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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ST. PAUL CATHEDRAL  
SCHOOL,

Plaintiff,

v.

UNITED STATES OF AMERICA,  
Defendant.

NO. CV-07-3021-RHW

**ORDER GRANTING  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT**

Before the Court is Defendant’s Motion for Summary Judgment (Ct. Rec. 26). A hearing on this motion was held on October 22, 2008. Kevan Montoya appeared on behalf of Plaintiff; Jennifer Auchterlonie appeared on behalf of Defendant.

Plaintiff seeks a refund of penalties the IRS collected from Plaintiff for failure to: (1) make timely deposits towards its liabilities for federal employment taxes; (2) timely pay those liabilities; and (3) timely file federal employment tax returns. Plaintiff does not dispute these failures; rather, Plaintiff asserts an affirmative defense provided by statute, arguing that Plaintiff is entitled to a refund because the failures were “due to reasonable cause and not due to willful neglect.”

1 26 U.S.C. §§ 6651(a)(1), (2), and 6656(a).<sup>1</sup> Plaintiff's argument was unsuccessful  
2 at the administrative level; Plaintiff's final appeal was denied on November 14,  
3 2006, and this suit followed.

4 Now Defendant moves the Court to find as a matter of law that Plaintiff is  
5 not entitled to the refund it seeks. In response, Plaintiff submits a number of  
6 declarations and other evidence, asking the Court to find that a genuine issue of  
7 material fact exists as to whether the failures were due to reasonable cause.  
8 Defendant moves to strike some of Plaintiff's proffered evidence and arguments on  
9 various procedural grounds.

### 10 I. Facts

11 Unless otherwise noted, the following facts are undisputed.

12 Plaintiff is a private, nonprofit Catholic school that is part of St. Paul  
13 Cathedral Parish in Yakima, Washington. During the quarterly periods beginning  
14 October 1, 2003, and ending June 30, 2005, Plaintiff failed to timely file federal  
15 employment tax returns and failed to make timely deposits and to timely pay its  
16 federal employment tax liabilities. As a result, the IRS assessed a total of  
17 \$90,444.74 in penalties against Plaintiff.

18 During all relevant periods, Plaintiff employed a bookkeeper named Sandra  
19 Page, who was responsible for financial duties including paying employment taxes  
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21 <sup>1</sup> Plaintiff's Complaint also argues that "the IRS should treat St. Paul the  
22 same as public schools and governmental entities for which the IRS will waive  
23 penalties under 26 C.F.R. § 301.6651-1(c)(1) if the entity exercised ordinary  
24 business care and prudence." Compl., ¶ 9. Plaintiff did not further develop or even  
25 mention this argument in its briefing responding to the Motion for Summary  
26 Judgment. The cited regulation merely sets forth the standard for showing  
27 reasonable cause, but does not set forth any different standard for public schools or  
28 governmental entities.

1 and filing tax returns. Sometime after her hiring, her supervisors were informed of  
2 a criminal case against Ms. Page, but took no action because they believed the  
3 allegation to be unsubstantiated. Unknown to her employers, Ms. Page had a  
4 number of convictions for theft and forgery, including one conviction that occurred  
5 during her employment with Plaintiff. During the discovery phase of this litigation,  
6 Plaintiff hired a forensic accountant who reports that Ms. Page misappropriated  
7 \$240,049.18 during her five years of employment with Plaintiff. Ms. Page's  
8 employment was terminated on March 20, 2008.

9 Ms. Page's direct supervisor was the principal of the school, a position filled  
10 by two different individuals during the periods at issue. Sister Tonia Wanecek was  
11 principal until July 2004<sup>2</sup>; Anne Berg was principal through the rest of the relevant  
12 period. Among other duties, the principals oversaw Ms. Page's work; however,  
13 Ms. Page was left solely responsible for the bookkeeping, preparation of financial  
14 reports, withholding taxes, and filing appropriate tax returns. The school also had  
15 help from a volunteer Certified Public Accountant named Chris Rivard, who  
16 worked closely with Ms. Page and had access to all of Plaintiff's accounting  
17 records. Mr. Rivard is the accountant for the Diocese of Yakima, of which Plaintiff  
18 is a part. Plaintiff's financial status was also reviewed regularly by both the  
19 Diocese and a school finance committee.

