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WASHINGTON, D. C. 20543

Supreme Court of the United States

-----X  
IKE SLODOV,  
Petitioner,  
--Vs--  
UNITED STATES OF AMERICA,  
Respondent.  
-----X

NUMBER:  
76-1835

Washington, D. C.  
February 22, 1978

Pages 1 thru 53

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v.	:	No. 76-1835
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	:	
Respondent.	:	
-----X	:	

Washington, D. C.

Wednesday, February 22, 1978

The above-entitled matter came on for argument at

1:01 p.m.

## BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
 WILLIAM J. BRENNAN, JR., Associate Justice  
 POTTER STEWART, Associate Justice  
 BYRON R. WHITE, Associate Justice  
 THURGOOD MARSHALL, Associate Justice  
 HARRY A. BLACKMUN, Associate Justice  
 LEWIS F. POWELL, JR., Associate Justice  
 WILLIAM H. REHNQUIST, Associate Justice  
 JOHN P. STEVENS, Associate Justice

## APPEARANCES:

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 Cleveland, Ohio 44114, for the Petitioner.

STEPHEN R. BARNETT, ESQ., Office of the Solicitor  
 General, Department of Justice, Washington, D. C.  
 20530.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1835, Slodov against the United States.

Mr. Kleinman, you may proceed.

ORAL ARGUMENT OF BENNET KLEINMAN ON  
BEHALF OF PETITIONER

MR. KLEINMAN: Mr. Chief Justice, and may it please the Court: The case before us is Slodov v. United States. It comes to this Court on a writ of certiorari from the Sixth Circuit Court of Appeals. The issue before this Court is whether under the provisions of Section 6672 of the Internal Revenue Code, the section, incidentally, which was discussed in the immediately preceding case, whether under that section of the Code or any other section of the Internal Revenue Code Dr. Slodov, the petitioner in this case, is personally liable for income taxes and social security taxes withheld from employees of a corporation, withheld prior to the time that he became a responsible officer under the provisions of this section and which taxes were not paid over to the Internal Revenue Service by the corporation.

QUESTION: At any time after he took over, did he ever have any control of this fund, any fund for the purposes involved in this case?

MR. KLEINMAN: So far as the petitioner is concerned, the petitioner Slodov came into no funds when he



took over the corporation. The date he took over control of the corporation, the bank accounts, all the bank accounts of the corporation had been overdrawn.

QUESTION: But did the company have some gross income that was subject to liability for the tax?

MR. KLEINMAN: At that time?

QUESTION: After he took over, did the corporation have some gross income.

MR. KLEINMAN: The corporation had gross income.

QUESTION: Which was subject to the tax liability?

MR. KLEINMAN: No. So far as we are concerned, it was not subject to the tax. Let me put it this way, the corporation --

QUESTION: There was a decision to pay some bills besides the tax.

MR. KLEINMAN: That's correct. The corporation remained liable for that tax liability throughout the entire proceedings --

QUESTION: And he could have applied that money to the tax instead of some other liabilities.

MR. KLEINMAN: He could have, that is correct.

QUESTION: Let me ask it another way. These funds that were available at that time were not encumbered otherwise?

MR. KLEINMAN: The funds which came into the corporation after the petitioner took over were not encumbered

except for the fact that the corporation, and the facts so indicate, was required to pay c.o.d. for any inventory which it purchased which, incidentally, gave rise to the gross income of the corporation. So that had he not paid these bills for inventory which he was buying, not paid them simultaneously, he would have had no income, nothing to sell, and therefore no money out of which --

QUESTION: Had a lien matured, a tax lien matured for the withholding tax?

MR. KLEINMAN: I am not aware whether a tax lien had been placed upon the assets of the corporation. I do not believe that they were, your Honor.

QUESTION: Then I take it that there was some net income realized, too.

MR. KLEINMAN: I do not believe there was any net income. In fact, the corporation went bankrupt within six months after the time Dr. Slodov took over control of the corporation. It was in very bad financial condition at the time he took over. There was no net income, otherwise there would probably not have been any need for the corporation to go through the bankruptcy proceeding.

QUESTION: Then I take it your answer to one of the earlier questions is that he did not give first priority to the old withholding taxes because he had to pay c.o.d. for everything.

MR. KLEINMAN: It is part of our argument, yes, Your Honor. But it is also part of our argument that there was no obligation on anyone's part to give priority to those payments of taxes out of funds which were acquired by the corporation at a later date. There is nothing in Sec. 6672 nor Sec. 7501 of the Internal Revenue Code, which are the only two sections I know of by which this petitioner could be held liable for the tax, which gives the Government any priority over subsequent funds.

Section 7501 which provides for these funds to be held in trust says that the funds that are withheld and collected, or tax withheld and collected, are held in trust. Those funds had been dissipated by prior officers of this corporation before perhaps Dr. Slodov had ever even heard of this corporation, certainly before he took control on January 31, there was no money, there were no funds representing withheld taxes at the time he took over.

QUESTION: What kind of an account -- you said all the bank accounts were drawn down to zero.

MR. KLEINMAN: Overdrawn.

QUESTION: Was there a segregated account for these funds at any time prior to his takeover?

MR. KLEINMAN: So far as the record shows, no funds had ever been segregated which had been withheld or collected.

QUESTION: In other words, they took the money from

the employees and just put it in the general revenues of the corporation.

MR. KLEINMAN: That is correct. So far as the record shows, that is what happened. Yes. They used the funds as they came in for --

QUESTION: For how long a period did that go on?

MR. KLEINMAN: Well, this went on for quite a period, although the taxes with which we are involved here are the few quarters before the time that Dr. Slodov took over. There were no funds available, that is clear from all of the evidence the court found. Originally this case was tried in the bankruptcy court. The bankruptcy judge found that the bank accounts had all been overdrawn. He found, the bankruptcy judge, found this petitioner not liable for any taxes which had been collected or withheld prior to the time he took over control of the corporation.

There was an appeal to the district court and the district court likewise held this petitioner not liable for those taxes. The court appeals, the Sixth Circuit Court of Appeals, reversed. The basis on which the lower courts have held that this petitioner was not liable for the tax was that the three requirements of making him a responsible person insofar as these particular taxes are concerned had not converged. That is to say, Section 6672 provides that any person required to collect, truthfully account for, and pay over the tax, all



three of these provisions are required before a person, even though a responsible officer at that time, can be held liable for any taxes which should have been collected.

