request for additional discovery. Petitioner informed the District Court that he was unable to present facts essential to justifying his opposition due the Government’s failure to provide additional discovery and that the Government failed to provide admissible evidence controverting the existence of the IRS Revenue officer’s letter, which stated that the lien was unenforceable due to the statute of limitation expiration.

Despite the Government claims of possessing documents relative to controverting the June 3, 2019

Letter 4711, the Government failed to produce evidence supporting its claim that documents being withheld were not relevant to this action (R. Dkt. No. 33 page 11). Although the Government may have conflated the 10-year collection extension period with a derivative of the liability ("the assessment against a responsible party"), this Court has determined that the 10-year collection statute is triggered by the original assessment against a corporation not its derivative. Moreover, the Government's assertion that the Letter 1153 is some kind of notification that the employment tax is owed and an additional assessment is somehow necessary is belied by the statutes, regulations and the IRS's procedures and interpretation of the code (R. Dkt. No. 28 page 2).

In *Bishay v. Comm'r of Internal Revenue*, No. 7537-14L, T.C. Memo. 2015-105, 2015 WL 3505310, *6 (T.C.M. 2015) ("[T]his court has held that a taxpayer has an 'opportunity' to dispute his liability for a trust fund recovery penalty when he receives a Letter 1153."); *Giaquinto v. Comm'r of Internal Revenue*, No. 3757-11L, T.C. Memo. 2013-150, 2013 WL 2631078, *3 (T.C.M. 2013) ("A taxpayer has the opportunity to dispute his or her liability for a trust fund recovery penalty when he or she receives a Letter 1153.").

In this instance interest and penalties assessed should have been suspended because the IRS did not mail a timely notice as prescribed under 26 U.S.C. § 6404. The Government clearly mislead the Court when it stated that "Through Letter 1153, the IRS notified Mr. Rowe that the employment taxes for the

quarters at issue were still owed, and in an effort to collect those taxes, the IRS proposed assessments against Mr. Rowe in the amounts described in the enclosed Form 2751. The IRS ultimately assessed the trust fund penalties for the quarters at issue against Mr. Rowe on October 19, 2009. The time period between the sending of the July 6 letter and the October 19 assessment allowed Mr. Rowe more than 60 days to appeal or protest the proposed assessments. *See 26 U.S.C. § 6672(b)(2) (requiring notice of proposed assessment under 6672 must be sent at least 60 days prior to penalty assessment)" [sic]* R. Dkt. No. 28 page 2.

Despite the Government's acknowledgement of the proper corporate tax assessment (which gives the taxpayer to opportunity to dispute the liability) Mrs. Lizama led the Court to believe that a subsequent assessment was required and that the October 19, 2009 assessment was a proper assessment. Mrs. Lizama's claim that the Government gave Petitioner additional time to appeal is patently false and barred by statute.

Although the Mrs. Lizama failed to comply with numerous requests for additional discovery, Petitioner was able to obtain exculpatory evidence via direct FOIA request to the (IRS) which refuted the Government's claims. It is evident that Mrs. Lizama misled the Court and illegally withheld evidence from Petitioner when she falsely claimed that the material in the Government's possession was irrelevant to this litigation. The mere existence of Form 4183 (Pet. App. M 72a) clearly shows the assessments associated with the

liabilities in question were made prior to October 19, 2009 which supports Petitions claim that the last assessment was conducted on December 29, 2008 proving that the Government was time barred from obtaining summary judgment.

Failure to meet substantial evidence standards

Mrs. Lizama's actions misled the Court and deprived Petitioner of a fair hearing when she falsely claimed that the documents used to support Revenue Officer Matthews Letter 4711 were "not relevant to the underlying liabilities that are at issue in this litigation." Mrs. Lizama's statement is patently false and a clear violation of "*Bivens*."

Under "*Bivens*," a citizen can seek civil damages against a federal-officers for violating his/her rights to due process. In addition, I.R.C. §§ 7432, 7433 allows a taxpayer to bring a civil action against a United States officer or agency who by reason of negligence, fails to release a lien under section 6325 on property of the taxpayer, recklessly or intentionally, disregards any provision of this title, or any regulation promulgated under the tax code.

Although Petitioner timely asserted counterclaims³ against Respondent, IRS Mrs. Lizama, Mrs. Baiata and Mrs. McLaughlin, the District Court erroneously dismiss Petitioner's claims (Pet. App. A 6a). In addition

³ Pursuant to Rule 13 FRCP.

to the counterclaims asserted in the motion to dismiss, on August 12, 2021 Petitioner also submitted an administrative claim to the IRS⁴ of which more 180-days have passed with no response. As such Petitioner ask this Court to review and grant Petitioner's counter-claims related to the following injuries:

- a. Appellate filing fee \$505.00
- b. Copy and equipment cost \$2,500.00
- c. Hours spent preparing documents 320hr
@ \$150hr = \$48,000.00
- d. Appellate filing fee \$505.00
- e. Supreme Court fee \$300.00
- f. Est Printing cost \$5,000.00
- g. Hours spent preparing documents 120 @
\$150hr = \$18,000.00
- h. Total \$74,810.00

From the onset of this action Petitioner stated that he did not have sufficient information to determine the truth of the Government's allegations. It was not until Petitioner obtain a copy of Form 4183 and the ICS History which enabled him to present a coherent response reflecting the exact date in which the corporate tax liabilities were assessed and the date the IRS assessed the underlying tax liabilities against Petitioner (Pet. App. L 63a).

⁴ Proof that Petitioner exhausted all avenues prior to the commencement of an action against a Government entity.

The missing information brought two key issues to light (1) The “actual liability” assessment date listed in Form 4183 in lieu of the “secondary liability” assessment date of October 19, 2009.⁵ (2) confirmation of the untimely service of the Letter 1153 and Form 2751 which unveils the Government’s failure to serve notice within 60-days of the assessment or to provide a demand notice 90-days after an assessment violated 26 U.S.C. § 6404.

This Court has consistently held that the “initial determination” of each penalty assessment was embodied in the Letter 1153 formally communicating the Government’s definite decision to assert TFRP against a tax payer clearly proves the Circuit Court’s ruling was arbitrary and capricious. In *Romano-Murphy v. Commissioner*, 816 F.3d at 717, the Tax Court held that the source of this requirement is I.R.C. sec. 6672(b). I.R.C. sec. 6672(b)(1) provides that the trust-fund-recovery penalty cannot be imposed on a person until the IRS notifies that person that he or she will be subject to an assessment of the penalty. It is the IRS’s practice to give this preliminary penalty notice using Letter 1153. For Mrs. Lizama to state that the Letter 1153 was a prerequisite to some future assessment is disingenuous and a violation of the law.

⁵ This Court noted in *United States v. Galletti*, 541 U.S. 114 (2004), “We use the term “secondary liability” to mean liability that is derived from the original or primary liability” [sic] footnote 4.

I.R.C. sec. 6672(b) alters the three-year period during which the IRS is entitled to assess the trust-fund-recovery penalty. It does so in two ways. First, under I.R.C. sec. 6672(b)(3)(A), the three-year period is held open for 90 days after the mailing of the preliminary penalty notice. Second, under I.R.C. sec. 6672(b)(3)(B), if the person makes a timely protest of the proposed assessment in response to the preliminary penalty notice, the three-year period is held open until 30 days after the IRS makes a final administrative determination with respect to the protest.

In this instance the Petitioner did not protest the IRS's administrative determination; which effectively closing the three-year assessment period (on October 4, 2009) 90-days after the mailing of the preliminary penalty notice ("Letter 1153"). That being said the District Court errored as a matter of law when it granted summary judgment on a statutorily barred claim. For this reason, I ask the Court to vacate the December 17, 2021 order and the October 15, 2020 judgment.

The Circuit Court's Decision Conflicts with Prior Decisions of this Court

The circuit court's decisions and orders are arbitrary and capricious and appears to exhibit preferential treatment towards the Government and parties represented by attorneys. The Court's Decisions are not only bias but are inconsistent with the circuit's prior rulings relative to similarly situated litigants.

Despite the District Courts claim of strict adherence with Rule 56.1 and the submission of a separate statement of material facts in support or controverting the oppositions claim, the Court failed to apply these rules equally. The District Court dismissed Petitioner's cross motion for his failure to submit a separate statement of facts in support and corresponding to citations and admissible evidence even though the body of Petitioners cross motion contained said information. The Court of Appeals claim that its failure to provide Petitioner with a copy of the Rule 56.1 was a harmless error and that Petitioners recital of Rule 56 is evidence of his understanding of the nature of summary judgment in both of these documents. *See* (Pet. App. C 17a) is an obtuse response for the court's failure to perform a duty.

Although Petitioner understood the effects of a summary judgment motion prescribed under Rule 56, he was not aware of the submission of a separate statement. Nowhere under Rule 56 states that a separate statement of facts should be submitted with the motion. If the District Court fulfilled its duty and provided a copy of Rule 56.1, Petitioner would have been aware of the additional requirement and complied with the same.

The second circuits strict compliance with Rule 56.1 appears only to apply to Pro Se litigants. In this instance the District Courts and the Government failed to perform a duty as prescribed under Rule 56.1. Also, the Government's failure to cite and provide evidence in admissible form (e.g., affidavit, memorandum

of law or exhibits)⁶ should have precluded them from obtaining summary judgment. In both instances the deficiencies were excused while Petitioner forced deficiency through no fault of his own was not excused.

In *Davis v. Town of Hempstead*, 14-CV-903 (JMA)(GRB), 4 (E.D.N.Y. Jan. 16, 2019) the District Court demanded strict compliance with Rule 56.1 when it cited (“*Suarez v. Cityscape Tours, Inc.*, 603 F. App’x 16, 17 (2d Cir. 2015) (affirming district court’s denial of summary judgment motion based upon movant’s filing of a 56.1 statement without adequate citation); *see Giannullo v. City of N.Y.*, 322 F.3d 139, 140 (2d Cir. 2003) (holding that “unsupported assertions [in a Local Rule 56.1 statement] must . . . be disregarded”); *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 73 (2d Cir. 2001) (“A district court . . . is not required to consider what the parties fail to point out in their Local Rule 56.1 statements”)).

In this instance the Court failed to enforce Local Rule 56.1 and Fed R. 56 equally or similarly to how it treated these rules in similarly-situated action. Unlike *Giannullo*, were the court claimed Respondent’s statement of material facts were unsupported assertions. Here the District Court accepted Mrs. Lizama’s unsupported assertions and hearsay evidence as truth when the Government should have been compelled Mrs. Lizama to provide substantial evidence supporting

⁶ Although Mrs. Lizama claim that the Letter 4711 was unrelated to the underlying liabilities at issue in this litigation, she failed to provide evidence controverting the fact.

her claim that the information in the Letter 4711 was unrelated to the tax periods in question.

It is clear that the Government is seeking penalties and not the actual tax liability. Publication 556 states that a taxpayer can seek relief if interest is assessed for periods during which interest should have been suspended because the IRS's failure to mail a notice to the taxpayer in a timely manner. Publication 556 also states "The suspension period begins the day after the close of the 36-month period and ends 21 days after the IRS mails a notice to you stating your liability and the basis for that liability. Also, the suspension period applies separately to each notice stating your liability and the basis for that liability received by you."

The fact that the Government's claim seeks penalties related to payroll taxes belies the circuit courts determination that Petitioners claim under 26 U.S.C. § 5000A(g) "is not an issue in this case as no such penalties were imposed on Rowe in relation to this action." [sic] (Pet. App. C. 16a). The TRFP penalties indicated in Form 2751 clearly are taxes categorized as minimum essential coverage required under 26 U.S.C. § 5000A(f)(1)(A) where the employer is responsible to collect, truthfully account for, and pay over:

- (i) the Medicare program under part A of title XVIII of the Social Security Act,
- (ii) the Medicaid program under title XIX of the Social Security Act,
- (iii) the CHIP program under title XXI of the Social Security Act,

(iv) medical coverage under chapter 55 of title 10, United States Code, including coverage

Moreover, the penalties associated with the collection of 941 taxes are defined under 26 U.S.C. § 5000A(f)(1)(A) and are excluded from collection by lien or levy as prescribed under 26 U.S.C. § 5000A(g)(2)(A).