20 The principals were hired by and reported to Monsignor John A. Ecker, the  
21 Pastor of St. Paul Cathedral Parish. The parties dispute the scope of Msgr. Ecker's  
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23 <sup>2</sup> Plaintiff proffers evidence that Sr. Tonia struggled with fibromyalgia,  
24 making it difficult for her to perform her job duties and causing her to be less  
25 visible to her staff. However, the record establishes that despite Sr. Tonia's health  
26 difficulties, she continued to meet regularly with her superior regarding Plaintiff's  
27 financial status, and Plaintiff continued to operate normally throughout the relevant  
28 periods.

1 duties as Pastor, though both parties acknowledge that Msgr. Ecker “oversees”  
2 Plaintiff. Plaintiff states that Msgr. Ecker merely ensures that “the Cathedral and  
3 [Plaintiff] are operating within the doctrine of the Catholic Church,” but “does not  
4 oversee the day-to-day operation of [Plaintiff]” (Plaintiff’s Statement of Facts, ¶  
5 4).<sup>3</sup> Defendant maintains that Msgr. Ecker “has ultimate decision-making authority  
6 on all matters with respect to [Plaintiff]” and “was responsible for overseeing the  
7 administration of [Plaintiff]... including financial issues” (Defendant’s Statement  
8 of Facts, ¶¶ 3, 4). Regardless of this dispute, Msgr. Ecker’s own declaration  
9 establishes that during the relevant periods he oversaw the financial health and  
10 status of the school, and regularly discussed those topics with both principals, Ms.  
11 Page, and even Mr. Rivard.

12 The parties also dispute Plaintiff’s financial health during the periods in  
13 question. Defendant maintains that Plaintiff had multiple bank accounts that were  
14 well in the black during all relevant periods. Plaintiff cites its forensic accountant’s  
15 calculations that, at best, Plaintiff would have ran out of money by March 2005 had  
16 it actually paid the taxes at issue.<sup>4</sup>

## 17 II. Standard of Review

18 Summary judgment shall be granted when “the pleadings, depositions,  
19 answers to interrogatories, and admissions on file, together with the affidavits, if  
20 any, show that there is (1) no genuine issue as to (2) any material fact and that (3)  
21 the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P.  
22 56(c). When considering a motion for summary judgment, a court may neither  
23 weigh the evidence nor assess credibility; instead, “the evidence of the non-movant  
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25 <sup>3</sup> This characterization of Msgr. Ecker’s duties is the subject of one of  
26 Defendant’s requests to strike.

27 <sup>4</sup>These calculations are the subject of another of Defendant’s motions to  
28 strike.

1 is to be believed, and all justifiable inferences are to be drawn in his favor.”  
2 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A “material fact” is  
3 determined by the substantive law regarding the legal elements of a claim. *Id.* at  
4 248. If a fact will affect the outcome of the litigation and requires a trial to resolve  
5 the parties' differing versions of the truth, then it is material. *S.E.C. v. Seaboard*  
6 *Corp.*, 677 F.2d 1301, 1305-06 (9<sup>th</sup> Cir. 1982). A dispute about a material fact is  
7 “genuine” if the evidence is such that a reasonable jury could return a verdict for  
8 the nonmoving party. *Liberty Lobby*, 477 U.S. at 248.

9 The moving party has the burden of showing the absence of a genuine issue  
10 as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In  
11 accord with Rules of Civil Procedure 56(e), a party opposing a properly supported  
12 motion for summary judgment “may not rest upon the mere allegations or denials  
13 of his pleading, but... must set forth specific facts showing that there is a genuine  
14 issue for trial.” *Id.* Summary judgment is appropriate only when the facts are fully  
15 developed and the issues clearly presented. *Anderson v. American Auto. Ass’n*, 454  
16 F.2d 1240, 1242 (9<sup>th</sup> Cir. 1972). “Rule 56(c) mandates the entry of summary  
17 judgment against a party who fails to make a showing sufficient to establish the  
18 existence of an element essential to that party's case, and on which that party will  
19 bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322  
20 (1986).