QUESTION: Mr. Kleinman, do you concede that Dr. Slodov, during the period of his control of the corporation, which were a few months in 1969, was such a person?

MR. KLEINMAN: Yes, we concede that, your Honor. We have no argument with the fact -- there was an issue in the original case as to whether there was any liability on his part for taxes incurred after he became a responsible officer. That has been settled to his satisfaction.

QUESTION: But you do concede that --

MR. KLEINMAN: We concede.

QUESTION: -- during the time that he was in control of the corporation, he was the person described in 6672.

MR. KLEINMAN: Correct. He was that person from the time he took over. We do not concede, however, that he was a responsible officer prior to that, and that is what the issue is before this Court at the present time.

The Government reads -- the Internal Revenue Service, the Government, and the Sixth Circuit read this statute differently from the way it is clearly written. They said that any person required to collect, truthfully account for, or pay over any tax. The statute says "and pay over." The two decisions in the lower courts were that these three had to

converge. They did not converge because the petitioner was not the responsible officer who was required to collect these taxes for which the Government is now making a claim.

QUESTION: On the interpretation you have just given, the distinction between "and" and "or" is the distinction the Fifth Circuit made, is it not?

MR. KLEINMAN: The Fifth Circuit likewise made the same distinction. The Government made the same argument in the Fifth Circuit. They said this should be read "or," and the Fifth Circuit clearly said that's fine except the principal difficulty with this argument is that that is not the way the statute is written and there is no statutory authority for the collection of this penalty. That is the basis for, at least in one part of our case where there is a conflict between the Sixth Circuit and the Fifth, and the Sixth Circuit clearly said that they don't follow the reasoning of the Fifth Circuit insofar as Section 6672 is concerned.

QUESTION: Then the Court of Appeals in the Sixth Circuit went on to explain the difference between this case and the Fifth Circuit case in terms of whether or not there were after-acquired assets.

MR. KLEINMAN: The Fifth Circuit didn't reach that point. It specifically said --

QUESTION: I want to know what the Sixth Circuit opinion was.

MR. KLEINMAN: The Sixth Circuit said, as I understand their decision, that when funds came in afterwards, not collected or withheld, but as in this case from vending machines, from catering fees, from whatever the gross income was, that somehow a trust was engrafted upon those funds so that his violation of those requirements to clothe those funds or pay them over to the Government somehow made him liable, that is, this petitioner liable, for those taxes.

The court cites no law which would indicate that there was a trust of after-acquired funds. The trust under Section 7501 provides that those taxes required to be collected shall be held in trust, in a fund in trust for the Government. This money that came in afterwards, even if it had been free, and we don't concede that point and that may be in issue if this Court holds as the Sixth Circuit did, it may be in issue as to whether there were any free funds available and how much those were and to what extent he could be liable for those free funds.

However, it is our contention that there is no basis in any of the decided cases, and several other district court cases have held that somehow the minute a dollar came in, regardless of the fact that it didn't come in from withholding, the minute it came in and went into the cash drawer, it became impressed with a trust. None of the cases which we have read would indicate what the basis for that determination is.

There just is nothing in Section 6672 or Section 7501, which are the only two sections we know of whereby this petitioner could be personally liable for corporate debt.

We read the statute strictly because normally an individual, an officer of a corporation, is not liable for the debts of the corporation, as, of course, this Court is well aware. It is only where there is some statutory provision, such as this, that a person becomes personally liable. And the statute to us is perfectly clear as to who that person is.

Congress has cast a net to attempt to protect the revenue so that the person responsible, the individual responsible for the collection, if he doesn't collect or doesn't pay it over, shall become personally liable. But we suggest that the Sixth Circuit and the Internal Revenue Service has cast too broad a net. They are seeking other persons from whom to collect the tax for which this person had no responsibility.

I might suggest to the Court that even the Internal Revenue Service itself was not consistent in stating that the funds as they came in were impressed with a trust. The record is clear, and the appendix filed in this case will indicate that the Internal Revenue Service insisted during the entire time that they were attempting to collect this past due tax during the six months when Dr. Slodov was in charge of the corporation, they insisted that as funds came in, the current taxes had to be paid, the current withholding taxes, not the



past taxes. They wanted them to take these funds and pay current taxes.

Now, if those funds were in fact impressed with a trust for prior collected taxes, then the Internal Revenue Service would have insisted that that's our money, it should apply to the old taxes and not be applied to the new taxes. But it is perfectly clear that that isn't what happened. They themselves insisted that some of these funds, if there was a diversion of money that came in which we, of course, do not admit, if there was a diversion, it was by the requirement not only with the consent but by the requirement of the Internal Revenue Service that current taxes be paid from those funds. So that there was no trust, at least so far as we are concerned, there was no trust on those taxes for prior liability.

QUESTION: If I understand the Government's theory correctly, every dollar that came in after the takeover would have been impressed with this trust, that if any money was used to pay wages or rent or the light bill or anything, it would have been a violation of the trust. Do I correctly understand that?

MR. KLEINMAN: I understand that to be the Government's position. Not only couldn't you pay --

QUESTION: Does the record show whether they ever objected? They were aware of what was going on, I guess.

MR. KLEINMAN: Oh, yes.

QUESTION: Did they ever object to paying ordinary expenses of operations or anything like that?

MR. KLEINMAN: No. As a matter of fact, as far as the record shows, and I think the findings were that they permitted the corporation to continue to do business, permitted, in fact insisted, that they pay not only the salaries and other debts, but these withholding taxes as well, and in fact had the Government not done that, had they insisted, had Internal Revenue insisted, said, "Look, every dollar that comes in from here on has to be applied to the old taxes that had been due before," the corporation would have ceased functioning and as a matter of fact, the Internal Revenue Service would have been further behind the ball than they were because there would have been no more money coming in out of which they could get any money. And they did get paid every single dollar of withholding taxes for which this petitioner was responsible. From the day he took over until the corporation went into bankruptcy six months later, every dollar that was owed the Internal Revenue Service for withholding and social security tax was religiously accounted for and paid.

QUESTION: Does the record show whether they made any effort to collect from prior individual officers of the corporation?

MR. KLEINMAN: The record is not clear, and so far as we know, they have not at least been persistent in attempting to collect. I am not even certain that they have made assessment against the prior officers who we say were obviously responsible for having dissipated funds which came into their hands.

It could logically be argued, it seems to me, that had there been a fund when this petitioner came into the corporation, had there been such a fund, under the general rules of trust law, he would have become by interpretation the successor trustee of that fund and then having dissipated, he perhaps could have been held liable for dissipating that trust fund.