The District Courts iniquitous actions and the Court of Appeals acquiescence to the same, violates Petitioners due process and equal protection under the law. Despite the second circuits acknowledgement that Petitioner argued (1) that the action was time barred (2) that the proposed assessment (Letter 1153) of trust fund recovery penalty was sent to him in July 2009, and (3) that the IRS assessed the underlying employment taxes on various dates in 2008" (Pet. App. C 15a to 17a), the Court of Appeals improperly determined that Petitioner's admission that the IRS assessed a tax against him on October 19, 2009 and that a notification of the assessment was received is somehow proof that the Government's October 11, 2019 filing was timely (Pet. App. C 16a) is disingenuous and fails to address Petitioners defenses and counterclaims.

Petitioner has always held that the Government's claims were time barred and the information provided was insufficient to present facts essential to the preparation of a coherent opposition. Just because the Petitioner acknowledge the performance and the service of an assessment does not mean the assessment was proper or timely served.

The date and substance of the Letter 1153 and Form 2751 raises a genuine issue of material fact as to when the proper assessments were performed and whether Petitioner was timely served. The absents of two permissible views related to competing assessment's ("dates") confirms the circuits clearly erroneous finding which should result in the vacatur of the October 15, 2020 judgment.

REASON FOR GRANTING WRIT

Mandamus is an extraordinary remedial process, which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. Although classed as a legal remedy, in issuing it, a court must be largely controlled by equitable principles. *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 312; *Arant v. Lane*, 249 U.S. 367, 371.

As in the *Matter of Skinner & Eddy Corp.*, 265 U.S. 86 (1924), Petitioner would be unjustly deprived of his substantial right if the District Court's is not mandated to vacate its December 17, 2021 order and all related judgment and orders. A denial of Petitioners right to vacate the District Courts order and judgment will deprive Petitioner of a right to a review, for the Court of Appeals has repudiated its jurisdiction. *Ex parte Peterson*, 253 U.S. 300, 305; *Ex parte Simons*, 247 U.S. 231, 239.

In order to avoid the erroneous deprivation of Petitioner's substantive and procedural rights to due

process, it is important that this Court exercise its supervisory power and grant Petitioner a writ of mandamus and prohibition mandating the District Court to vacate its December 17, 2021 order and modify its judgment to conforms with this Courts prior decisions.

CONCLUSION

The second circuit violated Petitioner's rights when it rendered a judgment adverse to this Court's prior rulings and allowed other Government officers and employees to intentionally, knowingly, or by reason of negligence, maintain a lien under section 6325 on property of the taxpayer and proceed with the unauthorized collections of said tax. *See 26 U.S.C. § 7432.*

Mrs. Lizama failure to disclose Petitioners (ICS History and the Form 4183) and her false testimony regarding the authenticity of the Letter 4711 deprived Petitioner of a fair hearing. Mrs. Kathleen A. Baiata and S. McLaughlin IRS Revenue officers negligently filed tax lien related to interest and penalties which should have been suspended because the IRS did not mail a timely notice of the corporate tax debt (Dkt. No. 28-1). I respectfully ask the Court to Prohibit the IRS and its employee's or agents from the unlawful enforcement of TFRP penalties.

Petitioner has no other forum for relief to compel the IRS's to release these liens and stop its illegal enforcement and collection. Although Petitioner filed an administrative claim 180 day has lapsed and the IRS

has yet to respond. Petitioner also submitted Form 843 seeking relief of interest and penalties assessed for the period during which interest should have been suspended because the IRS did not mail me a timely notice and an IRS officer or employee made and unreasonable error or delay in performing a ministerial or managerial act.

The IRS actions clearly violate Petitioners rights and the court in which an action can be commenced has already decided on the claims and issues in a manner that conflicts with the decision of this Court. For these reasons Petitioner seeks mandamus and prohibition against the IRS.

Based on the Court of Appeals denial of Petitioners motion to recall and stay its mandate (Pet. App. B 9a), Petitioner lost his right of appeal through no fault of his own, *McCain v. Collins*, 204 Ark. 521, 164 S.W.2d 448, 451 and have no other forum to obtain adequate relief or review from the District Court's orders. As such Petitioner request for mandamus and prohibition should be granted and the December 17, 2021 order and related judgment vacated.

Date 23rd day of February, 2022.

Respectfully submitted,
ROGER ROWE, Pro Se
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Amityville, NY 11701
Tel: (631) 767-6537
rroweny@gmail.com

APPENDIX A
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

Plaintiff

- v -

Roger Rowe

Defendant

Decision & Order Filed on Dec. 17, 2021
Hon. William F. Kuntz, II U.S.D.J.
Case 2:19-CV-05770-WFK-VMS

Motion to Dismiss Pursuant to
Fed. R. Civ. P. 60(a), 60(b)(2) & 60(b)(3)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
UNITED STATES :
OF AMERICA, :
Plaintiff, :
v. : **DECISION & ORDER**
ROGER ROWE, : 19-CV-5770
Defendant. :
----- x

WILLIAM F. KUNTZ, II, United States District Judge: Before the Court are 1) Defendant's "motion to dismiss," ECF No. 39; 2) the Government's motion to strike, ECF No. 46; and 3) the Government's ex parte motion to issue a writ enjoining Defendant from further filings in this case, ECF No. 47. For the reasons stated below, Defendant's motion is DENIED and the Government's motion to strike is GRANTED and the Government's motion for a writ is DENIED.

BACKGROUND AND PROCEDURAL HISTORY

On October 19, 2009, a delegate of the Secretary of the Treasury assessed a trust fund recovery penalty ("TFRP") against Roger Rowe ("Defendant" or "Rowe") pursuant to 26 U.S.C. § 6672, as a responsible person of Integrated Construction Management Inc. ("ICM") who willfully failed to collect, truthfully account for, and pay over to the United States the income and FICA taxes withheld from the wages of ICM employees for

the quarterly tax periods ending on December 31, 2007 through September 30, 2008. ECF No. 1 ¶¶ 3-5.

On October 11, 2019, the United States filed this action seeking to reduce to judgment the trust fund recovery penalty assessed against Rowe. ECF No. 1. On September 16, 2020, this Court denied Rowe's motion for summary judgment and granted the United States' cross motion for summary judgment. ECF Nos. 30, 31. The case was terminated on September 17, 2020. ECF No. 31. On October 1, 2020, this Court denied Rowe's motion for leave to file a motion pursuant to Federal Rule of Civil Procedure 52(b), 59(a)(1)(b), 59(a)(2), 60(1), 60(3), and 60(6) and granted the United States' motion to amend the judgment to reflect the amount due and to specify that the United States was entitled to statutory pre- and post judgment interest. ECF Docket Entry Oct. 1, 2020. On October 15, 2020 judgment was entered in favor of the United States and against Rowe in the amount of \$307,695.15 plus statutory interest pursuant to 28 U.S.C. § 1961(c)(1) and 26 U.S.C. §§ 6602, 6621, and 6622 from and after December 19, 2019. ECF No. 37.

On October 5, 2020, Rowe filed a notice of appeal and on June 1, 2021 the Court of Appeals for the Second Circuit affirmed this Court's judgment. ECF No. 38. On July 23, 2021, Rowe filed a "motion to dismiss pursuant to Fed. R. Civ. Pro. 60(a), 60(b)(2), and 60(b)(3)." ECF No. 39. The Government briefed the issues raised by Rowe in their submission, ECF No. 45, and now also moves to strike Defendant Rowe's alleged "counterclaim," contained on pages 15-17 of his

Affidavit/Declaration in Support of Notice of Motion Pursuant to FRCP 60(a), 60(b)(2) & 60(b)(3). The Government also moves to enjoin further filings by Defendant Rowe in this lawsuit.

DISCUSSION

I. Defendant's Motion at ECF No. 39 is DENIED.

On July 23, 2021, Defendant filed a “motion to dismiss” pursuant to Federal Rules of Civil Procedure 60(a); 60(b)(2); and 60(b)(3). *See* Mem. of L. in Support of Def. Mot. to Dismiss (“Def. Mem.”), ECF No. 40. He asks the Court for relief from its October 15, 2020 judgment and order against him arguing specifically, (1) the Court overlooked the statutory requirement of IRC § 6303(a); (2) the Court erred in granting the United States summary judgment because the United States provided an invalid assessment; (3) the Internal Revenue Service (“IRS”) failed to provide Rowe with an assessment within the 90-day period prescribed under 26 U.S.C. § 6672(b)(1); (4) the IRS failed to provide notice within the 60-day time period allotted under IRC § 6303(a); (5) the Court misunderstood or misinterpreted Rowe’s acknowledgement of the October 19, 2009 assessment; (6) newly discovered evidence shows that the assessment of the periods at issue was done prior to October 19, 2009; (7) the IRS failed to provide discovery, thereby depriving Rowe of due process; and (8) the government’s suit was untimely. *Id.*

The Court finds that Rowe's motion (1) is not a proper Rule 60(a) motion; (2) does not present any newly discovery evidence; and (3) is barred by res judicata. Accordingly, it is denied.

a. Rule 60(a)

Rule 60(a) allows a Court to provide relief from a judgment in stances of "clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Fed. Civ. R. Proc.; see *L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cty., Inc.*, 956 F. Supp. 2d 402, 409 (E.D.N.Y. 2013) (Span, J.) ("Rule 60(a) 'is not meant to provide a way for parties to relitigate matters already decided, to change errors in what a court has deliberately done, or to attempt to establish a right to relief which the court has not previously recognized.'" (quoting *Employers Mut. Cas. Co. v. Key Pharms., Inc.*, 886 F. Supp. 360, 363 (S.D.N.Y. 1995) (Sand, J.), *aff'd* 75 F.3d 815 (2d Cir. 1996))). Here, there has been no clerical error in the judgment. Instead, Rowe attempts to relitigate a matter that has already been decided by this Court. Accordingly, Rowe's motion on that basis is denied.

b. Rule 60(b)(2)

Rule 60(b)(2) allows relief from judgment upon a showing of "newly discovered evidence that, with reasonable diligence, could not have been discovered in

time to move for a new trial under Rule 59(b)." Fed. R. Civ. Proc.

There has been no new discovered evidence and Rowe's attempt to raise a new defense through a Rule 60(a) motion is improper and meritless. These are all issues that have been previously litigated by the parties, and judgment has been entered. Under the doctrine of res judicata, once a case reaches a final judgment on the merits, the parties cannot later relitigate the issues that were raised or could have been raised earlier. *Monahan v. New York City Dep't of Corr.*, 214 F. 3d 275, 284-85 (2d Cir. 2000). Res judicata principles apply to the tax field: "[I]f a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year." *Comm'r v. Sunnen*, 333 U.S. 591, 598 (1948). Here, the Court's October 15, 2020 judgment is conclusive not only as to any matters which may have been offered to defeat the Government's claim, but also to any matters which could have been offered to defeat the claim, but which were not. Therefore, Rowe is barred by res judicata from challenging the action.

c. Rule 60(b)(3)

Rule 60(b)(3) allows relief from judgment where a party shows there has been "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Fed. R. Civ. Proc.

Defendant has not shown that is the case here. Accordingly, his motion is denied on this basis.

II. Motion to Strike

The Government moves this Court to strike Defendant Roger Rowe's ("Rowe") counterclaim seeking damages totaling \$51,005.00. ECF No. 41 at 15±17. The Court finds the alleged counterclaim is untimely and also jurisdictionally deficient in that it does not identify a waiver of sovereign immunity. *Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985); *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Shaw*, 309 U.S. 495, 500±01 (1940). The Government's motion to strike the counterclaim is GRANTED.