21 In the context of determining the existence of “reasonable cause” under 26  
22 U.S.C. §§ 6651(a)(1), (2), and 6656(a), “what elements constitute reasonable cause  
23 is a question of law; whether those elements are present is a question of fact.”  
24 *Conklin Bros. v. United States*, 986 F.2d 315, 317 (9th Cir. 1993) (citing *United*  
25 *States v. Boyle*, 469 U.S. 241, 249 n.8 (1985)).

### 26 III. Analysis

27 Defendant asserts a number of procedural challenges to the evidence and  
28 arguments set forth in Plaintiff’s response to the motion for summary judgment.

1 For the purposes of this analysis, the Court will assume that Plaintiff should prevail  
2 on each of those challenges. Thus, the Court will consider all evidence proffered  
3 by Plaintiff and all arguments articulated in Plaintiff's response.

4 The tax code provides taxpayers with an affirmative defense to the  
5 assessment of penalties: taxpayers may excuse the failure to file a tax return or to  
6 pay tax by showing "that such failure is due to reasonable cause and not due to  
7 willful neglect." 26 U.S.C. § 6651(a)(1). Treasury regulations interpreting this  
8 language provide:

9 If the taxpayer exercised ordinary business care and prudence and was  
10 nevertheless unable to file the return within the prescribed time, then  
11 the delay is due to a reasonable cause. A failure to pay will be  
12 considered to be due to reasonable cause to the extent that the  
13 taxpayer has made a satisfactory showing that he exercised ordinary  
14 business care and prudence in providing for payment of his tax  
15 liability and was nevertheless either unable to pay the tax or would  
16 suffer an undue hardship...if he paid on the due date. In determining  
17 whether the taxpayer was unable to pay the tax in spite of the exercise  
18 of ordinary business care and prudence in providing for payment of  
19 his tax liability, consideration will be given to all the facts and  
20 circumstances of the taxpayer's financial situation, including the  
21 amount and nature of the taxpayer's expenditures in light of the  
22 income (or other amounts) he could, at the time of such expenditures,  
23 reasonably expect to receive prior to the date prescribed for the  
24 payment of the tax.

25 26 C.F.R. § 301.6651-1(c)(1).

26 26 C.F.R. § 301.6651-1(c)(1) sets forth a threshold requirement and then two  
27 prongs of the reasonable cause inquiry. First, a taxpayer must show that it  
28 exercised ordinary business care. Second, the taxpayer may excuse its failure to  
pay by showing either: (1) the taxpayer was unable to pay the tax; or (2) the  
taxpayer would suffer an undue hardship by paying the tax on the due date.

The Court finds that Plaintiff satisfied the threshold requirement by  
exercising ordinary business care. Given the budgetary challenges Plaintiff faced, it  
may well have been reasonable to delegate to Ms. Page the sole responsibility for  
withholding taxes and filing tax returns. However, while that decision may have  
been reasonable as a corporate matter, "it does not resolve the matter as to

1 [Plaintiff's] tax duties." *Conklin Bros.*, 986 F.2d at 317, 318-19. Thus, the Court  
2 must determine whether a triable issue of fact exists with respect to the second two  
3 prongs of the test.

#### 4 *A. Disability*

5 The duty to pay taxes is placed firmly on the taxpayer and is nondelegable; a  
6 taxpayer may not escape liability by relying on an agent to fulfill the taxpayer's  
7 obligations. *Boyle*, 469 U.S. at 249-50. However, where a taxpayer is effectively  
8 disabled from fulfilling its obligations because of "circumstances beyond [its]  
9 control," the taxpayer may well excuse its failure to comply. *Id.* at 248 n. 6.

10 The *Boyle* court described the showing required to establish reasonable  
11 cause as a "heavy burden"; the Ninth Circuit has instructed that the reasonable  
12 cause defense "is viewed very narrowly." *Conklin Bros.*, 986 F.2d at 317. Indeed,  
13 the Court finds only one case in which a corporate taxpayer's failure to comply  
14 was excused due to disability: *In re Am. Biomaterials Corp.*, 954 F.2d 919, 921,  
15 928 (3rd Cir. 1992).<sup>5</sup> The *Biomaterials* court found reasonable cause where  
16 criminal embezzlement by a CEO and CFO/Treasurer effectively incapacitated a  
17 corporation and rendered it unable to fulfill its tax obligations. 954 F.2d at 927-28.