On the other hand, to say that these people who were there before, the responsible person, suppose they paid the employees in cash and said, "Now, give me back the withholding. Here is \$10; give me a dollar," and they put it in their pocket. That is certainly the tax withheld. And they went ahead and spent that money, there doesn't seem to be any way that this petitioner should be responsible for funds over which he had no control and which never came to him. And there is, I suggest to the Court, no case that we have discovered that has been decided, and I am talking about those cases which have held somehow a trust applies to funds as they come in, there is no case which has indicated by what

law or by what authority they have come to this conclusion. They are broad statements which say the moment another dollar came in, it was impressed with a trust. Even, however, I suggest to this Court, that if it was impressed with a trust under the provisions of 7501, there is nothing in 7501 which would make this petitioner liable for the dissipation of those funds. We can't find anything in the law anywhere.

QUESTION: I take it the net of your argument is that no matter how the Sotelo case comes out, your case is a different kind of a case.

MR. KLEINMAN: It deals with the same sections of the law, but it is a different case, that's true.

QUESTION: Factually different.

MR. KLEINMAN: Pardon?

QUESTION: Factually different.

MR. KLEINMAN: Yes.

QUESTION: You certainly assert, I suppose, that Sotelo could lose and you could win.

MR. KLEINMAN: Yes. Yes. Sotelo could lose and we could win because we are dealing in -- in the Sotelo case there is no question that Sotelo was the responsible officer during the period when the taxes were collected and were required to be collected.

QUESTION: And when the so-called trust fund was paid out.



MR. KLEINMAN: And when the trust fund was paid out, that is correct.

QUESTION: We have a different issue. The Sotelo case involves whether or not something is discharged upon bankruptcy.

MR. KLEINMAN: That is correct.

QUESTION: This doesn't involve the bankruptcy issue.

MR. KLEINMAN: This is a completely different issue. This has to do with whether by law, not by facts -- facts are found and are determined and at this point no issue can be taken with the facts, obviously. The question is whether by law he falls within 6672.

QUESTION: Whether he is liable at all.

MR. KLEINMAN: Whether he is liable in the first instance for those taxes which had already been collected, already been dissipated.

QUESTION: And that issue wasn't being argued in Sotelo.

MR. KLEINMAN: It was not argued in Sotelo, no.

QUESTION: What was the Metropolis Industries? Is that involved here?

MR. KLEINMAN: Metropolis Industries may have been one of the creditors; I am not sure.

QUESTION: There were three corporations here,

weren't there?

MR. KLEINMAN: Well, yes. I might point out that the three corporations were joined as one because the issue is the same as to all three. There happened to be three separate corporations, all of which were controlled by Dr. Slodov.

QUESTION: That is not the Metropolis Industries thing coming up. That's not relevant here.

MR. KLEINMAN: I don't think it's relevant. I was not involved in the earlier trials of this matter, your Honor.

So that under 6672, really, the entire issue revolves around the fact of whether or not this petitioner is the responsible officer for these taxes, whether in order to find him liable for these taxes, the statute would have to be read with an "or" instead of an "and" where the "and" now appears. It seems perfectly unambiguous that the "and" is there and ought to be read thus.

QUESTION: What if when he came in to the company the company's bank accounts were in good order and the so-called trust fund was intact.

MR. KLEINMAN: Then his obligation, if the Court please, would be under the provisions of the general trust law, that there was a trust fund over which he took control and now he dissipated. He would not be liable under 6672, because he was not the responsible officer to collect and withhold

those taxes. He could perhaps, as I suggested, be held by reason of violating --

QUESTION: It is a disjunctive between the collect and the accounting and paying over, it is an or, it does say "or."

MR. KLEINMAN: Once you have determined the responsible officer, then when he fails to perform any one of those acts, he is liable. But to hold him as a responsible officer, the statute says, "Any person required to collect, truthfully account for, and pay over."

QUESTION: It says "collect or."

MR. KLEINMAN: No. No, it says who fails to collect, truthfully account for, or pay. But we are talking about whether he is the person that they are referring to. They say "any person." Who is the person? The person is the one required to collect, account for, and pay over. Those were the officers of this corporation before Dr. Slodov came in. All three of the requirements converged on those officers. They were required to collect, they were required to account for, and they were required to pay, all three. Once they are determined to have been the responsible officer, if they failed to do any one of those things, in the disjunctive admittedly, then they are liable. But you must first determine whether Dr. Slodov was in fact that person.

QUESTION: Such person, is the word the statute uses.

MR. KLEINMAN: Any person required to collect,

truthfully account for, and pay over -- I am reading from the statute -- any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax. In other words, once you have established that the individual is the person that they are talking about as the one who is required to collect, account for, and pay and he fails either to collect, either to account for, or to pay, then he becomes liable. But you cannot find the individual who bears this responsibility until you have made the determination that all three of these requirements were met.

Now, the Government's argument is that this leads to strategic shifts which could avoid liability on any person. For example, an individual is required to collect but leaves the corporation control before the payment date for the tax. Now, they say, somebody else comes in and he is only required to pay. Therefore, neither one of them have all three obligations at any one time. But that is not true, and the courts in the Teel and Tiffany cases, which are cited in our brief, have indicated that the party required to collect also has the burden of accounting and paying that tax. So he is the party, the one who collects it.

Now, it is true it may not be due and payable while he was in control, but he has means of protecting himself. He can put it into separate accounts. He can pay over to the Government in advance. So he can make arrangements for that



payment. He is responsible to collect, account for, and pay over. So all three of the elements making him a responsible party do converge if he is required to collect. But if he is only required to pay it and the money is not there out of which to pay it --

QUESTION: But you would say even if the money was there --

MR. KLEINMAN: No. I am saying he could be liable, but not under 6672.

QUESTION: I know, but that is what I mean, under the statute he would not be liable.

MR. KLEINMAN: Would not be liable, under 6672.

QUESTION: Even if he had the money in the bank when he came in and dissipated it himself.

MR. KLEINMAN: He would not be liable under 6672.

QUESTION: The liability would be what, under 7501?

MR. KLEINMAN: Possibly 7501. More than likely general trust provisions, your Honor.

QUESTION: A combination of the two.

MR. KLEINMAN: A combination of the two.

QUESTION: 7501 says it is a trust and it's under trust law.