III. Motion for Writ Enjoining Against Further Filings in this Lawsuit

Finally, the Government moves that Defendant be enjoined from filing further motions in this lawsuit, absent his obtaining prior leave of court. In support of this motion, the Government argues Defendant's "post-judgment filings are an attempt to frivolously re-litigate previously argued Defendant's "post-judgment filings are an attempt to frivolously re-litigate previously decided issues without regard to the Court's prior ruling or the doctrine of res judicata" which "waste of judicial and government resources." At this time, the Court refrains from enjoining Defendant from filing submissions in this docket. However, this

Order shall serve as notice to Defendant that should he continue to file frivolous submissions that waste judicial resources, this Court can and will enjoin him from filing in the docket without obtaining leave from the Court first. *See Abdullah v. Gatto*, 773 F.2d 487, 488 (2d Cir. 1985) (“A district court not only may but should protect its ability to carry out its constitutional functions against the threat of onerous, multiplicitous, and baseless litigation.”); *see also Castellaw v. Excelsior College*, 2021 WL 3046748 at *3-4 (E.D.N.Y July 20, 2021) (Chen, J.) (imposing a filing injunction limited to that lawsuit and requiring the *pro se* plaintiff to obtain permission from the court each time before making any submission, by filling a one-page letter showing cause why the submission should be accepted and reasoning that courts “should not excuse frivolous or vexatious filings by *pro se* litigants.”); *SBC 2010-1, LLC v. Morton*, 552 F. App’x 9, 12-13 (2d Cir. 2013) (summary order) (determining that the district court “acted well within its discretion” in imposing a filing injunction where “(1) the district court notified the [relevant party] of the possible injunction; (2) the [relevant party] continued to file repetitive motions, . . . ; and (3) the filing injunction [was] narrowly crafted in that it merely require[d] the [relevant party] to seek leave of the district court before filing further motions regarding th[e] [instant] case”). Accordingly, the Government’s motion is DENIED.

CONCLUSION

For the foregoing reasons, the Court hereby GRANTS the Government's motion to strike, ECF No. 46, and DENIES the Government's motion that the Court enjoin Defendant from filing further submission in this case, ECF No. 47. Additionally, the Court DENIES Defendant's motion to dismiss. ECF No. 39. The Clerk of Court is respectfully instructed to terminate all pending motions and close this case.

SO ORDERED.

s/ WFK

HON. WILLIAM F. KUNTZ, II
UNITED STATES
DISTRICT JUDGE

Dated: December 17, 2021
Brooklyn, New York

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

United States of America

Plaintiff-Appellee

- v -

Roger Rowe

Defendant-Appellant

Order Filed on Oct. 14, 2021
Circuit Judges Amalya L. Kearse,
Gerard E. Lynch, Denny Chin
Docket No. 20-3409

Motion to Recall and stay the mandate

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of October, two thousand twenty-one.

Before: Amalya L. Kearse,
Gerard E. Lynch,
Denny Chin,
Circuit Judges.

United States of America, **ORDER**
Plaintiff - Appellee, Docket No. 20-3409
v.
Roger Rowe,
Defendant - Appellant.

Appellant, pro se, moves to recall and stay the mandate.

IT IS HEREBY ORDERED that the motion is DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
[SEAL]

/s/ Catherine O'Hagan Wolfe

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

United States of America

Plaintiff-Appellee

- v -

Roger Rowe

Defendant-Appellant

Order Filed on June. 28, 2021
Circuit Judges Amalya L. Kearse,
Gerard E. Lynch, Denny Chin
Docket No. 20-3409

Motion to reconsider Mandate

MANDATE

20-3409-cv
United States v. Rowe

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**
AMENDED SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of June, two thousand twenty-one.

PRESENT: AMALYA L. KEARSE,
GERARD E. LYNCH,
DENNY CHIN,
Circuit Judges.

MANDATE ISSUED
ON 6/28/21

----- x

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

v. 20-3409-cv

ROGER ROWE,

Defendant-Appellant.

----- x

FOR PLAINTIFF-APPELLEE:

Richard L. Parker, Bruce R. Ellisen,
Attorneys, *for* David A. Hubbert, Acting
Assistant Attorney General, Tax Division,
United States Department of Justice,
Washington, DC, and Mark J. Lesko,
United States Attorney for the Eastern
District of New York, Brooklyn, NY.

FOR DEFENDANT-APPELLANT:

Roger Rowe, *pro se*, Amityville, NY.

Appeal from the United States District Court for
the Eastern District of New York (Kuntz, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY
ORDERED, ADJUDGED, AND DECREED** that the
judgment of the district court is **AFFIRMED**.

Defendant-appellant Roger Rowe appeals the judgment of the district court entered October 15, 2020, awarding plaintiff-appellee United States of America \$307,695.15 in assessed and unpaid penalties for failing to pay over withholding taxes to the Internal

Revenue Service.¹ By decision and order entered September 16, 2020, the district court denied Rowe’s motions to dismiss and for summary judgment and granted the Government’s cross-motion for summary judgment. The district court concluded that Rowe was liable for penalties assessed under 26 U.S.C. § 6672 for willfully failing to remit to the IRS taxes collected from the employees of Integrated Construction Management, Inc. (“ICM”) from December 31, 2007 through September 30, 2008. We assume the parties’ familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review a grant of summary judgment *de novo*, “resolv[ing] all ambiguities and draw[ing] all inferences against the moving party.” *Garcia v. Hartford Police Dep’t*, 706 F.3d 120, 126-27 (2d Cir. 2013) (per curiam). A district court’s “interpretation and application of a statute of limitations” are also reviewed *de novo*. *City of Pontiac Gen. Emps. Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011).

An employer required to withhold taxes from its employees’ wages must hold those funds as “a special fund in trust for the United States” and pay them to the Government “in the same manner . . . [as] the taxes from which such fund arose.” 26 U.S.C. § 7501(a). Under 26 U.S.C. § 6672(a), an individual may be liable for

¹ Rowe filed his notice of appeal on October 2, 2020; it became effective on October 15, 2020, when the district court granted the Government’s motion to amend the judgment to reflect the amount due and entered a new judgment accordingly. *See* Fed. R. App. P. 4(a)(4)(B)(1).

an employer's failure to remit such funds to the Government if "(1) he or she was a responsible person for collection and payment of the employer's taxes; and (2) he or she willfully failed to comply with section 7501(a)." *Winter v. United States*, 196 F.3d 339, 344 (2d Cir. 1999) (internal quotation marks omitted).² "The person against whom the IRS assesses a § 6672 tax penalty has the burden of disproving, by a preponderance of the evidence, the existence of one of these two elements." *Fiataruolo v. United States*, 8 F.3d 930, 938 (2d Cir. 1993).

Here, the record supports the district court's conclusion that Rowe was liable as a matter of law for the § 6672 trust fund recovery penalties assessed against him. First, Rowe conceded that he was a "responsible person" for § 6672(a) purposes, acknowledging that he had "significant control over the enterprise's finances." *Winter*, 196 F.3d at 345 (internal quotation marks omitted).³ Specifically, Rowe admitted that he was "a

² See 26 U.S.C. § 6672(a) ("Any person required to collect, truthfully account for, and pay over any tax imposed by [the Internal Revenue Code] 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 [for] a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.").

³ Rowe contends that the trustee in ICM's bankruptcy proceeding was responsible for paying ICM's employment taxes during the relevant quarters. But even if the trustee was also a "responsible person" for § 6672 purposes, Rowe cannot escape liability on that basis. As the statute and our precedent make clear, there can be more than one "responsible person" at a company,

person required to collect, truthfully account for and pay over" ICM's taxes. Answer at 1 1. Moreover, the documentary evidence established unequivocally that Rowe, as ICM's president and only shareholder, had check-signing authority, responsibility for paying the company's taxes, and significant control over its finances. *See Winter*, 196 F.3d at 345 (listing factors).

Second, on the record presented, a reasonable fact-finder could only conclude that Rowe knew of ICM's obligation to pay withholding taxes. To satisfy the willfulness element,

a responsible person need not act out of an evil motive or an intent to defraud. Instead, the principal component of willfulness is knowledge: a responsible person acted willfully within the meaning of § 6672(a) if he (a) knew of the company's obligation to pay withholding taxes, and (b) knew that company funds were being used for other purposes instead.

Id. (internal quotation marks, citation, and alteration omitted). Here, ICM's bankruptcy petition, signed by Rowe and filed in January 2009, listed the IRS as one of its creditors, stating that ICM owed \$410,000 in IRS withholding taxes. Rowe signed ICM's employment tax returns and numerous checks from ICM during the four quarters relevant here, demonstrating that he

"all of whom may be found responsible for a tax delinquency" under § 6672. *Winter*, 196 F.3d at 345 (internal quotation marks omitted); *see also* 26 U.S.C. § 6672(a) ("[a]ny person required to . . . pay over any tax . . . shall . . . be liable").

knew ICM continued to use funds for other purposes instead of remitting the funds to the IRS as required. Hence, no genuine issue of fact existed as to willfulness.

Rowe asserts several defenses. None has merit. First, he argues that he is not liable for failing to pay withholding because an IRS Account Transcript for the tax period "Dec. 31, 2008" states that the account balance and penalty is zero dollars. The government, however, did not seek to recover for unremitted taxes for the quarter ending December 2008; rather, it sought recovery for the quarters ending December 2007, March 2008, June 2008, and September 2008. Compl. ¶ 5.

Second, Rowe's claim that this action was barred by the applicable statute of limitations also fails. Rowe first argues that the five-year statute of limitations set forth in 28 U.S.C. § 2462 governs in this case because the IRS assessed penalties, rather than taxes, against him. That argument is meritless. Section 2462 establishes a five-year limitations period for any action to enforce a civil penalty "[e]xcept as otherwise provided by Act of Congress." 28 U.S.C. § 2462. Such a specific Act of Congress creates a ten-year limitations period for actions to collect assessed taxes. *See* 26 U.S.C. § 6502(a)(1). And because 26 U.S.C. § 6671(a) provides that penalties under § 6672 "shall be assessed and collected in the same manner as taxes," that ten-year limitations period applies here. *See Capozzi v. United States*, 980 F.2d 872, 874-75 & n.2 (2d Cir. 1992).

Alternatively, Rowe argues that the action is time-barred under the ten-year limitations period. That argument also fails. Rowe claims that the penalties were assessed more than ten years before the filing of this action, pointing to a *proposed* assessment of trust fund recovery penalty sent to him in July 2009, that indicated that the IRS had assessed the underlying employment taxes on various dates in 2008. In his answer, however, Rowe admitted that the IRS assessed § 6672 tax penalties against him on October 19, 2009 for four tax periods in 2007-2008 and that he was notified of this assessment. Thus, the Government's complaint, filed on October 11, 2019, was timely filed "within 10 years after the assessment" of the § 6672 tax penalties. 26 U.S.C. § 6502(a)(1).

Third, Rowe argues that the district court's judgment violated 26 U.S.C. § 5000A(g). Section 5000A, however, concerns penalties for an employer's failure to maintain required health benefits and is not at issue in this case as no such penalties were imposed on Rowe in relation to this action.

Fourth, Rowe correctly notes that the Government failed to fully comply with the notice requirements of Local Rule 56.2. Although the Government's notice to him as a pro se litigant opposing summary judgment stated that the "full text of Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 56.1 [were] attached," the text of those rules was not in fact attached to the notice. Notice, Record on Appeal Doc. 20 at 2. This was harmless error. Under *Vital v. Interfaith Medical Center*, a pro se litigant must be notified by either

the district court or opposing counsel of the consequences of failing to respond to a motion for summary judgment and the nature of summary judgment. 168 F.3d 615, 620-21 (2d Cir. 1999). “Where, however, a pro se litigant has demonstrated a clear understanding of the nature and consequences of a summary judgment motion and the need to set forth all available evidence demonstrating a genuine dispute over material facts, failure to provide proper notice will be deemed harmless.” *Jova v. Smith*, 582 F.3d 410, 414 (2d Cir. 2009) (internal quotation marks omitted).

Here, Rowe was provided with a one-page notice describing summary judgment and stating, *inter alia*, that under Rule 56 he could “NOT oppose summary judgment simply by relying upon the defenses [he] raised in [his] answer” and “must submit evidence . . . countering the facts asserted by the plaintiff and raising specific facts that support [his] claim.” Notice at 2. Rowe filed both an opposition to the Government’s motion and his own summary judgment motion, citing Rule 56 and describing the evidentiary requirements for a motion for summary judgment in both of those documents. Because the record shows that Rowe understood the nature and consequences of summary judgment, the Government’s failure to attach copies of the rules cited in its notice was harmless error. *See Jova*, 582 F.3d at 414.