18 The Ninth Circuit has seemingly accepted *Biomaterials* as good law, while  
19 carefully distinguishing it from a slightly different set of facts. *See Conklin Bros.*,  
20 986 F.2d at 318. In *Conklin Bros.*, an accounts payable clerk was promoted to  
21 office manager/controller and placed in charge of fulfilling a corporation's tax  
22 obligations. *Id.* at 315. Later, the president/majority shareholder of the corporation  
23 and the corporation's outside accountants determined that "close supervision and  
24 review of [her] payroll tax related duties were no longer necessary." *Id.* at 316. Her

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26 <sup>5</sup>*See also A Better Plumbing Service, Inc. v. United States*, 533 F. Supp. 2d  
27 1233, 1240 (N.D. Ga. 2008) (citing *Biomaterials* as the single Circuit Court  
28 opinion finding reasonable cause after *Boyle*).

1 deficient and improper conduct eventually led to the assessment of IRS penalties.  
2 *Id.* The Ninth Circuit distinguished *Biomaterials* from the facts before the court,  
3 noting that the instant office manager’s conduct “was not largely beyond Conklin’s  
4 control,” while the *Biomaterials* corporation could not supervise the embezzling  
5 officers because they were “the control people in the corporate structure.” *Id.* at  
6 318. Though it may have been “reasonable” to rely on the office manager to fulfill  
7 her duties, that reasonable reliance did not excuse Conklin’s failure to fulfill its  
8 nondelegable tax obligations. *Id.* at 318-19.

9 The Sixth Circuit reached a similar result in *Valen Mfg. Co. v. United States*,  
10 90 F.3d 1190 (6th Cir. 1996). There, despite multiple layers of oversight, an office  
11 manager/bookkeeper failed to file returns and pay taxes, and concealed her failures  
12 from her supervisors. *Id.* at 1191. Because the “executive officers of the company  
13 did retain both oversight of [the bookkeeper’s] work and ultimate responsibilities  
14 for tax liabilities,” the court held that the taxpayer was not disabled. *Id.* at 1194.  
15 The court also found it relevant that the taxpayer, like Plaintiff here, was able to  
16 pay the taxes and penalties immediately upon discovering they were due. *Id.* at  
17 1193.

18 Numerous district courts confronted with facts similar to the case at bar have  
19 declined to find disability. *See, e.g., Better Plumbing*, 533 F. Supp. at 1242-43  
20 (finding no disability where the derelict employee “was not the only person  
21 capable of acting” for the taxpayer in fulfilling its tax obligations, and the  
22 employee was expected to report to the corporation’s president if the corporation  
23 could not pay its tax obligations); *Dogwood Forest Rest Home, Inc. v. United*  
24 *States*, 181 F. Supp. 2d 554, 561 (M.D. N.C. 2001) (“A corporation is not disabled  
25 from complying with tax deadlines if it retains control over the agent responsible  
26 for tax liabilities.”); *Atlas Therapy*, 66 F. Supp. at 1208 (finding that “misconduct  
27 by a corporate officer or employee who is susceptible to the control of higher-level  
28 managers is not sufficient cause to abate the company's tax penalties,” and thus a

1 corporate taxpayer who “always retained the authority to oversee [the employee]  
2 and ensure that the taxes were paid” was not disabled); *Mason Motors Co. v.*  
3 *United States*, 8 F. Supp. 1177, 1181 (D. Minn. 1998) (finding no reasonable cause  
4 where the failure to pay was due to a “disloyal, deceitful employee who was not  
5 acting within the scope of her employment,” but “the corporation’s officer retained  
6 ultimate control over the corporation’s tax obligations”).