MR. KLEINMAN: It says it is a trust, but it's a trust in the hands of the employer. Then it does not provide for what happens if it is dissipated. It doesn't say --

QUESTION: I know, but in answering let's stick with my Brother White's question. You concede that the newcomer would be liable if the funds were there, but you say not under --

MR. KLEINMAN: If they were not dissipated.

QUESTION: No, not dissipated.

MR. KLEINMAN: If they were there, he would be liable.

QUESTION: But not under 6672, you assessed. And my question was would that be then under 7501, and you said, well, maybe.

MR. KLEINMAN: The only other provision it could be was 7501, and I would concede that there is an argument to be presented --

QUESTION: 7501, which calls it a trust fund and then you import general principles of trust law, is that it?

MR. KLEINMAN: That's correct. That's true. That would be the basis on which he could be held.

Now, I believe that the other courts, I think with the exception of Teel, perhaps, have said -- in the McCullough case in the Fifth Circuit, the court said, "We do not reach the question of whether there would be a liability if when he became the responsible officer, the fund was there." They said they didn't reach that point.

In the other cases, however, they have loosely

combined 6672 and 7501, in fact mixed them up, to first decide under 6672 there is no liability, but then there is a trust that is created on the new funds that come in, again which I say there is no legal authority for creating such a trust. The Government is attempting to give them some priority in payment out of monies that were not in the trust fund to begin with and that were not intended under 6672 to be part of that fund.

Now, under Section 7501, as I stated, there could be -- there would be, in fact -- a trust for any funds collected. That is what the statute says, Section 7501 says there is a trust fund for taxes withheld and --

QUESTION: When your client came into the company, wasn't he a person who was at that very moment -- at that very moment wasn't he from then on required to collect taxes --

MR. KLEINMAN: Yes. He was the --

QUESTION: -- and account for?

MR. KLEINMAN: He was the person required to collect, account for, and pay over.

QUESTION: So he satisfies that first sentence of the --

MR. KLEINMAN: From there on.

QUESTION: I understand. But as of that time, he does satisfy it.

MR. KLEINMAN: Correct. We concede he was the

responsible officer from and after the day he took over responsibility --

QUESTION: After that, if he does any one of the things, he is liable.

MR. KLEINMAN: As to which tax, your Honor. The Government seeks to mix up these taxes. We say that the person is the responsible officer as to a particular tax.

QUESTION: And you rely on the words "such tax."

MR. KLEINMAN: Such tax, the tax he is required to collect or withhold. Such tax. The Government says such tax means any tax under this title. The fact is that in general Section 6672 deals with any tax under the title. That's the general parameter. But specifically then, it says, to collect the tax. You must use the word "collect" with it; otherwise, corporate income taxes could be recovered from an individual because if you don't relate such tax to collected taxes, then the corporate income tax, the corporate share of the social security tax, any other Federal tax which is not withheld and collected could be collected from the individual. I don't think the Government has ever taken that position, except that it appears in his brief when it serves their purpose to say such tax does not mean collected taxes, it means any tax.

It doesn't mean any tax. It means such tax, that is the tax required to be collected, accounted for, and paid. He had no responsibility with such tax, only the tax for a



subsequent period.

MR. CHIEF JUSTICE BURGER: If you wish to save any time for rebuttal --

MR. KLEINMAN: Yes, I do.

MR. CHIEF JUSTICE BURGER: Mr. Barnett, at sometime at your own convenience, I wish you would indicate whether there is an obligation on the part of the Government to pursue the predecessors of Dr. Slodov and if the record shows anything about pursuit of them, point that out.

ORAL ARGUMENT OF STEPHEN R. BARNETT ON  
BEHALF OF THE RESPONDENT

MR. BARNETT: Mr. Chief Justice, and may it please the Court: The answer is that the record is entirely silent on the question of whether the Government did or did not pursue the predecessors in this case.

MR. CHIEF JUSTICE BURGER: Then if you will at some point pursue whether there is an obligation on the part of the Government to pursue them. You don't need the record for that purpose.

MR. BARNETT: The Government takes the position, your Honor, as was stated in the Sotello argument this morning, that it never will collect more than 100 percent of the taxes due, and thus the Government would not go out to the predecessor and the successor and try to get more than 100 percent. Now, whether the Government has an obligation to go



after the predecessor first just because the predecessor was there first, I doubt that.

QUESTION: If there is any default here, are they not the primary defaulters?

MR. BARNETT: As between the predecessor and the successor, they may be as a matter of private law between those parties, but we say that under the Internal Revenue Code each is liable to the Government and the Government, like any creditor who has two debtors liable for the same debt, can take his choice I should think as to which one to go after first so long as it does not collect more than the total from both of them.

There are a few aspects of the facts here which, while the facts are undisputed, I believe deserve brief emphasis.

First of all, it is undisputed that after petitioner purchased the stock of the three corporations, as of January 31, he was thereafter in complete control of the corporation for the relevant period. It is also undisputed that when petitioner took control of the corporations, he knew that the withholding taxes in question here had previously been withheld from the employees' wages and were due to the Government. This fact is unusually clear here because immediately after taking control, petitioner sent off to the Internal Revenue Service corporate checks for the withholding taxes. Two days

later he discovered that there was no money in the bank to cover those checks and he immediately stopped payment on them.

QUESTION: What significance should we attach to that?

MR. BARNETT: Simply that it makes quite clear that he knew of the liability and thus it could not be suggested --

QUESTION: Of the corporation.

MR. BARNETT: Of the corporation's liability.

The third point which --

QUESTION: Mr. Barnett, what was his duty at that point?

MR. BARNETT: Well, his duty at that point and thereafter was when the corporation came into funds --

QUESTION: Say he got a hundred dollar check in, he had an employee there who earned a hundred dollars in wages. Should he have not paid the employee and given all that money to the Government?

MR. BARNETT: It isn't a question of a hundred dollars.

QUESTION: Every cent that came in should have immediately been turned over to the Government, is that your position?

MR. BARNETT: That was his statutory liability before --

QUESTION: Did the Government ever assert that

position to him?

MR. BARNETT: No, the Government didn't assert that position to him. In fact, the record shows that the amount that came in every week during his tenure was \$130,000 that came in per week and was deposited. So we are not talking about \$100.

But it is true, Mr. Justice Stevens, the Government apparently did not tell him, "You have got to pay us everything first on pain of going out of business." The Internal Revenue Service in these cases is flexible. It would rather keep the business going if possible so that eventually it could collect the taxes due from the corporation rather than from an individual.

