

Jurisdiction: A Refund Action Runs Afoul of Flora, Part II.

[Last week](#), I reported on *Diversified Group, Inc. v. United States*, 2015 U.S. Claims LEXIS 1101 (Aug. 26, 2015), a case on divisible taxes and jurisdiction, but I did not examine the cases that the taxpayer relied upon in the detail that they deserved.

Two cases were central to the taxpayer's divisibility argument: *Noske v. United States*, 911 F.2d 133 (8th Cir. 1990), and *Humphrey v. United States*, 854 F. Supp. 2d 1301 (N.D. Ga. 2011). See *Diversified Group*, 2015 U.S. Claims LEXIS 1101, slip op. at *19. The Court of Federal Claims concluded that neither supported the taxpayer's jurisdictional argument.

Humphrey was decided under Section 6700 of the Internal Revenue Code, which provides for the imposition of penalties on those who organize abusive tax shelters or promote their sale. I.R.C. § 6700(a). Congress had amended this part of the Code to make it very clear that the penalty was divisible by stating that each promotional activity was a separate activity.

Diversified Group, 2015 U.S. Claims LEXIS 1101, slip op. at *36 (discussing I.R.C. § 6700(a)). In contrast, the Court of Federal Claims concluded that the language of Section 6707 did not reflect an intent to create a divisible tax, particularly given the failure of Congress to amend Section 6707 when it amended Section 6700. *Diversified Group*, 2015 U.S. Claims LEXIS 1101, slip op. at *37-*39.

Turning to *Noske*, another case involving the promoter penalty under Section 6700 of the Code, the Court of Federal Claims again found the taxpayer's reliance upon the case "inapposite." *Diversified Group*, 2015 U.S. Claims LEXIS 1101, slip op. at *39. In the court's view, *Noske* was simply an example of a court examining the ambiguous pre-amendment language of Section 6700 and coming down on the divisible side of an existing split among the circuits. *Id.*, slip op. at *39-*40. Finding no similar ambiguity in Section 6707, the Court of Federal Claims concluded that *Noske* did not support the plaintiffs' position. *Id.*, slip op. at *40.

The court also emphasized that Section 6707 was focused upon a single wrongful act, the failure to register a tax shelter, and not a series of transactions. *Id.* While I am normally sympathetic to arguments that a tax is divisible, I have difficulty faulting the reasoning here.

Jim Malone is a tax attorney in Philadelphia; he focuses his practice on federal, state and local tax controversies. This post is intended to provide background on a relevant issue; it is not intended as legal advice. © 2015, MALONE LLC.