Finally, Rowe has not shown that the district court abused its discretion by not affording him additional discovery. “A district court has wide latitude to determine the scope of discovery, and we ordinarily defer to

the discretion of district courts regarding discovery matters. A district court abuses its discretion only when the discovery is so limited as to affect a party's substantial rights." *In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76, 103 (2d Cir. 2008) (internal quotation marks, citation, and alteration omitted). Rowe's conclusory statement that more discovery would have allowed him to find better support for his defenses is not sufficient to show that his substantial rights were violated.

We have considered all of Rowe's remaining arguments and conclude they are without merit. Accordingly, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

APPENDIX D
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

United States of America

Plaintiff-Appellee

- v -

Roger Rowe

Defendant-Appellant

Order Filed on June 1, 2021
Circuit Judges Amalya L. Kearse,
Gerard E. Lynch, Denny Chin
Docket No. 20-3409

Appeal District Court October 15, 2020

20-3409-cv
United States v. Rowe

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**
AMENDED SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of June, two thousand twenty-one.

PRESENT: AMALYA L. KEARSE,
GERARD E. LYNCH,
DENNY CHIN,
Circuit Judges.

----- X

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

v.

20-3409-cv

ROGER ROWE,

Defendant-Appellant.

----- X

FOR PLAINTIFF-APPELLEE:

Richard L. Parker, Bruce R. Ellisen,
Attorneys, *for* David A. Hubbert, Acting
Assistant Attorney General, Tax Division,
United States Department of Justice,
Washington, DC, and Mark J. Lesko,
United States Attorney for the Eastern
District of New York, Brooklyn, NY.

FOR DEFENDANT-APPELLANT:

Roger Rowe, *pro se*, Amityville, NY.

Appeal from the United States District Court for
the Eastern District of New York (Kuntz, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY
ORDERED, ADJUDGED, AND DECREED** that the
judgment of the district court is **AFFIRMED**.

Defendant-appellant Roger Rowe appeals the
judgment of the district court entered October 15,
2020, awarding plaintiff-appellee United States of
America \$307,695.15 in assessed and unpaid penalties
for failing to pay over withholding taxes to the Internal

Revenue Service.¹ By decision and order entered September 16, 2020, the district court denied Rowe's motions to dismiss and for summary judgment and granted the Government's cross-motion for summary judgment. The district court concluded that Rowe was liable for penalties assessed under 26 U.S.C. § 6672 for willfully failing to remit to the IRS taxes collected from the employees of Integrated Construction Management, Inc. ("ICM") from December 31, 2007 through September 30, 2008. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review a grant of summary judgment *de novo*, "resolv[ing] all ambiguities and draw[ing] all inferences against the moving party." *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 126-27 (2d Cir. 2013) (per curiam). A district court's "interpretation and application of a statute of limitations" are also reviewed *de novo*. *City of Pontiac Gen. Emps. Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011).

An employer required to withhold taxes from its employees' wages must hold those funds as "a special fund in trust for the United States" and pay them to the Government "in the same manner . . . [as] the taxes from which such fund arose." 26 U.S.C. § 7501(a). Under 26 U.S.C. § 6672(a), an individual may be liable for

¹ Rowe filed his notice of appeal on October 2, 2020; it became effective on October 15, 2020, when the district court granted the Government's motion to amend the judgment to reflect the amount due and entered a new judgment accordingly. *See Fed. R. App. P. 4(a)(4)(B)(1)*.

an employer's failure to remit such funds to the Government if "(1) he or she was a responsible person for collection and payment of the employer's taxes; and (2) he or she willfully failed to comply with section 7501(a)." *Winter v. United States*, 196 F.3d 339, 344 (2d Cir. 1999) (internal quotation marks omitted).² "The person against whom the IRS assesses a § 6672 tax penalty has the burden of disproving, by a preponderance of the evidence, the existence of one of these two elements." *Fiataruolo v. United States*, 8 F.3d 930, 938 (2d Cir. 1993).

Here, the record supports the district court's conclusion that Rowe was liable as a matter of law for the § 6672 trust fund recovery penalties assessed against him. First, Rowe conceded that he was a "responsible person" for § 6672(a) purposes, acknowledging that he had "significant control over the enterprise's finances." *Winter*, 196 F.3d at 345 (internal quotation marks omitted).³ Specifically, Rowe admitted that he was "a

² See 26 U.S.C. § 6672(a) ("Any person required to collect, truthfully account for, and pay over any tax imposed by [the Internal Revenue Code] 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 [for] a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.").

³ Rowe contends that the trustee in ICM's bankruptcy proceeding was responsible for paying ICM's employment taxes during the relevant quarters. But even if the trustee was also a "responsible person" for § 6672 purposes, Rowe cannot escape liability on that basis. As the statute and our precedent make clear, there can be more than one "responsible person" at a company,

person required to collect, truthfully account for and pay over" ICM's taxes. Answer at 11. Moreover, the documentary evidence established unequivocally that Rowe, as ICM's president and only shareholder, had check-signing authority, responsibility for paying the company's taxes, and significant control over its finances. *See Winter*, 196 F.3d at 345 (listing factors).

Second, on the record presented, a reasonable fact-finder could only conclude that Rowe knew of ICM's obligation to pay withholding taxes. To satisfy the willfulness element,

a responsible person need not act out of an evil motive or an intent to defraud. Instead, the principal component of willfulness is knowledge: a responsible person acted willfully within the meaning of § 6672(a) if he (a) knew of the company's obligation to pay withholding taxes, and (b) knew that company funds were being used for other purposes instead.

Id. (internal quotation marks, citation, and alteration omitted). Here, ICM's bankruptcy petition, signed by Rowe and filed in January 2009, listed the IRS as one of its creditors, stating that ICM owed \$410,000 in IRS withholding taxes. Rowe signed ICM's employment tax returns and numerous checks from ICM during the four quarters relevant here, demonstrating that he

"all of whom may be found responsible for a tax delinquency" under § 6672. *Winter*, 196 F.3d at 345 (internal quotation marks omitted); *see also* 26 U.S.C. § 6672(a) ("[a]ny person required to . . . pay over any tax . . . shall . . . be liable").

knew ICM continued to use funds for other purposes instead of remitting the funds to the IRS as required. Hence, no genuine issue of fact existed as to willfulness.

Rowe asserts several defenses. None has merit. First, he argues that he is not liable for failing to pay withholding because an IRS Account Transcript for the tax period "Dec. 31, 2008" states that the account balance and penalty is zero dollars. The government, however, did not seek to recover for unremitted taxes for the quarter ending December 2008; rather, it sought recovery for the quarters ending December 2007, March 2008, June 2008, and September 2008. Compl. ¶ 5.

Second, Rowe's claim that this action was barred by the applicable statute of limitations also fails. Rowe first argues that the five-year statute of limitations set forth in 28 U.S.C. § 2462 governs in this case because the IRS assessed penalties, rather than taxes, against him. That argument is meritless. Section 2462 establishes a five-year limitations period for any action to enforce a civil penalty "[e]xcept as otherwise provided by Act of Congress." 28 U.S.C. § 2462. Such a specific Act of Congress creates a ten-year limitations period for actions to collect assessed taxes. *See* 26 U.S.C. § 6502(a)(1). And because 26 U.S.C. § 6671(a) provides that penalties under § 6672 "shall be assessed and collected in the same manner as taxes," that ten-year limitations period applies here. *See Capozzi v. United States*, 980 F.2d 872, 874-75 & n.2 (2d Cir. 1992).

Alternatively, Rowe argues that the action is time-barred under the ten-year limitations period. That argument also fails. Rowe claims that the penalties were assessed more than ten years before the filing of this action, pointing to a *proposed* assessment of trust fund recovery penalty sent to him in July 2009, that indicated that the IRS had assessed the underlying employment taxes on various dates in 2008. In his answer, however, Rowe admitted that the IRS assessed § 6672 tax penalties against him on October 19, 2009 for four tax periods in 2007-2008 and that he was notified of this assessment. Thus, the Government's complaint, filed on October 11, 2019, was timely filed "within 10 years after the assessment" of the § 6672 tax penalties. 26 U.S.C. § 6502(a)(1).

Third, Rowe argues that the district court's judgment violated 26 U.S.C. § 5000A(g). Section 5000A, however, concerns penalties for an employer's failure to maintain required health benefits and is not at issue in this case as no such penalties were imposed on Rowe in relation to this action.

Fourth, Rowe correctly notes that the Government failed to fully comply with the notice requirements of Local Rule 56.2. Although the Government's notice to him as a pro se litigant opposing summary judgment stated that the "full text of Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 56.1 [were] attached," the text of those rules was not in fact attached to the notice. Notice, Record on Appeal Doc. 20 at 2. This was harmless error. Under *Vital v. Interfaith Medical Center*, a pro se litigant must be notified by either

the district court or opposing counsel of the consequences of failing to respond to a motion for summary judgment and the nature of summary judgment. 168 F.3d 615, 620-21 (2d Cir. 1999). “Where, however, a pro se litigant has demonstrated a clear understanding of the nature and consequences of a summary judgment motion and the need to set forth all available evidence demonstrating a genuine dispute over material facts, failure to provide proper notice will be deemed harmless.” *Jova v. Smith*, 582 F.3d 410, 414 (2d Cir. 2009) (internal quotation marks omitted).

Here, Rowe was provided with a one-page notice describing summary judgment and stating, *inter alia*, that under Rule 56 he could “NOT oppose summary judgment simply by relying upon the defenses [he] raised in [his] answer” and “must submit evidence . . . countering the facts asserted by the plaintiff and raising specific facts that support [his] claim.” Notice at 2. Rowe filed both an opposition to the Government’s motion and his own summary judgment motion, citing Rule 56 and describing the evidentiary requirements for a motion for summary judgment in both of those documents. Because the record shows that Rowe understood the nature and consequences of summary judgment, the Government’s failure to attach copies of the rules cited in its notice was harmless error. *See Jova*, 582 F.3d at 414.

Finally, Rowe has not shown that the district court abused its discretion by not affording him additional discovery. “A district court has wide latitude to determine the scope of discovery, and we ordinarily defer to

the discretion of district courts regarding discovery matters. A district court abuses its discretion only when the discovery is so limited as to affect a party's substantial rights." *In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76, 103 (2d Cir. 2008) (internal quotation marks, citation, and alteration omitted). Rowe's conclusory statement that more discovery would have allowed him to find better support for his defenses is not sufficient to show that his substantial rights were violated.

We have considered all of Rowe's remaining arguments and conclude they are without merit. Accordingly, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

APPENDIX E

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

United States of America

Plaintiff

- v -

Roger Rowe

Defendant

Order Filed on Oct. 15, 2020
Hon. William F. Kuntz, II U.S.D.J.
Case 2:19-CV-05770-WFK-VMS

Amended Summary Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES :
OF AMERICA, :
Plaintiff-Appellee, :
v. : No. 2:19-cv-05770-
ROGER ROWE, : WFK-VMS
Defendant-Appellant. :

JUDGMENT

In accordance with the order granting the *Plaintiff United States' Motion to Amend Judgment* entered on this date,

It is **ORDERED AND ADJUDGED** that the United States shall recover of the defendant Roger Rowe, for the trust fund recovery penalties assessed against him pursuant to 26 U.S.C. § 6672, for the quarterly tax periods ending on December 31, 2007 through September 30, 2008, the amount of \$307,695.15, plus statutory interest pursuant to 28 U.S.C. § 1961(c)(1) and 26 U.S.C. §§ 6602, 6621, and 6622 that continues to accrue from and after December 19, 2019.