If bankruptcy does ensue, the Government has recourse under Section 6672 to collect it from the individual who was responsible, who did make this choice to try to keep the business going rather than pay the Government.

QUESTION: Placing him in a terrible dilemma. If you let him go along and he goes into bankruptcy, then you stick him.

MR. BARNETT: Yes. Well, he is stickable originally as well. It isn't as if he is more stickable in bankruptcy than he is as soon as he comes into control and as soon as money is available that would cover the liability to the Government which he applies to other corporate debts instead.

QUESTION: Then it is your position that he should liquidate immediately.

MR. BARNETT: Well, that is his statutory liability; if he makes the choice --

QUESTION: It's a Hobson's choice you give him.

MR. BARNETT: Well, in a sense it's a Hobson's choice. The cases have dealt with this problem and have made clear that while a statute may seem harsh, the statute is designed to protect the revenue to make sure that these taxes owing are collected.

Now, after all, the corporation is benefiting from these withheld taxes.

QUESTION: So was the Revenue Service, as you describe it in its flexible position, wasn't it, Mr. Barnett, that if they did bail this thing out, which was a real loser at the time the petitioner took over, the Government would eventually get all of its tax money. So it has the same incentive as lots of creditors do to let him try to hang in there and pull the thing out.

MR. BARNETT: That is true, but he has not asserted here that there was any agreement on the part of the Government that if you carry the business on, we will absolve you of the statutory liability.

QUESTION: But under your theory, it didn't take an agreement. He was under an immediate duty to liquidate under



the statute.

MR. BARNETT: Well, as soon as he had money available that would have paid the Government, he was under a duty to pay the Government first and if that required litigation --

QUESTION: Mr. Barnett, why do you say as soon as he had money available? I take it you mean as soon as the corporation had money available.

MR. BARNETT: Yes.

QUESTION: Why does that affect his personal liability? Under your theory, if I read the statute your way, 10 minutes after he took over, he became the person required to account for, collect, and pay over, whatever the words are. Why wasn't he immediately liable for the full amount?

MR. BARNETT: Because he is liable only through a willful failure to do that.

QUESTION: But we have established he knew about it.

MR. BARNETT: Yes, but a willful failure means that you prefer other creditors.

QUESTION: There is nothing about preferring other creditors in the word "willful" as I understand the cases.

MR. BARNETT: The cases are clear on the meaning of "willful."

QUESTION: It means he has to know --

MR. BARNETT: He has to have a choice.

QUESTION: He had a choice. He had personal assets



he could have used.

MR. BARNETT: Oh, no. You have to have a choice out of corporate assets.

QUESTION: Why if it is a personal liability --

QUESTION: The statute doesn't say that.

QUESTION: Yes, but there has to be some failure.

He not only has to be in that category of people required to collect and pay over, but he has then to fail, he has to then willfully fail to collect, willfully fail to account for or willfully fail to pay over.

MR. BARNETT: That's right.

QUESTION: So it is after that time he has to be --

QUESTION: This was a corporation with substantial assets, was it not? Fixed assets. It had the wherewithal to liquidate and pay that debt right away, it didn't have to wait for incoming receipts, did it?

MR. BARNETT: The record doesn't indicate that. The record indicates that it had --

QUESTION: It generated income of \$130,000 a month, wasn't it? You mean to say with no assets he did that?

MR. BARNETT: I don't know, the record doesn't indicate.

I think the answer is that it is a corporate tax and he has to truthfully account -- he has to fail to collect, truthfully account for, and pay over such tax. Therefore, he

is liable only when the corporation has money which he diverts to another purpose.

QUESTION: Mr. Barnett, when did he become liable for that?

MR. BARNETT: He became liable when the corporation obtained sufficient funds that would have paid the tax and he decided not to use them for that purpose.

QUESTION: Why wasn't he liable when he first took over?

MR. BARNETT: Because the corporation at that point did not have sufficient funds to pay the tax.

QUESTION: How much funds does it have now?

MR. BARNETT: It's bankrupt now; I assume it has none.

QUESTION: I don't see the difference except that he gets caught. You couldn't have then said, "You are about to be bankrupt so you put the money up."

MR. BARNETT: Well, we couldn't have said that he must put it up out of his own money --

QUESTION: That's right.

MR. BARNETT: But once he had collected money available and --

QUESTION: And his money got involved when the corporation went bankrupt.

MR. BARNETT: When the corporation went bankrupt,

he becomes liable under 6672 --

QUESTION: Automatically.

MR. BARNETT: -- because he was the person in control of the corporation who willfully failed to have the corporation pay its taxes, and he did that by having the corporation use the corporate funds and prefer other creditors over the Government with those funds.

QUESTION: Are you saying that the first \$177,000, the amount that is involved here, that came into the corporation after the moment of his takeover had to be funneled right to the Government?

MR. BARNETT: Technically, as a matter of statutory liability, yes. Now, in practice, the Service is willing to go along in the hope that the corporation will make it, but he could have made that choice.

QUESTION: You say it's at his risk. If he uses it for something else, even though the United States stands aside and let's him do it, if he used it for something else, that's his risk.

MR. BARNETT: Yes, and the cases are clear on that. For example, the Monday case, cited at pages 19 and 20 of our brief, the court there charged the jury that "willful" under this statute means that you fail to pay the tax without justifiable excuse or without reasonable cause. This charge was held to be error because it invites consideration of such

misleading and improper factors as the financial condition of the business or the demands of the creditors. The Mueller case, cited in our brief at page 12, held, "Absent stringent measures to protect these funds, they might easily be available to finance a business in hazardous or failing condition."

QUESTION: That might be -- your friend might agree with you except his position is he never does become liable under this particular statutory section to pay any tax that accrued prior to that time. You haven't addressed that.

MR. BARNETT: No, I haven't. However, I will try to now. Under the language of the statute, Section 6672 which appears in the appendix to our brief, the crucial language is, "Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax," and so forth.

Now, the petitioner reads this to mean that the person has to be required to collect, truthfully account for, and pay over particular tax monies and thus he argues that here the petitioner was required, as he concedes, to pay over these taxes after the petitioner came into control of the company but was not required to collect them originally and therefore is not covered by this language.

QUESTION: He concedes that he was required to do all three things once he became in control.

MR. BARNETT: With respect to taxes that accrued



after that.

QUESTION: Thereafter. But he simply is not a person identified in 6672 with respect to taxes that were collected before he took over.