7 Here, Plaintiff acknowledges the holding and reasoning of *Conklin Bros.*,  
8 but argues that because of limited funds and consolidation of duties in one  
9 individual, Ms. Page should be considered equivalent to a CFO with the capacity to  
10 disable a corporation. To the contrary, the Court finds that Ms. Page simply did not  
11 occupy a position of authority comparable to the officers in *Biomaterials*. The  
12 record establishes that while Ms. Page may have been something more than a  
13 garden variety bookkeeper, she was something less than a CFO. Although she was  
14 given the sole responsibility for paying taxes and keeping the books, she was not in  
15 charge of Plaintiff’s financial affairs in general. She did not participate in financial  
16 planning or policy development. For example, she had no role in the decision  
17 whether to raise tuition, a decision that was made by Ms. Page’s two supervisors:  
18 the principal and Msgr. Ecker. The record establishes that Ms. Page was subject to  
19 the constant oversight of the principals, the frequent (multiple times a week)  
20 oversight of Msgr. Ecker, and the regular oversight of Mr. Rivard. Further, the  
21 school’s financial affairs were reviewed at least quarterly by a finance committee  
22 and the Diocese. Importantly, each of these levels of oversight *could have* (i.e.,  
23 retained the authority to have) specifically checked Ms. Page’s payment of payroll  
24 taxes, but chose not to.

25 Plaintiff argues that Sr. Tonia’s illness inhibited her from properly fulfilling  
26 her duties as principal, and that her consequently deficient oversight of Ms. Page at  
27 least creates a genuine issue of material fact with respect to Plaintiff’s disability.  
28 “It is clear that a taxpayer’s serious illness can constitute reasonable cause under 26

1 C.F.R. § 301.6651-1(c)(1).” *Van Camp & Bennion v. United States*, 251 F.3d 862,  
2 867 (9th Cir. 2001). However, the record (both Msgr. Ecker’s declaration and his  
3 deposition testimony) establishes that Sr. Tonia continued to perform the essential  
4 functions of her job, including overseeing Ms. Page and meeting with Msgr. Ecker  
5 regarding the school’s financial status. The Court finds those circumstances  
6 insufficient to disable Plaintiff as a matter of law.

7 Plaintiff also suggests that Msgr. Ecker’s oversight role was fairly limited,  
8 and thus that he should not be considered to have provided the same level of  
9 supervision as the controllers in *Conklin Bros.* That argument is belied by Msgr.  
10 Ecker’s own declaration, which establishes that Msgr. Ecker directly oversaw  
11 Plaintiff’s finances. He had weekly meetings with Plaintiff’s principals in which  
12 Plaintiff’s financial condition was at issue; he discussed Plaintiff’s financial  
13 condition with Ms. Page; he discussed Plaintiff’s financial condition with the  
14 Diocese’s CPA.

15 These undisputed facts place this case squarely within the holdings of  
16 *Conklin Bros.* and *Valen Mfg.* Accordingly, the Court must find that Plaintiff has  
17 failed to show it was disabled from complying with its tax obligations.

#### 18 *B. Undue Hardship*

19 Alternatively, Plaintiff may excuse its failure to pay if payment would result  
20 in an undue hardship. The Treasury Regulations set a high bar for undue hardship:

21 The term “undue hardship” means more than an inconvenience to the  
22 taxpayer. It must appear that substantial financial loss, for example,  
23 loss due to the sale of property at a sacrifice price, will result to the  
24 taxpayer for making payment on the due date of the amount with  
respect to which the extension is desired. If a market exists, the sale of  
property at the current market price is not ordinarily considered as  
resulting in an undue hardship.

25 26 C.F.R. § 1.6161-1(b). “Evidence of financial trouble, without more, is not  
26 enough” to establish undue hardship. *Synergy Staffing, Inc. v. United States*, 323

1 F.3d 1157, 1160 (9th Cir. 2003).<sup>6</sup> A taxpayer seeking refund of penalties must  
2 “come forward with evidence of what funds it *did* have on hand each time a payroll  
3 tax was due,” and “produce evidence of how it spent those funds in lieu of paying  
4 its taxes.” *Id.* However, financial difficulties as substantial as “the potential ruin of  
5 a corporation” may constitute reasonable cause. *Van Camp*, 251 F.3d at 868.