Dated: October 15, 2020 s/ WFK

WILLIAM F. KUNTZ, II
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

Plaintiff

- v -

Roger Rowe

Defendant

Order Filed on Oct. 1, 2020
Hon. William F. Kuntz, II U.S.D.J.
Case 2:19-CV-05770-WFK-VMS

Order Denying Motion to Leave

**Activity in Case 2:19-cv-05770-WFK-VMS United
States of America v. Rowe Order on Motion for
Leave to File**

1 message

ecf_bounces@nyed.uscourts.gov Thu, Oct 1, 2020
<ecf_bounces@nyed.uscourts.gov> at 3:41 PM
To: nobody@nyed.uscourts.gov

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS*****

Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

**U.S. District Court
Eastern District of New York**

Notice of Electronic Filing

The following transaction was entered on 10/1/2020 at 3:41 PM EDT and filed on 10/1/2020

Case Name: United States of America v. Rowe

Case Number: 2:19-cv-05770-WFK-VMS

Filer:

WARNING: CASE CLOSED on 09/17/2020

Document Number: No document attached

Docket Text:

**ORDER denying [33] Motion for Leave to File.
SO Ordered by Judge William F. Kuntz, II on
10/1/2020. (Stykes, Jacqueline)**

2:19-cv-05770-WFK-VMS Notice has been electronically mailed to:

Thelma A Lizama thelma.a.lizama@usdoj.gov,
northern.taxcivil@usdoj.gov

Roger Rowe rroweny@gmail.com

2:19-cv-05770-WFK-VMS Notice will not be electronically mailed to:

APPENDIX G
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

Plaintiff

- v -

Roger Rowe

Defendant

Order Filed on Oct. 1, 2020
Hon. William F. Kuntz, II U.S.D.J.
Case 2:19-CV-05770-WFK-VMS

Order Granting Motion to Amend Complaint

**Activity in Case 2:19-cv-05770-WFK-VMS United
States of America v. Rowe Order on Motion to
Amend/Correct/Supplement**

1 message

ecf_bounces@nyed.uscourts.gov Thu, Oct 1, 2020
<ecf_bounces@nyed.uscourts.gov> at 3:40 PM
To: nobody@nyed.uscourts.gov

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**U.S. District Court
Eastern District of New York**

Notice of Electronic Filing

The following transaction was entered on 10/1/2020 at 3:40 PM EDT and filed on 10/1/2020

Case Name: United States of America v. Rowe

Case Number: 2:19-cv-05770-WFK-VMS

Filer:

WARNING: CASE CLOSED on 09/17/2020

Document Number: No document attached

Docket Text:

ORDER granting [32] Motion to Amend/Correct/Supplement. SO Ordered by Judge William F. Kuntz, II on 10/1/2020. (Stykes, Jacqueline)

2:19-cv-05770-WFK-VMS Notice has been electronically mailed to:

Thelma A Lizama thelma.a.lizama@usdoj.gov,
northern.taxcivil@usdoj.gov

Roger Rowe rroweny@gmail.com

2:19-cv-05770-WFK-VMS Notice will not be electronically mailed to:

APPENDIX H

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

United States of America

Plaintiff

- v -

Roger Rowe

Defendant

Order Filed on Sep. 17, 2020
Hon. William F. Kuntz, II U.S.D.J.
Case 2:19-CV-05770-WFK-VMS

Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES
OF AMERICA,

Plaintiff,

v.

ROGER ROWE,

JUDGMENT

19-CV-5770 (WFK)

Defendant.

----- X

A Decision and Order of Honorable William F Kuntz II, United States District Judge, having been filed on September 16, 2020, denying Defendant's motion for summary judgment; and granting Plaintiff's cross-motion for summary judgment in its entirety; it is

ORDERED and ADJUDGED that Defendant's motion for summary judgment is denied; and that Plaintiff's cross-motion for summary judgment is granted in its entirety.

Dated: Brooklyn, NY
September 17, 2020

Douglas C. Palmer
Clerk of Court

By: /s/Jalitza Poveda
Deputy Clerk

APPENDIX I

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

United States of America

Plaintiff

- v -

Roger Rowe

Defendant

Order Filed on Sep. 16, 2020
Hon. William F. Kuntz, II U.S.D.J.
Case 2:19-CV-05770-WFK-VMS

Summary Judgment Decision & Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x
UNITED STATES :
OF AMERICA, :
Plaintiff, :
v. : **DECISION & ORDER**
ROGER ROWE, : 19-CV-5770
Defendant. :
----- x

WILLIAM F. KUNTZ, II, United States District Judge: By Complaint filed on October 11, 2019, Plaintiff United States of America (“Plaintiff”) brings this action against Defendant Roger Rowe (“Defendant”) pursuant to 26 U.S.C. § 7401 to reduce to judgment assessed and unpaid federal tax liabilities owed by Defendant. Plaintiff moves for summary judgment pursuant to Fed. R. Civ. P. 56. ECF No. 20. Defendant moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and for summary judgment pursuant to Fed. R. Civ. P. 56. ECF No. 23. For the reasons stated below, the Court grants Plaintiff’s motion for summary judgment in its entirety and denies Defendant’s motions.

BACKGROUND AND PROCEDURAL HISTORY

The Court finds the following facts from the Plaintiffs Local Rule 56.1 Statements, declarations, and other evidence submitted in support of the motion, to be undisputed or construed in the light most favorable

to Defendant, the non-moving party, for the purposes of evaluating Plaintiff's motion. Plaintiff sent the required Local Rule 56.2 Notice to Defendant. ECF No. 20 at 2. However, Defendant did not submit a Statement of Undisputed Facts in accordance with Local Civil Rule 56.1 neither in support of his own motion nor in opposition to Plaintiffs motion.¹ Defendant also did not cite evidence in support of his motion as required by Fed. R. Civ. P. 56(c).² “[P]ro se status ‘does not exempt a party from compliance with relevant rules of procedural and substantive law.’” *Jenn-Ching Luo v. Town of Hempstead*, 06-CV-0082, 2007 WL 9706846, at *2 (E.D.N.Y. June 29, 2007) (Spatt, J.) (citing *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)).

Accordingly, the Court finds as true those statements in Plaintiffs Local Rule 56.1 Statement, which are supported by citations to evidence. E.D.N.Y. Local Rules 56.1(c)–(d).

¹ “Significantly, the requirement of filing a Rule 56.1 statement is not waived due to a litigant’s pro se status.” *Bristol v. Schenk*, 14-CV-6647, 2017 WL 9485715, at *4 (E.D.N.Y. July 31, 2017) (Tomlinson, Mag. J.) (collecting cases.), *report and recommendation adopted*, 14-CV-6647, 2017 WL 4277158 (E.D.N.Y. Sept. 25, 2017) (Bianco, J.).

² A party moving for summary judgment under Rule 56 must submit a “separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.” *Antwi v. Health & Human Sys. (Ctrs.) F.E.G.S.*, 13-CV-835, 2014 WL 4548619, at *4 (S.D.N.Y. Sept. 15, 2014) (Ramos, J.) (denying pro se plaintiff’s motion seeking summary judgment for failing to comply with Local Rule 56.1).

I. Facts

On October 19, 2009, a delegate of the Secretary of the Treasury assessed a trust fund recovery penalty (“TFRP”) against Defendant, as a responsible person of Integrated Construction Management, Inc. (“ICM”) who willfully failed to collect, truthfully account for and pay over to the United States the income and Federal Insurance Contribution Act taxes withheld from the wages of ICM employees for the quarterly tax period ending on December 31, 2007 through September 30, 2008. Pl.’s Statement of Facts ¶ 7, ECF No. 20 (“Pl. St.”). Defendant has acknowledged the trust fund penalty was assessed within the time required by the statute, *id.* ¶ 8, yet has failed to fully pay the assessment and the interests accrued, *id.* ¶ 9.

II. Procedural History

Plaintiff filed suit against Defendant on October 11, 2019. Compl., ECF No. 1. On October 28, 2019, Defendant filed an Answer to the Complaint. ECF No. 6. After a pre-motion conference held on January 24, 2020, the Court granted the parties’ applications to make cross-motions for summary judgment. ECF No. 16. On March 20, 2020, both parties filed their motions and memoranda of law. ECF Nos. 20, 21, 22, 23, 24. On August 28, 2020, Defendant filed a notice regarding correction of false statements of material fact. ECF No. 27. Plaintiff filed a letter in response on September 1, 2020, ECF No. 28, and Defendant filed a reply on September 3, 2020, ECF No. 29.

LEGAL STANDARD

Summary judgment is appropriate where the movant establishes there exists no genuine issue as to any material fact, and the movant is entitled to summary judgment as a matter of law. *Fendi Adele, S.R.L. v. Ashley Reed Trading, Inc.*, 507 F. App'x 26, 29 (2d Cir. 2013). In deciding a motion for summary judgment, the Court must “construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant.” *Brod v. Omya, Inc.*, 653 F.3d 156, 164 (2d Cir. 2011) (quoting *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123, 126 (2d Cir.2004)). The movant has the burden of showing the absence of a disputed issue of material fact, after which the burden shifts to the non-moving party to present specific evidence showing a genuine dispute. *Brown v. Eli Lilly & Co.*, 654 F.3d 347, 358 (2d Cir. 2011).

“The same standard of review applies when the court is faced with a cross-motion for summary judgment. When evaluating cross-motions for summary judgment, the Court reviews each party’s motion on its own merits and draws all reasonable inferences against the party whose motion is under consideration.” *Gustavia Home, LLC v. Hoyer*, 362 F. Supp. 3d 71, 78 (E.D.N.Y. 2019) (Chen, J.) (internal citations and alterations omitted).

DISCUSSION

After careful review of the motion papers submitted by both parties, *see* ECF Nos. 20, 21, 22, 23, 24, Defendant's notice regarding correction of false material fact, ECF Nos. 27, 29, and the Plaintiff's response, ECF No. 28, the Court finds there are no genuine issues of material fact and GRANTS Plaintiff's motion for summary judgment.

Plaintiff takes the position: (1) 26 U.S.C. § 6502(a) is the applicable statute of limitations for collection of a TFRP assessment resulting in a statute of limitations of 10 years after the October 19, 2009 assessment; (2) Defendant was a responsible person within the meaning of 26 U.S.C. § 6672; and (3) Defendant meets the willfulness requirements of 26 U.S.C. § 6672. Pl. Mem. in Supp. Mot. for Summ. J. at 6-10, ECF No. 20.

In his cross-motion, Defendant argues Plaintiff failed to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Def. 's Mem. in Supp. Mot. to Dismiss and Summ. J., at 5-6, ECF No. 23. Defendant further claims he is entitled to summary judgment because the statute of limitations "prohibits Defendant from being prosecuted, tried, or punished for these claims." *Id.* at 8. Defendant takes the position the relevant statutes are 26 U.S.C. §§ 6531, 6533 and 28 U.S.C. § 2462, which provide for a six-year statute of limitations. *Id.* at 6-10.

I. Plaintiff's Prima Facie Case

Plaintiff brought action seeking to reduce to judgment trust fund liability assessments made against Defendant. "Section 6672 of the IRS Code was designed to ensure that employers would comply with their obligation to withhold taxes and to pay the taxes withheld by subjecting the employers' officers responsible for the withholding and payment of taxes to personal liability." *Skouras v. United States*, 854 F. Supp. 962, 971 (S.D.N.Y. 1993) (Patterson, J.), *aff'd*, 26 F.3d 13 (2d Cir. 1994) (internal quotation omitted). Section 6672, which governs the imposition of TFRP's, provides:

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 to 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.

26 U.S.C. § 6672(a). "It is well established that the statute requires two elements to be present before personal liability for unpaid withholding taxes attaches: first, the individual must be a person responsible for the collection and payment of withholding taxes, i.e., he must have the authority to direct the payment of corporate funds; second, the individual's failure to comply with the statute must be willful." *Hochstein v. United States*, 900 F.2d 543, 546 (2d Cir. 1990).

Plaintiff has established a *prima facie* case of Defendant's liability. For the first element of responsibility, Defendant concedes he was a "responsible person" at ICM during the relevant period. Def.'s Ltr. at 1, ECF No. 15. As to the second element of willfulness, Plaintiff has provided employment tax returns from October 2007 through September 2008 signed by Defendant, Decl. of Thelma A. Lizama ("Lizama Decl."), Ex. 9, ECF No. 20, and correspondences from the IRS to Defendant attempting to collect liabilities at issue and outstanding liabilities from earlier quarters, Lizama Decl., Ex. 12, ECF No. 20. Plaintiff also provided evidence Defendant signed payroll and other checks for ICM during the period in question, instead of remitting funds in trust for the benefit of the United States. Lizama Decl., Ex 11, ECF No. 20; Lizama Decl., Exs. 18, 19A, 19B, ECF No. 24. This evidence demonstrates Defendant's willfulness, as he knew of ICM's obligations to pay withholding taxes and knew ICM funds were being used for alternative purposes.

