

**RULES
OF
DEPARTMENT OF REVENUE
ADMINISTRATIVE DIVISION**

**CHAPTER 560-1-2
COLLECTIONS**

**560-1-2-.01 Responsible Party Liability for Trust Fund
Taxes.**

- (1) **Purpose.** O.C.G.A. § 48-2-52 permits the collection of an entity's unpaid trust fund taxes from the party(ies) responsible for collecting, paying over, and accounting for such taxes on behalf of an entity. The Department of Revenue uses this as a collection mechanism when taxes are not fully collected or collectible from the entity itself. This regulation sets forth the Department's policies for determining, assessing, and collecting against a Responsible Party, as well as procedures for protesting a Responsible Party assessment with the Department.
- (2) **Definitions.**
- (a) "Entity" as used in this regulation means any limited liability entity incorporated or organized under Title 14 of the O.C.G.A.

(b) “Person” shall have the meaning set forth in O.C.G.A. § 48-1-2(18).

(3) **Trust Fund Taxes.** O.C.G.A. § 48-2-52 applies to taxes that are required to be collected and held in trust. In Georgia, trust fund taxes include sales, withholding, and prepaid 911 tax, and may include any amounts that are required to be collected and remitted to the Department.

(4) **Incorporation of IRS Law.** O.C.G.A. § 48-2-52 mirrors the federal responsible party statute, I.R.C. § 6672. Responsible Party liability is a two-prong test: 1) the person must be “responsible,” and 2) the nonpayment of the tax must be “willful.”

(5) Prong 1: Identifying the Responsible Party.

(a) **Definitions.** A “Responsible Party” is:

A person who has control over, or entitlement to, the funds or assets of the entity, such that the person has the ability to directly or indirectly control, manage, or direct the disposition of the entity’s funds and/or assets. Providing capital to an entity, with no corresponding ability to control, is insufficient.

(b) **Registration.** Every entity that is legally required to collect trust fund taxes must register with the Department.

1. **Identification.** Each registered entity must identify the person(s) responsible for collecting, paying over, or accounting for state taxes. An entity may identify multiple persons, and designate each such person’s responsibility for a respective tax type.

(i) Any entity that has previously registered with the Department but has not provided

Responsible Party information must identify the Responsible Party.

- (ii) Any change of Responsible Party information must be reported to the Department. It is the taxpayer's burden to update this information.
- (iii) An entity may add, remove, or otherwise edit its Responsible Party information any time by accessing its online Georgia Tax Center account.

2. **Presumption of Responsibility.** Failure to identify the Responsible Party creates a rebuttable presumption that those persons identified as the entity's officers in the registration with the Department are responsible.

(c) **Indicia of Responsibility.** Merely holding the title of officer in a corporation, partner in a limited liability partnership, or member in a limited liability company is insufficient to conclusively establish responsibility. The key determination is whether the person has the duty and authority to make payments. Thus, Responsible Party status is a functional determination—liability will be imposed upon those actually responsible for failure to collect and/or pay over the tax.

- 1. Factors suggesting responsibility include, but are not limited to:
 - (i) Holding the position of officer, director, partner, member, manager, or principal;

- (ii) Duties described by corporate by-laws, corporate operating agreement, partnership agreement, or other entity records;
- (iii) Day-to-day involvement in or responsibility for management of the business;
- (iv) Control over financial affairs and payment of debts;
- (v) Signing tax returns;
- (vi) Ability to hire and fire employees;
- (vii) Authority to sign checks or otherwise make payments on behalf of the entity;
- (viii) Knowledge of failure to pay the tax; and
- (ix) Receipt of substantial income or benefits from the entity.

(d) Delegation of Responsibility. Delegating authority to an employee or a third-party does not relieve a Responsible Party of liability.

1. Determination of responsibility will be based on case-specific factors, including, but not limited to:
 - (i) The Responsible Party's knowledge of a pattern of noncompliance by the third-party payer;
 - (ii) The third-party's use of fraud to cover up the non-payment of taxes; and
 - (iii) Receipt of notices of nonpayment by the Responsible Party and actions taken subsequent to such receipt.

- (e) **Multiple Responsible Parties.** The Department may designate more than one person responsible. The existence of one Responsible Party does not negate another person's liability as a Responsible Party.
- (6) **Prong Two: Willfulness.** A Responsible Party's nonpayment of the tax will be willful if the failure to pay the tax is voluntary and knowing, or reckless. Willfulness does not require a bad motive or intent to defraud the state.
- (a) **Knowledge.** Willfulness requires that the Responsible Party has knowledge of the tax liability and ability to pay such liability, but chooses not to pay the tax.
- (b) **Reckless Disregard.** Reckless disregard for the duty to pay the tax can constitute willfulness. Examples of such reckless disregard include, but are not limited to, ignoring an obvious risk of nonpayment, failing to investigate a risk of nonpayment, or failing to inquire into the status of taxes when the entity is in financial trouble.
- (c) **Examples of indicia of willfulness** include, but are not limited to:
1. Deliberate choice to pay other creditors of the entity before paying the tax;
 2. Knowledge of the tax liability but no action to arrange for payment;
 3. Failure to investigate or correct mismanagement to address the unpaid tax; and

4. Action or inaction that results in failure to satisfy the entity's tax liability.

(7) Assessments. All Responsible Party assessments will conform to the procedures set forth in this paragraph.