MR. BARNETT: Yes. Now, we say as a matter of both the language and the purpose of the statute and the authorities, the statute does not mean that. What it means is that petitioner here at the time after he took over the corporations was, as he concedes, the responsible officer. That is, he was required at that time and thereafter to collect, truthfully account for, and pay over any tax imposed by this title, e.g., the withholding taxes of income and social security taxes that are imposed by this title on the corporation. He was required continually to pay those taxes for the corporation, and he failed to truthfully account for and pay over those taxes, the particular ones that had previously been collected. That is, the reference to any tax imposed by this title and the subsequent reference back in the word "such tax" is to a generic tax, the withholding tax. It is not to particular tax dollars.

Support for this, incidentally, can be found in the words of the statute itself in another section. If one looks at Section 6671(a), which is printed in the appendix to our brief, page 1a, right over 6672, in 6671(a) the final sentence reads, "Except as otherwise provided, any reference in this



title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter."

Now, the purpose of this section, of course, is not relevant here. The purpose of this section is to equate taxes with penalties.

QUESTION: Even if you are right as to your generic interpretation of any tax imposed by this title in the first clause of Section 6672, that still doesn't answer your opponent's contention that the phrasing is in the conjunctive, that before that liability is imposed on him, he has to be required to collect, truthfully account for, and pay over.

MR. BARNETT: I think it does answer that, Mr. Justice Rehnquist. We contend that he was required after he took control of the corporations to collect, to truthfully account for, and to pay over the corporations' withholding taxes, the generic withholding taxes. So he was required to do all three, and we are not saying that "and" should be read as or.

QUESTION: He couldn't do all three.

MR. BARNETT: Well, that goes back to the other point.

QUESTION: He couldn't do all three. He couldn't collect.

MR. BARNETT: He could collect --

QUESTION: He couldn't collect the past withholding.

MR. BARNETT: If you read it as past withholding taxes. Our reading is it means withholding taxes continually.

QUESTION: Didn't he pay out from the time he took over? Didn't he pay it out?

MR. BARNETT: He paid most of those, the record does indicate.

QUESTION: All right. But he did not collect anything that he didn't pay over. Is that correct?

MR. BARNETT: That is correct if you read "tax" as --

QUESTION: No, isn't it true as a matter of fact that the money he collected as taxes he paid over.

MR. BARNETT: I think that is correct, but our reading of the statute --

QUESTION: So there is no way that he can collect the other money.

MR. BARNETT: There is no way he could collect the earlier money, but the statute does not require that he had been in a position to collect the earlier money. The statute talks about the generic withholding tax. It identified the person --

QUESTION: I am just trying to be as technical as you are.

MR. BARNETT: Well, we are only trying to be as technical as petitioner.

The point I was trying to make with respect to 6671(a)

may illustrate this. What is relevant about 6671(a), we would submit, is the way it uses the phrase "tax imposed by this title," the same phrase in 6672. The context in 6671(a) where taxes are equated with penalties indicates, we suggest, that the Congress is talking there about tax imposed by this title in the generic sense of the whole tax, a withholding tax, not in the sense of particular tax money.

QUESTION: Mr. Barnett, the word "title." This just occurred to me. Doesn't that refer to the whole Internal Revenue Code?

MR. BARNETT: Yes.

QUESTION: That would include corporate income taxes, wouldn't it?

MR. BARNETT: Yes, but that would not be covered under 6672.

QUESTION: Why not?

MR. BARNETT: People are not required to collect --

QUESTION: The treasurer of the corporation is not required to collect and pay over the corporation's income tax?

MR. BARNETT: I don't think he is required by the Internal Revenue Code to collect the tax from the corporation.

QUESTION: It just occurred to me, it seems to me your reading would impose personal liability on the officers.

MR. BARNETT: I don't think there is that requirement to collect, but if it were, we would take the same position

that he is the person required to --

QUESTION: From whom was Dr. Slodov required to collect the tax for the past period before January 31, 1969?

MR. BARNETT: No one for the past period, but we do not agree that this refers to the past period. We view this as meaning collect, truthfully account for, and pay over at a particular point in time. And he was required to do all three with respect to the continuing ongoing withholding taxes after he took over.

The basic problem here, Mr. Justice Stevens, is that you have got an inevitable time lag between the time of withholding and the time that the taxes are paid over to the Government.

Now, petitioner's argument that the person to be liable under 6672 has to be required to collect, truthfully account for, and pay over with respect to particular dollars would mean that whenever there was a change in who is the responsible person, that neither of them can be liable because neither the first guy nor the second guy is required to do all three as to particular dollars.

QUESTION: His answer to that is that if he has collected and accounted for it, he has an ongoing obligation to be sure it's paid, so there is an obligation on him.

MR. BARNETT: Yes, but his answer, I am afraid, is not correct. He relies on the cases of Teel and --



QUESTION: Teel and Tiffany.

MR. BARNETT: And we read them differently. It seems to us that they support --

QUESTION: Those cases say you could read the statute the way --

MR. BARNETT: Those cases, particularly Teel and Tiffany --

QUESTION: And I feel sure if the Government had that problem with a person, say you had the predecessor before you, I am sure the Government would be asserted that the predecessor had an obligation.

MR. BARNETT: Yes, and Teel and Tiffany so hold. But our position is that that supports our argument, because the only basis on which they could so hold, the only basis on which the predecessor can be held liable when in fact he was not around at the time of paying over must be that our interpretation of the statute is correct. Otherwise, those cases would have to be decided differently.

Petitioner in his brief quotes from the Teel case at page 10 of petitioner's brief where the taxpayer in Teel had made the argument that he could not be liable for the taxes accrued during the month of November because by the time it was time for those taxes to be paid over, a receiver was there and he therefore was not required to pay them over.

Now, that is exactly the converse of petitioner's



argument, and if petitioner is right that all three requirements must converge, then this taxpayer would have won, but the taxpayer lost, and the reason must be that our interpretation is correct that the taxpayer in Teel was required to do all three generally with respect to the withholding taxes --

QUESTION: No, his argument is that specifically he was required to be sure the taxes which he had collected and accounted for got paid.

MR. BARNETT: But unfortunately, we see no support for that. Petitioner says that might be a reason --

QUESTION: But I am saying your interpretation isn't a necessary one to reach the contrary result.

MR. BARNETT: I think it perhaps is. Petitioner says maybe this person would be liable under the trust law, but he was held liable here under the Internal Revenue Code.