Plaintiff has therefore demonstrated a *prima facie* case for Defendant's liability.

II. Defendant's Alleged Affirmative Defenses

Once a *prima facia* case is established, the burden then shifts to Defendant who "must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." *Brown*, 654 F.3d at 358. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply

show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Defendant has failed to meet his burden.

Defendant argues Plaintiff “failed to provide sufficient evidence proving Defendant willfully failed to collect such tax” and “the government failed to provide evidence that a balance remains due” for the periods at issue. Def.’s Mem. in Opp’n to Pl.’s Mot. for Summ. J. at 5, ECF No. 21 (“Def. Opp.”). Having determined Plaintiff has established its *prima facie* case, the Court rejects this defense. *Signature Bank v. HKD Prods., Inc.*, 12-CV-6149, 2013 WL 1130247, at *2 (S.D.N.Y. Mar. 19, 2013) (Keenan, J) (rejecting failure-to-state-a-claim defense where Plaintiff “ha[d] established a *prima facie* case”).

Defendant also argues Plaintiff’s claim is barred by the statute of limitations, claiming 26 U.S.C. §§ 6531, 6533 and 28 U.S.C. § 2462 govern suits to collect a TFRP. Def. Opp. 7-14. Defendant is incorrect. 26 U.S.C. § 6502(a) prescribes the applicable statute of limitations for collections of a TFRP assessment. 26 U.S.C. § 6671(a) explicitly provides TFRP “*shall be assessed and collected in the same manner as taxes.*” *United States v. Rozbruch*, 28 F. Supp. 3d 256, 264 (S.D.N.Y. 2014) (Gorenstein, J.), *aff’d*, 621 F. App’x 77 (2d Cir. 2015) (quoting 26 U.S.C. § 6671(a)). A timely assessed “tax may be collected . . . by a proceeding in court, but only if the levy is made or the proceeding begun within 10 years after the assessment of the tax.” 26 U.S.C. § 6502(a).

A TFRP was assessed against Defendant on October 19, 2009. Defendant has acknowledged this assessment was performed “within the time frame proscribed by law.” Pl. St. ¶ 8. Plaintiff filed the instant action on October 11, 2019, eight days short of the ten-year statute of limitations. 26 U.S.C. § 6502(a). Accordingly, the Court rejects Defendant’s argument Plaintiffs claim is barred by the statute of limitations.

Finally, Defendant claims his actions did not rise to the level of recklessness to warrant summary judgment. Def. Opp. at 14-16. Defendant fails to provide a statement of material facts nor cite to any “specific evidence” in support of his claim. *See Fincher v. Depository Tr. & Clearing Corp.*, 06-CV-9959, 2008 WL 4308126, at *3 (S.D.N.Y. Sept. 17, 2008) (Pauley, J.) (“A [non-moving party’s] self-serving statement, without direct or circumstantial evidence to support the charge, is insufficient to defeat a motion for summary judgment”), *aff’d*, 604 F.3d 712 (2d Cir. 2010); *Jenn-Ching Luo*, 2007 WL 9706846, at *2 (“[P]ro se status ‘does not exempt a party from compliance with relevant rules of procedural and substantive law.’”).

III. Defendant’s Cross-Motion

Defendant brings a cross-motion for summary judgment and motion to dismiss arguing Plaintiff failed to state a claim and violated the statute of limitations. Defendant failed to provide a statement of material fact and does not cite to evidence in the record as required by Fed. R. Civ. P. 56(c) and Local Civil Rule

56.1. Because the Court has concluded Plaintiff is entitled to summary judgment, Defendant's cross-motion is necessarily dismissed. *See Colavito v. N.Y. Organ Donor Network, Inc.*, 356 F. Supp. 2d 237, 238 (E.D.N.Y. 2005) (Irizarry, J.).

CONCLUSION

For the foregoing reasons, the Court hereby DENIES Defendant's motion for summary judgment, ECF No. 23, and GRANTS Plaintiffs cross-motion for summary judgment in its entirety, ECF No. 20.

SO ORDERED.

s/ WFK

HON. WILLIAM F. KUNTZ, II
UNITED STATES
DISTRICT JUDGE

Dated: September 16, 2020
Brooklyn, New York

APPENDIX J
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

Plaintiff

- v -

Roger Rowe

Defendant

Notice of Appeal Filed on Jan. 14, 2022
Hon. William F. Kuntz, II U.S.D.J.
Case 2:19-CV-05770-WFK-VMS

Notice of Appeal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

Plaintiff

**Docket No. 2:10-cv-
5770-WFK-VMS**

- v -

Roger Rowe

NOTICE OF APPEAL

Defendants.

Notice is hereby given that, Roger Rowe (defendants) in the above-named case, hereby appeal to the Supreme Court of the United States from the following (final order dismissing defendants motion and granting Plaintiff's motion to strike dated December 17, 2021 ECF No. 51); from a (final judgment granting Plaintiffs right to reduce tax lien to judgment dated September 17, 2020 ECF No. 31); from an (order denying Defendant's motion for summary judgment and granting Plaintiff's cross-motion for summary judgment dated September 16, 2020 ECF No. 30); from an (order granting Plaintiff's motion to amend/correct/ supplement dated October 1, 2020 ECF No. 32); and from an (order denying Defendants motion to amend, relief from judgment and in the alternative a new trial dated October 1, 2020 ECF No. 33). This request for a direct appeal to the Supreme Court is based on 28 U.S.C. § 2101(b) and Supreme Court Rule 23(2) and (3) where the Court of Appeals issued a mandate on June 28, 2021 ECF No. 38 and Petitioner has no other avenue to review.

Dated: January 14, 2022

/s/ Roger Rowe
Roger Rowe
Pro Se
20 Spruce rd
Amityville, NY 11701
Tel: (631) 767-6537
rroweny@gmail.com

To: Thelma A. Lizama
Attorney for the Plaintiff
Trial Attorney Tax Division
U.S. Department of Justice
Thelma.a.lizama@usdoj.gov

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America
Plaintiff

**CERTIFICATE
OF SERVICE***

v.
Roger Rowe
Defendants.

Docket No. 2:19-cv-
5770-WFK-VMS

I, Roger Rowe, hereby certify under penalty of perjury
that on January 14, 2022, I served a copy of my Notice
of Appeal to the Supreme Court of the United States.

Personal Delivery United States Mail
Federal Express or other Overnight Courier
Commercial Carrier Mail (on consent)

on the following parties:

Richard L. Parker Post Office Box 502, Washington,
D.C. 20044

e-mail thelma.a.lizama@usdoj.gov; richard.l.parker@usdoj.gov; bruce.r.ellisen@usdoj.gov; appellate.taxcivil@usdoj.gov.

*A party must serve a copy of each paper on the other parties, or their counsel, to the appeal or proceeding. The Court will reject papers for filing if a certificate of service is not simultaneously filed.

**If different methods of service have been used on different parties, please complete a separate certificate of service for each party.

Today's Date 01/14/2022

/s/ Roger Rowe
Roger Rowe
Pro Se
20 Spruce rd
Amityville, NY 11701
Tel: (631) 767-6537
rroweny@gmail.com

APPENDIX K
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

Plaintiff

- v -

Roger Rowe

Defendant

Letter 1153 filed Mar. 20, 2020
Hon. William F. Kuntz, II U.S.D.J.
Case 2:19-CV-05770-WFK-VMS

Letter 1153

**Internal Revenue
Service**

Date: 7/6/2009

ROGER ROWE
116 MADISON AVE
AMITYVILLE, NY
11701-1830-161

**Department of
the Treasury**

Number of this Letter
1153

Person to Contact:
ELLEN MONTEITH

Employee Number:
11-07450

IRS Contact Address:
INTERNAL REVENUE
SERVICE
1180 VETERANS HWY
HAUPPAUGE, NY 11788

IRS Telephone Number:
(631) 651-4967 Ext

**Employer Identification
Number:**
[REDACTED]

**Business Name
and Address:**
INTEGRATED
CONSTRUCTION
MANAGEMENT CORP
780 SUNRISE HWY
W BABYLON, NY
11704-6105-807

Dear MR ROGER ROWE,

Our efforts to collect the federal employment or excise taxes due from the business named above have not resulted in full payment of the liability. We therefore

propose to assess a penalty against you as a person required to collect, account for, and pay over withheld taxes for the above business.

Under the provisions of Internal Revenue Code section 6672, individuals who were required to collect, account for, and pay over these taxes for the business may be personally liable for a penalty if the business doesn't pay the taxes. These taxes, described in the enclosed Form 2751, consist of employment taxes you withheld (or should have withheld) from the employees' wages (and didn't pay) or excise taxes you collected (or should have collected) from patrons (and didn't pay), and are commonly referred to as "trust fund taxes."

The penalty we propose to assess against you is a personal liability called the Trust Fund Recovery Penalty. It is equal to the unpaid trust fund taxes which the business still owes the government. If you agree with this penalty for each tax period shown, please sign Part 1 of the enclosed Form 2751 and return it to us in the enclosed envelope.

If you don't agree, have additional information to support your case, and wish to try to resolve the matter informally, contact the person named at the top of this letter within ten days from the date of this letter.

You also have the right to appeal or protest this action. To preserve your appeal rights you need to mail us your written appeal within 60 days from the date of this letter (75 days if this letter is addressed to you outside the United States). The instructions below explain how to make the request.

APPEALS

You may appeal your case to the local Appeals Office. Send your written appeal to the attention of the Person to Contact at the address shown at the top of this letter. The dollar amount of the proposed liability for each specific tax period you are protesting affects the form your appeal should take.

For each period you are You should:
protesting, if the proposed
penalty amount is:

\$25,000 or less	Send a letter listing the issues you disagree with and explain why you disagree. (Small Case Request).
More than \$25,000	Submit a formal Written Protest.

One protest will suffice for all the periods listed on the enclosed Form 2751, however if any one of those periods is more than \$25,000, a formal protest must be filed. Include any additional information that you want the Settlement Officer/Appeals Officer to consider. You may still appeal without additional information, but including it at this stage will help us to process your request promptly.

A SMALL CASE REQUEST should include:

1. A copy of this letter, or your name, address, social security number, and any information that will help us locate your file;

2. A statement that you want an Appeal's conference;
3. A list of the issues you disagree with and an explanation of why you disagree. Usually, penalty cases like this one involve issues of responsibility and willfulness. Willfulness means that an action was intentional, deliberate or voluntary and not an accident or mistake. Therefore, your statement should include a clear explanation of your duties and responsibilities; and specifically, your duty and authority to collect, account for, and pay the trust fund taxes. Should you disagree with how we calculated the penalty, your statement should identify the dates and amounts of payments that you believe we didn't consider and on any computation errors that you believe we made.

Please submit two copies of your Small Case Request.

A formal **WRITTEN PROTEST** should include the items below. Pay particular attention to item 6 and the note that follows it.

1. Your name, address, and social security number;
2. A statement that you want a conference;
3. A copy of this letter, or the date and number of this letter;
4. The tax periods involved (see Form 2751);
5. A list of the findings you disagree with;
6. A statement of fact, signed under penalties of perjury, that explains why you disagree and why you believe you shouldn't be charged with

the penalty. Include specific dates, names, amounts, and locations which support your position. Usually, penalty cases like this one involve issues of responsibility and willfulness. Willfulness means that an action was intentional, deliberate or voluntary and not an accident or mistake. Therefore, your statement should include a clear explanation of your duties and responsibilities; and specifically, your duty and authority to collect, account for, and pay the trust fund taxes. Should you disagree with how we calculated the penalty, your statement should identify the dates and amounts of payments that you believe we didn't consider and/or any computation errors you believe we made;

NOTE:

To declare that the statement in item 6 is true under penalties of perjury, you must add the following to your statement and sign it:

“Under penalties of perjury, I declare that I have examined the facts presented in this statement and any accompanying information, and, to the best of my knowledge and belief, they are true, correct, and complete.”

7. If you rely on a law or other authority to support your arguments, explain what it is and how it applies.

REPRESENTATION

You may represent yourself at your conference or have someone who is qualified to practice before the Internal Revenue Service represent you. This may be your attorney, a certified public accountant, or another individual enrolled to practice before the IRS. If your representative attends a conference without you, he or she must file a power of attorney or tax information authorization before receiving or inspecting confidential tax information. Form 2848, Power of Attorney and Declaration of Representative, or Form 8821, Tax Information Authorization, may be used for this purpose. Both forms are available from any IRS office. A properly written power of attorney or authorization is acceptable.