6 *Synergy*, the text of the quoted regulations, and case law from other circuits  
7 all suggest that the touchstone here is the reasonableness of the taxpayer’s decision  
8 not to pay at the time the tax was due. In other words: has the taxpayer provided  
9 sufficient evidence to establish that its decision not to pay the tax because of  
10 financial difficulties was reasonable? The Court finds only one reported case in  
11 which that question was answered in the affirmative: *East Wind Indus. v. United*  
12 *States*, 196 F.3d 499, 507 (3d Cir. 1999). There, a taxpayer who depended on  
13 government contracting as its sole revenue stream failed to pay withholding taxes  
14 due to financial difficulties caused by bribes solicited by corrupt government  
15 employees, which ultimately accounted for up to 50% of the taxpayer’s business.  
16 *Id.* at 502. The taxpayer chose to pay only its employees and those creditors whose  
17 services were essential to the taxpayer’s survival. *Id.* at 509. Under these

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18  
19 <sup>6</sup>Note that the Sixth Circuit has adopted a bright line rule that “financial  
20 difficulties can never constitute reasonable cause to excuse the penalties for  
21 nonpayment of withholding taxes by an employer.” *Brewery, Inc. v. United States*,  
22 33 F.3d 589, 592 (6th Cir. 1994). The Second Circuit declined to adopt this bright  
23 line rule, but did note that a taxpayer seeking to avoid penalties must provide  
24 evidence showing in what order it placed the IRS among its creditors. *See Fran*  
25 *Corp. v. United States*, 164 F.3d 814, 818-21 (2d Cir. 1999). The Third and Ninth  
26 Circuits have similarly rejected *Brewery*’s rule and adopted the reasoning of *Fran*.  
27 *East Wind Indus. v. United States*, 196 F.3d 499, 508 (3d Cir. 1999); *Van Camp &*  
28 *Bennion v. United States*, 251 F.3d 862, 868 (9th Cir. 2001).

1 circumstances, the court held that the taxpayer would have suffered an undue  
2 hardship by paying its taxes on the dates they were due. *Id.* at 509-510.

3 Note that even the taxpayer in *East Wind*, who was excused from paying  
4 penalties, continued to file tax returns during all the periods in question. *Id.* at 501.  
5 *See also Fran Corp. v. United States*, 164 F.3d 814, 816 n. 5 (2d Cir. 1999) (noting  
6 that financial difficulties would not provide reasonable cause to avoid timely filing  
7 tax returns); *Pacific Wallboard & Plaster Co. v. United States*, 319 F. Supp. 2d  
8 1187, 1190 (D. Or. 2004) (finding no undue hardship where a taxpayer “simply  
9 ignored its tax obligations for three whole years”).

10 Here, Plaintiff does not argue that because of financial difficulties, Plaintiff  
11 consciously chose not pay its taxes but to instead use those funds to pay other  
12 creditors. Rather, Plaintiff has simply proffered evidence that it was in financial  
13 trouble, “losing money at an alarming rate during the time it was not making its tax  
14 payments” (Plaintiff’s Memorandum in Opposition to United States’ Motion for  
15 Summary Judgment, p. 17, ln. 1-2).

16 The Court finds that Plaintiff has failed to create a triable issue of fact  
17 regarding undue hardship. Plaintiff does not attempt to justify any decision to pay  
18 other creditors before the IRS; in fact, the evidence establishes that no such  
19 conscious decision was made. Due to the business decision not to closely supervise  
20 Ms. Page, the individuals in Plaintiff’s supervisory positions were simply unaware  
21 that taxes were due and not being paid. Moreover, Plaintiff has failed to contradict  
22 the evidence that Plaintiff had three checking accounts with tens of thousands of  
23 dollars available during all the relevant periods, not to mention access to a savings  
24 account containing over \$200,000. Accordingly, Plaintiff has not shown that it  
25 would have suffered an undue hardship by paying its taxes at the time they were  
26 due.

#### 27 28 **IV. Conclusion**

1 Plaintiff has established that it exercised ordinary business care and that its  
2 failure to fulfill its tax obligations was not due to willful neglect. However, the  
3 undisputed facts establish that Plaintiff was not disabled from complying with its  
4 obligations, and that it would not have suffered an undue hardship if it had paid its  
5 taxes when they were due.

6 Accordingly, **IT IS HEREBY ORDERED:**

- 7 1. Defendant's Motion for Summary Judgment (Ct. Rec. 26) is **GRANTED**.  
8 2. The District Court Executive is directed to enter judgment in favor of  
9 Defendant and against Plaintiff.

10 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
11 Order, forward copies to counsel, and close the file.

12 **DATED** this 5<sup>th</sup> day of December, 2008.

13 *S/ Robert H. Whaley*

14 **ROBERT H. WHALEY**  
15 Chief United States District Judge

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