QUESTION: Under the trust law we are talking about a successor. Now, directing your attention to the predecessor, you can read the statute as requiring all three elements and say the predecessor who has collected and accounted for has an additional liability to pay.

MR. BARNETT: How is he required to pay over when the time those taxes are required to be paid over has not yet come?

QUESTION: Well --

MR. BARNETT: You see, we think --

QUESTION: The time of payment is one thing, the liability for making sure that there is a payment is another thing.

MR. BARNETT: That might be a nice liberalization of the statute, but we think that on petitioner's reading all the requirements did not converge in the case of the predecessors there and yet they were held liable under the Internal Revenue Code, not under some trust law.

QUESTION: We are talking about the clear language of the Code. The clear language, as I read it, is they envisage one person doing all three things.

MR. BARNETT: Well, yes, but --

QUESTION: Isn't that right?

MR. BARNETT: Yes, but not with respect to particular dollars.

QUESTION: I mean, that's what they were talking about.

MR. BARNETT: No, no, I must disagree. I say one person who is the responsible officer for the corporation to do all three with respect to any tax imposed by this --

QUESTION: So that if you have a corporation where one man is in this responsible position, he takes all the money and instead of putting it in the bank, the corporation's bank account, he puts it in his bank account. Then he is succeeded by another man and you know those facts and you go

after the second man and don't even look at the first man.

Is that what the statute envisaged?

MR. BARNETT: Well, we are assuming --

QUESTION: Is that what the statute envisaged?

MR. BARNETT: No. You are assuming that the second man has corporate funds available to pay the tax?

QUESTION: No, the money is in his own bank account.

MR. BARNETT: No, it has to be corporate funds. It would not be a willful failure to pay the corporate tax unless there were corporate funds.

QUESTION: Then the company goes broke, goes bankrupt, then you go into his money.

MR. BARNETT: If he diverted corporate funds to creditors other than the United States knowing of the obligation --

QUESTION: No, the second man did not misappropriate any funds.

MR. BARNETT: But he did divert corporate funds to other creditors.

QUESTION: No. No. No.

MR. BARNETT: Then he did not willfully fail.

QUESTION: He did just what was done right here.

MR. BARNETT: Then he did divert corporate funds to other creditors. That's what we have here.

QUESTION: That --

MR. BARNETT: Here the corporation was getting --

QUESTION: So far as we know somebody stole this money.

MR. BARNETT: That may be.

QUESTION: And instead of trying to find that out, you take this man --

MR. BARNETT: There is no evidence in the record, Mr. Justice Marshall --

QUESTION: The only thing you had in the record is you found one person that had enough money to pay it.

MR. BARNETT: We don't know we didn't try to find the other guy.

QUESTION: The only thing the record shows is that you had one man who could pay it.

MR. BARNETT: We don't know that he can pay it. All we know is that --

QUESTION: On man that you could try to collect from.

MR. BARNETT: Yes. But we are doing it on the basis that the corporation --

QUESTION: You think that's what Congress meant.

MR. BARNETT: Yes. The corporation had money coming in which would have paid the Federal taxes and this man in charge of the corporation decided to pay other creditors instead. The Metropolis Industries that Mr. Justice Stewart referred to before was a creditor who was paid \$100,000 in the first week of February here, at the time that the petitioner



came into control of the corporation. That's at page 3 of our brief. That is what gives rise to the --

QUESTION: Is that because he couldn't get credit?

MR. BARNETT: We don't know why it is, the record does not indicate.

QUESTION: He said they were paying c.o.d. That's what petitioner said.

MR. BARNETT: The record doesn't indicate why that loan was paid. But as those cases indicate, the cases are clear that the fact that you might have to go out of business if you don't pay the debt to the Government is not an excuse for liability under this statute.

QUESTION: The petitioner doesn't complain about going out of business or the bankruptcy. He complains about you putting your hand in his pocket.

MR. BARNETT: Because he when in control of the corporation and when the corporation had money available that would have paid the Government, decided to pay other people instead. That is why.

QUESTION: Mr. Barnett, you said a little while ago, as I understood you, that the case had to be decided on the language of the statutes and I think we would all agree with that, and you said not on trust law. Section 7501, as you and others have suggested here, states that the amount of tax collected is to be held in a special trust fund. And one of



the problems with your case is that that trust fund was  
 ... dissipated, there was no res left at the time of the acquisition of this corporation. I am not familiar with any trust law that requires that where the trustee has dissipated the funds of the trust someone who was not a party to that has to restore them. And I see no language in the Code that imposes that obligation.

MR. BARNETT: Well, Mr. Justice Powell, for one thing we don't think we have to rely on 7501 since the language of 6672 is clear. But in addition, it is not the case as petitioner claimed that there is no law that supports the notion that the trust still exists even though the money has been dissipated.

The court below, in fact, dealt with a case, the Teel case, which gives law on that point. At page 56 of the appendix, quoting from the Teel case, the Court of Appeals quoted: "as the cash went into the cash drawer, it became subject to trust or lien in favor of the federal government for the unpaid withholding taxes. By dissipating the cash for new purchases, of which the taxpayers knew, they unwittingly supplied the necessary willfulness." We contend that that case, for one, does support the notion that the trust still exists even though the initial trustee has dissipated the actual dollars.

QUESTION: The bankruptcy judge found here that no  
 .. res existed. Is there anything in the record that suggests

the contrary?

MR. BARNETT: That is a conclusion of law, I would suggest.

QUESTION: Also it's a matter of fact, isn't it? There was nothing as of the date of takeover that could be identified as a res by the statutory trust.

MR. BARNETT: There is no requirement under Section 7501 of segregation, that the employer segregate the money being withheld.

QUESTION: You would not construe the language requiring that the funds be held in a special trust to require segregation?

MR. BARNETT: Apparently it has not been so construed, I am informed.

QUESTION: If I were a corporate officer, I would certainly view it that way.

MR. BARNETT: I would, too, as a corporate officer, but apparently the legal authorities have not viewed it that way.

QUESTION: I take it there is no criminal statute anywhere that imposes criminal sanctions for failure to account for trust funds, is there?

MR. BARNETT: I don't know. There is a criminal statute that would be relevant here, Section 7202, the criminal counterpart --

QUESTION: That wouldn't be applicable to this petitioner or to the --

MR. BARNETT: Well, it's a counterpart of 6672. It might be applicable here. But the Government did not proceed under a criminal statute, of course. Now, whether there is a criminal statute that simply says anyone who violates any trust imposed by the Internal Revenue Code is liable under that code. I don't know whether there is. I tend to doubt it. I tend to think that petitioner's suggestion that the only way the predecessor responsible officer in the Teel situation can be reached is some vague trust law is something that the Government --

QUESTION: Isn't there one that says it's a specific crime for not paying over withholding taxes?