If your representative prepares and signs the protest for you, he or she must substitute a declaration stating:

1. That he or she submitted the protest and accompanying documents, and
2. Whether he or she knows personally that the facts stated in the protest and accompanying documents are true and correct.

**CLAIMS FOR REFUND AND CONSIDERATION
BY THE COURTS****CONSIDERATION BY THE COURTS**

If you and the IRS still disagree after your conference, we will send you a bill. However, by following the

procedures outlined below, you may take your case to the United States Court of Federal Claims or to your United States District Court. These courts have no connection with the IRS.

Before you can file a claim with these courts, you must pay a portion of the tax liability and file a claim for refund with the IRS, as described below.

SPECIAL BOND TO DELAY IRS COLLECTION ACTIONS FOR ANY PERIOD AS SOON AS A CLAIM FOR REFUND IS FILED

To request a delay in collection of the penalty by the IRS for any period as soon as you file a claim for refund for that period, you must do the following within 30 days of the date of the official notice of assessment and demand (the first bill) for that period:

1. Pay the tax for one employee for each period (quarter) of liability that you wish to contest, if we've based the amount of the penalty on unpaid employment taxes; or pay the tax for one transaction for each period that you wish to contest, if we've based the amount of the penalty on unpaid excise tax.
2. File a claim for a refund of the amount(s) you paid using Form(s) 843, Claim for Refund and Request for Abatement.
3. Post a bond with the IRS for one and one half times the amount of the penalty that is left after you have made the payment in Item 1.

If the IRS denies your claim when you have posted this bond, you then have 30 days to file suit in your United States District Court or the United States Court of Federal Claims before the IRS may apply the bond to your trust fund recovery penalty and the interest accruing on this debt.

CLAIM FOR REFUND WITH NO SPECIAL BOND

If you do not file a special bond with a prompt claim for refund, as described above, you may still file a claim for refund following above action items 1 and 2, except these action items do not have to be taken in the first 30 days after the date of the official notice of assessment and demand for the period.

If IRS has not acted on your claim within 6 months from the date you filed it, you can file a suit for refund. You can also file a suit for refund within 2 years after IRS has disallowed your claim.

You should be aware that if IRS finds that the collection of this penalty is in jeopardy, we may take immediate action to collect it without regard to the 60-day period for submitting a protest mentioned above.

For further information about filing a suit you may contact the Clerk of your District Court or the Clerk of the United States Court of Federal Claims, 717 Madison Place, NW, Washington, D.C. 20005.

If we do not hear from you within 60 days from the date of this letter (or 75 days if this letter is addressed to

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you outside the United States), we will assess the penalty and begin collection action.

Sincerely yours,

/s/ Ellen Monteith
ELLEN MONTEITH
Revenue Officer

Enclosures:
Form 2751
Publication 1
Envelope
BOD: SB

Report of Business Taxpayer's Unpaid Tax Liability

Name and address of business INTEGRATED CONSTRUCTION MANAGEMENT
CORPEIN: XXXXXXXX
780 SUNRISE HWY
W BABYLON, NY 11704-6105-807

Tax Return Form Number	Tax Period Ended	Date Return Filed	Date Tax Assessed	Identifying Number	Amount Outstanding	Penalty
941	12/31/2007	07/21/2008	08/18/2008		\$121,220.50	\$65,666.48
941	03/31/2008	07/18/2008	08/18/2008		\$111,863.36	\$63,071.12
941	06/30/2008	08/02/2008	11/10/2008		\$118,395.54	\$72,837.87
941	09/30/2008	11/17/2008	12/29/2008		\$14,563.98	\$8,317.15
Totals:					\$366,043.38	\$209,892.62

Agreement to Assessment and Collection of Trust Fund Recovery Penalty

Name, address, and social security
number of person responsible ROGER ROWE
084-64-5910
116 MADISON AVE
AMITYVILLE, NY 11701-1830-161

I consent to the assessment and collection of the penalty shown for each period, which is equal either to the amount of federal employment taxes withheld from employees' wages or to the amount of federal excise taxes collected from patrons or members, and which was not paid over to the Government by the business named above. I waive the 60 day restriction on notice and demand set forth in Internal Revenue Code Section 6672(b).

Signature of person responsible

Date

APPENDIX L
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

Plaintiff

- v -

Roger Rowe

Defendant

ICH History filed July. 23, 2021
Hon. William F. Kuntz, II U.S.D.J.
Case 2:19-CV-05770-WFK-VMS

ICS History July 23, 2021

Thursday, September 17, 2009, 12:15 pm

REQUESTOR: 2106-1537
ICS HISTORY TRANSCRIPT
HISTORY INFORMATION

**Name: INTEGRATED CON- TIN: 06-1674552
STRUCTION MGMT CORP**

ACTION DATE: 10/20/2008 CREATE ID: 21976811

Systemic History: CASE CREATED – ICS

ASGMT # 6816 EMPLOYEE NAME ANDREA TABBI
CASE CODE : 101 IND-WAGE EARNER
CASE SUBCODE: 000 COMPLIANCE TDA/TDI
BOD CODE: SB

ACTION DATE: 10/20/2008 CREATE ID: 21976811

Systemic History: NEW INVENTORY ITEM – ICS

INCOMING NF 00000001 – 174 TFRP FILES 21976816

ACTION DATE: 10/20/2008 SYSTEM DATE: 10/20/2008

CONTACT: OTHER CREATE ID: 21976811

GENERAL HISTORY

Received fax request from Marilyn Lynch Hope, Advisor in Brooklyn office (718-488-2786) for closed TFRP file re: (b)(3) 26 U.S.C. § 6103(b)(7)(C) & Roger Rowe (084-64-5910) assessed 6/30/08. 174 module for Brooklyn case created by Tech Barb Comerford assigned to Tech Andrea Tabbi (out on leave until 11/3/08) Sending to Marilyn via 3210 today. Extending due date 60 days for follow up.

ACTION DATE: 10/20/2008 CREATE ID: 21976811

Systemic History: INVENTORY ITEM UPDATED –
ICS

00000001, NF DUE DATE CHANGED FROM: 12/04/2008
TO: 12/22/2008

ACTION DATE: 12/17/2008 CREATE ID: 21976743

Systemic History: FORMS/CORRESPONDENCE

LEVY SOURCE ADDED:

TRAVELERS INSURANCE COMPANY
33650 6TH AVENUE
SUITE 200
FEDERAL WAY, WA 98003

ACTION DATE: 12/23/2008 CREATE ID: 21976816

Systemic History: INVENTORY ITEM UPDATED –
ICS

00000001, NF DUE DATE CHANGED FROM: 12/22/2008
TO: 01/12/2009

ACTION DATE: 12/23/2008 SYSTEM DATE: 12/23/2008
CONTACT: OTHER CREATE ID: 21976816

GENERAL HISTORY

Reviewing follow up due dates on ICS. CPM not able to contact Advisor, Marilyn Lynch-Hope today. Advisor is out of the office until the first of the year. Changing follow up to 01/12/2009.

ACTION DATE: 01/20/2009 SYSTEM DATE: 01/20/2009
CONTACT: OTHER CREATE ID: 21976816

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GENERAL HISTORY

CPM called Advisor regarding closed TFRP file and left a voice message to all regarding the status. Set follow up for 01/26/09.

ACTION DATE: 01/20/2009 CREATE ID: 21976816

Systemic History: INVENTORY ITEM UPDATED – ICS

00000001, NF DUE DATE CHANGED FROM: 01/12/2009 TO: 01/26/2009

ACTION DATE: 01/26/2009 SYSTEM DATE: 01/26/2009
CONTACT: OTHER CREATE ID: 21976816

GENERAL HISTORY

Advisor will send file by 02/02/09. Set follow up for that date.

ACTION DATE: 01/26/2009 CREATE ID: 21976816

Systemic History: INVENTORY ITEM UPDATED – ICS

00000001, NF DUE DATE CHANGED FROM: 01/26/2009 TO: 02/02/2009

ACTION DATE: 02/05/2009 SYSTEM DATE: 02/05/2009
CONTACT: OTHER CREATE ID: 21976816

GENERAL HISTORY

Advisor still has closed TFRP file. Set new follow up for 03/02/09.

ACTION DATE: 02/05/2009 CREATE ID: 21976816

Systemic History: INVENTORY ITEM UPDATED – ICS

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00000001, NF DUE DATE CHANGED FROM: 02/02/2009
TO: 03/02/2009

ACTION DATE: 02/10/2009 SYSTEM DATE: 02/10/2009
CONTACT: OTHER CREATE ID: 21976811

GENERAL HISTORY

Closed TFRP file returned to Buffalo Advisory and re-filed in closed Brooklyn TFRP file. Closing 174 module this date.

ACTION DATE: 02/10/2009 CREATE ID: 21976811

Systemic History: INVENTORY ITEM CLOSED –
ICS

NF – ACTION ACCEPTED 00000001

ACTION DATE: 02/10/2009 CREATE ID: 21976811

Systemic History: CASE CLOSED – ICS

NO NARRATIVE ASSOCIATED
WITH THIS HISTORY ENTRY

ACTION DATE: 02/14/2009 CREATE ID: 00000000

Systemic History: CASE CLOSED – ICS

NO NARRATIVE ASSOCIATED
WITH THIS HISTORY ENTRY

ACTION DATE: 04/08/2009 CREATE ID: 21996834

Systemic History: NEW INVENTORY ITEM – ICS

INCOMING NF 00000002 – 187 MISCELLANEOUS
21996834

ACTION DATE: 04/08/2009 CREATE ID: 21996834

Systemic History: ENTITY UPDATED – ICS

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PRIMARY ASSIGNMENT NUMBER UPDATED to
21996834

ACTION DATE: 04/08/2009 CREATE ID: 21996834

Systemic History: ENTITY UPDATED – ICS

CASE REOPENED

ACTION DATE: 04/08/2009 CREATE ID: 21996834

Systemic History: NEW INVENTORY ITEM – ICS

OUTGOING OI 00000003 – TRUST FUND RECOVERY INVESTIGATION – SPECIFIC RO 21061537

ACTION DATE: 02/10/2009 SYSTEM DATE: 02/10/2009

CONTACT: OTHER CREATE ID: 21976811

GENERAL HISTORY

CHAPTER 7 NO ASSET BANKRUPTCY FILED 1/27/2009 DOCKET#09-70460 . . . OUT OF BUSINESS . . . TFRP PREVIOUSLY ASSERTED AGAINST (b)(3) 26 U.S.C. § 6103(b)(7)(C) ROGER ROWE SS#084-64-5910 FOR TAX PERIODS 200703, 200706, 200709. . . . CONTACT INSOLVENCY UNIT R/O DEANNA GOVAN (718) 488-2824 IF FURTHER INFORMATION IS NEEDED

ACTION DATE: 04/08/2009 CREATE ID: 21996834

Systemic History: INVENTORY ITEM UPDATED – ICS

00000003, OI DUE DATE CHANGED FROM:
05/23/2009 TO: 07/08/2009

ACTION DATE: 04/08/2009 CREATE ID: 21996834

Systemic History: INVENTORY ITEM UPDATED – ICS

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00000002, NF DUE DATE CHANGED FROM:
05/23/2009 TO: 07/08/2009

ACTION DATE: 04/11/2009 CREATE ID: 00000000

Systemic History: ENTITY UPDATED – ENTITY
ENTITY UPDATED – ENTITY: RISK SCORE 101

ACTION DATE: 04/13/2009 CREATE ID: 21061537

Systemic History: FORMS/CORRESPONDENCE
LEVY SOURCE ADDED:
BANK OF AMERICA
NORTHEAST LEGAL ORDER PROCESSING
MAILCODE NY7-501-01-17
5701 HORATIO STREET
UTICA, NY 13502

ACTION DATE: 04/13/2009 CREATE ID: 21061537

Systemic History: ENTITY UPDATED – ICS
(b)(3) 26 U.S.C. § 6103

ACTION DATE: 04/13/2009 CREATE ID: 21061537

Systemic History: ENTITY UPDATED – ICS
(b)(3) 26 U.S.C. § 6103

ACTION DATE: 04/13/2009 SYSTEM DATE: 04/13/2009
CONTACT: CORR. CREATE ID: 21061537

OTHER INTERNAL SOURCE
GENERAL HISTORY
CLOSED TDA/53 FILE
BMF/IMF ON LINE

CLOSED TDA/53 FILE

RESULTS: See history below.

