

Trust Fund Taxes: A Sensible Application of *Flora*.

Jurisdiction over a refund action requires full payment of the tax. *Flora v. United States*, 362 U.S. 145, 150 (1960). For someone who is challenging the imposition of the trust fund recovery penalty, this rule is relaxed: jurisdiction is established if the plaintiff has paid the withheld tax for one employee for one quarter is paid. *Psaty v. United States*, 442 F.2d 1154, 1159 (3d Cir. 1971).

A recent Court of Federal Claims case addressed an interesting issue: what if the plaintiff lacks sufficient access to records to determine what is the correct amount; will an estimate suffice? *Kaplan v. United States*, 2014 U.S. Claims LEXIS 24 (Fed. Cl. Jan. 27, 2014).

Mr. Kaplan was assessed with the trust fund recover penalty as a responsible person of Merchants Restaurant, an LLC in Texas. *Kaplan v. United States*, 113 Fed. Cl. 84, slip op. at *85 (Fed. Cl. Oct. 9, 2013). Mr. Kaplan paid \$100 to support his refund claim; when the government moved to dismiss for lack of subject matter jurisdiction, Mr. Kaplan submitted a single payroll report for one pay period that he had used to estimate the amount of the tax for a single employee. *Id.*, slip op. at *86. Initially, the court held that the evidence submitted was insufficient, as it did not account for the possibility of variation in an employee's schedule. As a consequence, his complaint was dismissed. *Id.*, slip op. at *86-*87.

Kaplan and his lawyer sought reconsideration; reconsideration motions almost never work, but in this case it was fruitful. In his motion, Mr. Kaplan detailed all of the effort that he had put into obtaining a complete payroll record for a quarter. As an added twist, he noted that the reason why he couldn't get access to the records was that he didn't have enough control over the entity, which was also his contention on the merits. *Kaplan v. United States*, 2014 U.S. Claims LEXIS 24, slip op. at *5-*6. Concluding that Mr. Kaplan was caught in "an evidentiary Catch-22," the court vacated its prior order of dismissal. *Id.*, slip op. at *6. The court noted that the government was unable to state what the correct amount was, a factor that presumably played a big role in the outcome.

Noting that in divisible tax cases, the amount paid is "representative," the court concluded that it was "not inclined to prevent Mr. Kaplan from challenging that full assessment in this forum simply because the representative amount he paid might not be representative enough." *Id.*, slip op. at *7.

This is a good and pragmatic outcome. Individuals who are subject to the trust fund recovery penalty don't have the option of requesting tax court review, so that a practical approach to *Flora* is needed to assure fairness. But it is also worth avoiding this close a call: if the records used to estimate the amount of the employees' taxes are incomplete, it probably makes sense to pay two or three times a reasonable estimate to avoid the jurisdictional issue.

I would like to thank Jack Townsend, as his excellent Federal Tax Procedure [blog](#) flagged the case for me.

Jim Malone is a tax lawyer in Philadelphia. © 2014, MALONE LLC.