(a) Assessment amount. Once a person is determined to be a Responsible Party, the Department may issue an assessment against that person for the delinquent trust fund taxes owed by the entity. Such assessment will reflect the taxes owed for the periods for which the person is responsible. Once the assessment against the Responsible Party is issued, interest and appropriate penalties on the assessed tax will begin to accrue consistent with O.C.G.A. § 48-2-40. *See* O.C.G.A. § 48-2-52(b) (providing that assessment and collection under the responsible party statute is the same as for the underlying entity's tax liability).

(b) Assessment Process. Upon determination of responsibility, the Department will first issue a Proposed Assessment to the Responsible Party. The Proposed Assessment will state the basis of the liability (O.C.G.A. § 48-2-52), the entity for which the person is being held responsible, the tax type, and the periods for which the person is liable. This Proposed Assessment will include information for how to protest the Proposed Assessment (procedures for which are discussed in Paragraph 8 in detail). If the person does not properly protest, the Department will issue an Official Assessment and Demand for Payment. The Official Assessment may be appealed in accordance with O.C.G.A. § 48-2-59.

(c) Statute of Limitations

1. An assessment against a Responsible Party follows the time limitations set forth in O.C.G.A. § 48-2-49.

Thus, an assessment against a Responsible Party must be made within three years after the relevant entity's return or report is filed. O.C.G.A. § 48-2-49(b). If the entity does not file a return or the filed return is fraudulent, the liability may be assessed at any time. O.C.G.A. § 48-2-49(b).

2. An entity's consent or waiver of the statute of limitations in accordance with O.C.G.A. § 48-2-49(d) is also effective against a Responsible Party.
3. A Responsible Party's liability survives the dissolution of the underlying entity.

(d) Joint & Several Liability. Because more than one person may be liable as a Responsible Party, the total liability can be collected from any one or a combination of such assessed Responsible Parties. The Department will only collect the entity's total liability once.

(8) Protests. A person may protest a Responsible Party Proposed Assessment to the Department within 30 days of the Issue Date of the Assessment. O.C.G.A. § 48-2-46. The person must complete and submit the *Protest of Proposed Assessment or Refund Denial Form* (TSD-1), available on the Department's website. ***Only this form and no other correspondence will constitute a Protest.*** Once the Department receives this form, all collections activities against the person for the Responsible Party liability will be stayed, and the statute of limitations for issuing a final assessment will be tolled. O.C.G.A. § 48-2-46. If the person desires a conference with the Department for consideration of the protest, the person must check the appropriate box on the form.

(a) **Conferences.** If the person requests a conference, the Department will generally contact the person within 30 days of receipt of the protest to schedule a conference.

1. **Informal Conference.** The conference is informal; it is not a hearing governed by the Administrative Procedure Act and will not prejudice the rights of any taxpayer or the Department. Ga. Comp. R. & Regs. 560-1-1-.12.
2. **Conferees.** The conference will be conducted by a representative from the Department's Legal Affairs & Tax Policy Division. Upon review of the protest and assessment, the representative will determine whether other Department representatives should be in attendance. The person may bring representation to the conference, but such representatives should submit a Power of Attorney (RD-1061).
3. **Content.** The conference is an opportunity for the person to present evidence challenging the bases for the assessment. Such evidence may include, but is not limited to, proof of the person's cessation of control of the entity, proof of the person's ignorance of the tax liability, contracts showing limitation of duties, or other proof of the person's inability to exercise authority over collection and/or payment of the tax.
4. **Settlement.** The conferees may come to a mutual settlement to resolve the tax liability. Such settlement agreement will be memorialized in writing and signed by the person and the Department's representative.

5. **Decision.** Absent a settlement, the Department's representative will issue a written letter to the protesting person. The letter will state the outcome of the conference—a grant, denial, or partial grant of the protest. The letter will also detail how the Department intends to proceed.

(b) Protests without a Conference. If a protest is filed, but no conference is requested, a representative from the Department's Legal Affairs & Tax Policy Division will consider any and all information submitted with the protest and the underlying facts to make a determination. The Department's representative will contact the person if a settlement is a possibility, or the Department's representative will issue a written letter stating the Department's decision on the protest—a grant, denial, or partial grant of the protest. The letter will also detail how the Department intends to proceed.

(9) Disclosures. The person may request from the Department the information used to conclude that the person is a Responsible Party. Information about third parties is subject to confidentiality laws. O.C.G.A. § 48-2-15.

(a) Disclosure of third-party information. The Department cannot disclose any information regarding collections activities against other persons. O.C.G.A. § 48-2-15.

(b) Entity Information. Because the person was assessed as a Responsible Party for an entity's debt, such person may request the tax return information of that entity. This includes information on any payments made towards the entity's total liability owed.

Authority: O.C.G.A. §§ 48-2-12, 48-2-52.