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BMF/IMF ON LINE

RESULTS: See history below.

OTHER INTERNAL SOURCE

RESULTS: See history below.

Received OI.

TP corp. was previously in my inventory, and I proposed the TFRP against corp. President Roger Rowe(084-64-5910) (b)(3) 26 U.S.C. § 6103, (b)(7)(C) for periods through 200709.

Corp has filed ch / no asset bankruptcy.

Reviewed archive history.

Corp. banked with Bank of America.

Updated levy and summons information on ICS.

Reviewed prior TFRP on ATFR and set up new ATFR module for 01 200712 – 200809, which are all in st. 72 on IDRS.

Checked TXMODAs

All liabilities appear to be based on returns filed by the TP.

The unpaid tax for these four periods totals app. \$366,044.00, and the trust funds total app. \$210.000.00.

Added Rowe and (b)(3) 26 U.S.C. § 6103, (b)(7)(C) as responsible parties on ATFR and printed and mailed TFRP L3164s to each.

Copies in file.

Summons can be sent to Bank of America on 04/23/2009.

Cannot generate follow-up as this is not my case.

ESTAB'd for 01 200712 – 200809 with IDAP.

64a

ACTION DATE: 05/15/2009 SYSTEM DATE: 05/15/2009
CONTACT: OTHER CREATE ID: 21061537

ST/LOCAL GOVT. SEARCH
OTHER 3RD PARTY CONT.
GENERAL HISTORY

ST/LOCAL GOVT. SEARCH
Not an IRC 7602(c) 3rd Party Contact
RESULTS: See history below.

OTHER 3RD PARTY CONT.
Not an IRC 7602(c) 3rd Party Contact

Checked NYS Unclaimed Funds website.
No hit for TP corp.

(b)(3) 31 U.S.C. § 5319

ACTION DATE: 05/18/2009 CREATE ID: 21061537

Systemic History: SUMMONS

SUMMONS SERIAL NO. 20090518130414 MANUAL
SUMMONS FORM 6639
SUMMONED PARTY: BANK OF AMERICA

APPEARANCE DATE: 06/18/2009 TIME: 10:00 AM
THIRD PARTY SUMMONS: NOTICE REQUIRED

ACTION DATE: 05/18/2009 CREATE ID: 21061537

Systemic History: SUMMONS

SUMMONS SERIAL NO. 20090518130414
FORM 6639

DATE SERVED: 05/18/2009
APPEARANCE DATE: 06/18/2009 TIME: 10:00 AM
THIRD PARTY SUMMONS: NOTICE REQUIRED
TO: BANK OF AMERICA

ACTION DATE: 05/18/2009 CREATE ID: 21061537

Systemic History: SUMMONS

SUMMONS SERIAL NO. 20090518130414

FORM 6639

DATE TP NOTICE MAILED OR DELIVERED

05/18/2009

ACTION DATE: 05/18/2009 SYSTEM DATE: 05/18/2009

CONTACT: CORR. CREATE ID: 21061537

GENERAL HISTORY

Manually generated and sent 6639 TFRP summons and Form 6863 via certified mail to Bank of America. Summons covers 01 200712 – 200809.

Sent noticee copy to corp. President Roger Rowe via certified mail.

Sent copy of noticee copy to TP corp. via certified mail.

Copy held for TFRP file.

Response date: 06/18/2009.

ACTION DATE: 06/03/2009 SYSTEM DATE: 06/03/2009

CONTACT: CORR. CREATE ID: 21061537

GENERAL HISTORY

Received certified receipt for TFRP summons sent to Bank of America and noticee copy sent to corp. President Roger Rowe.

Receipts with summons in case file.

ACTION DATE: 06/17/2009 CREATE ID: 21061537

Systemic History: SUMMONS

CLOSE FORM 6639 SUMMONS

SERIAL NO. 20090518130414 CLOSED

COMPLIED ON 06/17/2009

ACTION DATE: 06/17/2009 SYSTEM DATE: 06/17/2009
CONTACT: CORR. CREATE ID: 21061537

GENERAL HISTORY

Received TFRP summons response from Bank of America.

(b)(3) 26 U.S.C. § 6103, (b)(7)(C)

All checks and documents summonsed are signed by Roger Rowe, and he is the only person named on the bank signature card.

(b)(3) 26 U.S.C. § 6103, (b)(7)(C)

Bank documents in TFRP file.

Closed summons on ICS.

ACTION DATE: 06/25/2009 SYSTEM DATE: 06/25/2009
CONTACT: OTHER CREATE ID: 21061537

GENERAL HISTORY

06/29/2009 – 07/05/2009 Annual Leave

ACTION DATE: 07/06/2009 CREATE ID: 21061537

Systemic History: FOLLOW UP – ICS

Follow up (OI/NF/PALS) created for: 09/04/2009
INTEGRATED CONSTRUCTION MGMT CORP.
Appeal deadline for L1153 expires.

ACTION DATE: 07/06/2009 SYSTEM DATE: 07/06/2009
CONTACT: CORR. CREATE ID: 21061537

GENERAL HISTORY

LETTER 1153 ISSUED

LETTER 1153 ISSUED

Name Line 1: Roger Rowe
Name Line 2: President

67a

Generated and printed L1153 and Form 2751 for Roger Rowe on ATFR.

Mailed letter and form to Rowe via certified mail with Pub. 1 and return envelope.

Copies in ATFR file.

Appeal deadline expires 09/04/2009.

Input follow-up.

ACTION DATE: 07/13/2009 CREATE ID: 21061537

Systemic History: INVENTORY ITEM UPDATED – ICS

00000003 Updates: OI

DUE DATE CHANGED FROM:
7/8/2009 TO 9/10/2009

ACTION DATE: 07/21/2009 SYSTEM DATE: 07/21/2009

CONTACT: CORR. CREATE ID: 21061537

GENERAL HISTORY

Received certified receipt for L1153 and Form 2751 sent to Roger Rowe.

Receipt with letter in case file.

ACTION DATE: 07/21/2009 SYSTEM DATE: 07/21/2009

CONTACT: PHONE CREATE ID: 21061537

GENERAL HISTORY

PC to RO Govan.

Left her a voicemail message asking how she wants me to proceed with the OI – should I keep the OI open until the appeal deadline expires for the L1153, and, if so, once the appeal deadline expires, do I send the package to Buffalo or back to her in the Insolvency Unit?

ACTION DATE: 08/24/2009 SYSTEM DATE: 08/24/2009
CONTACT: OTHER CREATE ID: 21061537

GENERAL HISTORY

08/17/2009 – 08/21/2009 Sick leave

ACTION DATE: 09/02/2009 SYSTEM DATE: 09/02/2009
CONTACT: OTHER CREATE ID: 21061537

GENERAL HISTORY

Reviewed file.

Can take no action until L1153 appeal deadline expires.

ACTION DATE: 09/12/2009 CREATE ID: 00000000

Systemic History: INVENTORY ITEM UPDATED –
ICS

OI INVENTORY ITEM CHANGED FROM
21976816 TO 99999999

ACTION DATE: 09/17/2009 SYSTEM DATE: 09/17/2009
CONTACT: OTHER CREATE ID: 21061537

GENERAL HISTORY

Printed Forms 4183, 3177 and 2749 and history from
ATFR.

Submitted Form 3177 for processing, copy in penalty
file.

Assembled TFRP file.

Will print ICS history and add same to file on return
to the office.

NOTE: Unable to secure Form 4180.

Corp. is oob and in bankruptcy.

As noted in archive history, dealings with corp. President Roger Rowe were difficult, and once enforcement action commenced, he became uncooperative.

ACTION DATE: 09/17/2009 SYSTEM DATE: 09/17/2009
CONTACT: OTHER CREATE ID: 21061537

GENERAL HISTORY
TFRP COMPLETED

Printed ICS history and added same to case.
Generated and printed Form 3210 from ATFR.
Submitted TFRP package for transmittal to Buffalo.
Closing OI per completion of TFRP investigation.

Corporate Case History Report: 06-1674552
INTEGRATED CONSTRUCTION MANAGEMENT
04/13/2009

Sorted By: Date

09/15/2009 S3VBB Form 3177 Prepared date was
saved for 084-64-5910.

09/15/2009 S3VBB 3177 generated successfully for
ROGER ROWE 084-64-5910

09/15/2009 S3VBB 2749 generated successfully for
ROGER ROWE 084-64-5910

09/15/2009 S3VBB Assessment type change to R for
resptin = 084-64-5910

09/15/2009 S3VBB 3177 generated successfully for
ROGER ROWE 084-64-5910

07/21/2009 TVSBB Accessed by User Not Assigned to
Case.

70a

07/06/2009 S3VBB 1153 generated successfully for
ROGER ROWE 084-64-5910

07/06/2009 S3VBB Responsible Party 084-64-5910 –
Letter 1153 Certified

07/06/2009 S3VBB 2751 generated successfully for
ROGER ROWE 084-64-5910

07/06/2009 S3VBB 1153 generated successfully for
ROGER ROWE 084-64-5910

06/18/2009 WTVBB Form 4183 Approved

06/18/2009 WTVBB 4183 automatically regenerated
when approved.

06/18/2009 WTVBB Form 4183 Pg.4 archived as
page_4@0617200901

06/18/2009 WTVBB Form CalcSheet archived as
paysh@0617200901

06/17/2009 S3VBB Sending F4183 for Manager Ap-
proval

71a

06/17/2009 S3VBB 4183_13 generated successfully

(b)(3) 26 U.S.C. § 6105, (b)(7)(C)

06/17/2009 S3VBB Narrative Inserted for 084-64-5910

(b)(3) 26 U.S.C. § 6103, (b)(7)(C)

04/13/2009 S3VBB Form 3164 Mailed date was saved
for 084-64-5910.

04/13/2009 S3VBB 3164 generated successfully for
ROGER ROWE 084-64-5910

(b)(3) 26 U.S.C. § 6103, (b)(7)(C)

04/13/2009 S3VBB Adding Responsible Party, TIN:
084-64-5910, Name: ROGER ROWE

04/13/2009 S3VBB Determination to Pursue Case

04/13/2009 S3VBB Setting status to 20 – Assert

APPENDIX M
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

Plaintiff

- v -

Roger Rowe

Defendant

Form 4183 filed July. 23, 2021
Hon. William F. Kuntz, II U.S.D.J.
Case 2:19-CV-05770-WFK-VMS

Form 4183 July 23, 2021

EIN 06-1674552			Trust Fund Recovery Penalty Data			Tue Sep 15 15:11:22 2009		
Earliest ASED 07/21/2011		Tax Only	F.I.C.A.		Income Tax Withheld	Total Employee Portion Withheld		
Amount	Paid	Employer Portion	Employee Portion	Withheld				
01-200712	Filed: 07/21/2008		Assessed: 08/18/2008		42120.00		65666.48	
Amount		23546.48			0.00		0.00	
Paid		5162.92			0.00		0.00	
Balance		18383.56			42120.00		65666.48	
01-200803	Filed: 07/18/2008		Assessed: 08/18/2008		41660.00		63071.12	
Amount		21411.12			0.00		0.00	
Paid		0.00			0.00		0.00	
Balance		21411.12			41660.00		63071.12	
01-200806	Filed: 08/02/2008		Assessed: 11/10/2008		45778.00		72837.87	
Amount		27059.87			0.00		0.00	
Paid		0.00			0.00		0.00	
Balance		27059.87			45778.00		72837.87	
01-200809	Filed: 11/17/2008		Assessed: 12/29/2008		4649.00		8317.15	
Amount		3668.14			0.00		0.00	
Paid		0.00			3668.14		4649.00	
Balance		11985.29			3668.15		8317.15	
Balance Totals		280415.31			75685.62		134207.00	
							209892.62	