MR. BARNETT: That's 7202, which is the criminal counterpart of 6672. We are not trying to get a criminal conviction here, in which case there might be different requirements of willfulness, I don't know. We are simply proceeding under a civil statute.

QUESTION: Mr. Barnett, just to make it clear, the Government in a situation like this isn't helpless, I take it.

MR. BARNETT: Well, I think it would be rather helpless under petitioner's --

QUESTION: I know, but let's assume that the Government knew what was happening and that the withholding taxes hadn't

been paid and here comes a new man on the horizon. A lien had accrued here, hadn't it?

MR. BARNETT: A lien had accrued. I --

QUESTION: If it hadn't, the Government could easily have perfected it.

MR. BARNETT: Yes, I think that's true.

QUESTION: With respect to any of the assets of the corporation.

MR. BARNETT: I assume that's true.

QUESTION: So it was in position to tell the company, "As money comes in, you pay it over, because we have a lien on it."

MR. BARNETT: Yes, but exercising its flexibility --

QUESTION: I know, but all I am saying is they could protect themselves.

MR. BARNETT: Well, they could protect themselves --

QUESTION: \$177,000 they could if they wanted to.

MR. BARNETT: Yes.

QUESTION: And they could take some risks, though. They could say, "Well, we may get more if we let him go ahead." And you say that is what they really did.

MR. BARNETT: Yes, that's what they do in practice or what they apparently did here, but they made no agreement here, it is not asserted here that they made any agreement that they would absolve the petitioner of the liability for



this if the petitioner kept the business going.

QUESTION: Certainly, if they had a lien or could have had it, they certainly didn't assert it with respect to certain monies. They said, "Go pay your bills, don't give it to us, although we have a lien on it. Go pay somebody else." And now you are saying, "Well, that money they paid out, the risk didn't turn out, we are going to collect it from the man himself."

MR. BARNETT: That's right and that's what Congress had in mind here, because otherwise there would be --

QUESTION: The question is whether that's what they had in mind or not.

MR. BARNETT: And the fact that the Government takes a risk in a situation like this does not mean that 6672 liability does not apply.

QUESTION: Of course, in your view, the Government really isn't taking a risk, because if the corporation succeeds, it gets it from the corporation, and if the corporation fails, it gets it from the person in charge.

MR. BARNETT: There is no reason to think that it can get it from the person in charge after all.

QUESTION: If the person in charge doesn't have it, then it is only to that extent --

MR. BARNETT: Yes, and one might well assume that the Government would have a better chance to get it from those

first bills that come into the corporation than from the individual.

QUESTION: Can't you concede that it shouldn't be interpreted a failure to pay over if the Government says, "Oh, go ahead and we are waiving our lien, pay it to somebody else"?

MR. BARNETT: The Government did not. It is not claimed that the Government made any such express waiver here. It would be a different case if it were claimed that the Government had --

QUESTION: They call up the Government on the telephone, the IRS, say, "Here is our situation." And the Government says, "We've got a lien on every dollar you get." And then they talk for a while and the Government says, "Well, we are probably going to get along better if we rock along, we might get all of our money sooner or later."

MR. BARNETT: That simply is not claimed to be the fact here, Mr. Justice Rehnquist.

QUESTION: If it were, what would you say?

MR. BARNETT: I think that would be an interesting case in whether the Government can be equitably estopped.

Thank you. My time is up.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Kleinman.

REBUTTAL ARGUMENT OF BENNET KLEINMAN

ON BEHALF OF PETITIONER

MR. KLEINMAN: If the Court please, in terms of analysis of the section, the individual petitioner or the party being charged is charged with such tax. Such tax is the tax required to be collected by him. As Mr. Justice Stevens said, if it were not that tax, then the individual could be held liable for corporation income taxes and every other tax along the board if such tax only meant any tax. Such tax means any tax required to be collected by him.

If in fact what the Government says is true, it doesn't make any difference when the tax accrued. We are talking about tax for a particular period, not just any old withholding taxes. If in fact what the Government says is true that a man could today become a responsible officer, pay every dollar he owed, leave the company, the next people did not pay the withholding taxes, then he could be held responsible under the Government's interpretation because one time he was a responsible officer. They said that all three of those things did converge when he became the responsible officer. But that doesn't mean he is only responsible for the period of time when they converge, but for the period of time before. Why if before, why not after? And I suggest to you that this is not what was intended.

The fact of the matter is that in this case when the Government knew that the tax was not paid, Dr. Slodov went to them, paid the tax, because he was advised that funds were

available to pay. So he decided that if the funds were available, he would pay.

QUESTION: They were available because they had withheld them from the employees.

MR. KLEINMAN: No, they were to be in the bank.

QUESTION: But after he came on, he continued to withhold ---

MR. KLEINMAN: I am not talking about that withholding. When he bought the company, he knew that there was a withholding tax liability of the company, but he had been advised by the seller of the stock to him that the money was in the bank, all he had to do was go in and pay. It was due tomorrow. He would write the checks and pay the money. He went in, the money wasn't there.

Now, this is such a dangerous thing to anyone purchasing stock, it would seem that whether he knew of the tax or not and whether he made an investigation, he could have had his accountants in there for months and not known that the Government would come in at some later date and say that these people whom you employ and who you contend are independent contractors and therefore you do not withhold are in fact employees and you should have withheld.

QUESTION: Mr. Kleinman, I think your opponent would answer your before and after cases as well as this one by emphasizing the word "willful" in the statute.



MR. KLEINMAN: Willfully. He could have paid it. He could have paid the money.

QUESTION: But on your after situation, if he didn't know what happened later, he couldn't be willfully --

MR. KLEINMAN: But the willful point is he knew the tax was liable. He knew there was tax due. Remember that the courts have interpreted willfully, and I believe wrongly, as knowing the tax is due and not paying it. Those two provisions are here as to subsequent taxes. He knows that they have got employees and he knows they are withholding taxes. He knows it's payable and he doesn't pay it. Why would he not be liable under the Government's interpretation. It doesn't make sense. There There are people who are personally liable. The Government has latched onto the wrong individual, if the Court please.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:03 p.m., the oral arguments in the above-entitled matter were concluded.)

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