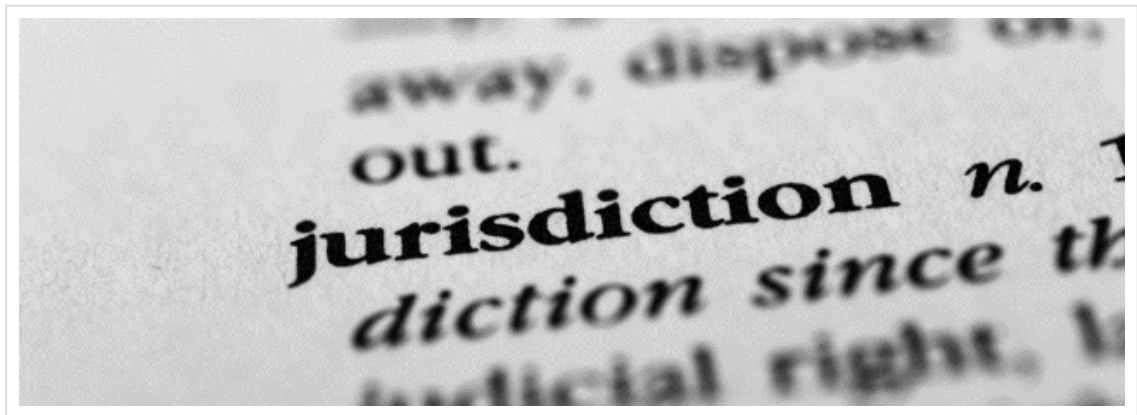




TAX PROCEDURE: THINK CAREFULLY ABOUT JURISDICTION - IT'S IMPORTANT

Posted on [March 3, 2016](#) by [Jim Malone](#)



An individual who has been assessed with the trust fund recovery penalty for failure to collect, account for or pay over employment taxes generally cannot obtain review in Tax Court. Instead, judicial review is available by means of a refund claim, which can be heard either in district court or the [Court of Federal Claims](#). Normally, 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: because the tax is divisible, jurisdiction is established if the plaintiff has paid the withheld tax for one employee for one quarter. *Psaty v. United States*, 442 F.2d 1154, 1159 (3d Cir. 1971).

But even a relaxed rule can have teeth, as demonstrated by a recent opinion from the Court of Federal Claims; the refund claimant made a nominal payment and failed to convince the court that it was sufficient. *Vir v. United States*, 2016 U.S. Claims LEXIS 104 (Feb. 22, 2016).

Mr. Vir was an officer of NGTV, a corporation; when the corporation failed to pay its payroll taxes for four quarters, he was assessed with a trust fund recovery penalty of \$130,437.41. *Vir*, 2016 U.S. Claims LEXIS 104 at *1. Mr. Vir responded by filing a series of refund claims with the IRS, one for each quarter; each of the refund claims was accompanied by a payment of \$100. *Id.* at *1-*2. Each claim was accompanied by a memorandum, which explained that Mr. Vir “was making a nominal payment on the withheld tax for one employee for one quarter of liability.” *Id.* at *2. The employee was never identified.

Mr. Vir then filed a “three page complaint,” asserting that the trust fund recovery penalty was improperly assessed against him. *Id.* at *5. The court held a status conference at which it directed Mr. Vir to produce pay stubs to demonstrate that the court had jurisdiction. Vir did not produce the pay stubs and did not offer an explanation for that failure. *Id.* at *6-*7. A motion to dismiss for lack of

subject matter jurisdiction followed. In response, Mr. Vir belatedly identified the relevant employee in response to the government's motion, but he still failed offer any explanation for the failure to furnish paystubs. *Id.* at *19-*20. As a result, the court concluded that Mr. Vir had made conclusory allegations to support jurisdiction, which did not suffice. *Id.* at *21.

The Court of Federal Claims then considered *Kaplan v. United States*, 115 Fed. Cl. 491 (2014) ([discussed here](#)) and concluded it was distinguishable. *First*, the court noted that the plaintiff in *Kaplan* had asserted that he had not been responsible for the collection and payment of employment taxes. *Id.* at *22-*23. *Second*, the plaintiff there had alleged that he had been listed as a managing member in his employer's organizational documents without his knowledge or consent and had not agreed to accept that responsibility. *Id.* at *23. *Third*, the plaintiff in *Kaplan* had offered some payroll records and had explained his diligent (but unsuccessful) efforts to acquire additional records. *Id.*

In contrast, Mr. Vir conceded he was an officer at all relevant times. And while he claimed to have made diligent efforts to obtain the records, he offered no specifics. *Id.* at *24. Given these circumstances, the court was not persuaded that it should extend the narrow, fact-specific holding of *Kaplan* to Mr. Vir's situation.



By: **Jim Malone**

Jim Malone is a tax attorney in Philadelphia and Co-Chair of Post & Schell's [Tax Controversy Practice Group](#). He focuses his practice on federal, state and local tax controversies. [Learn more about Post & Schell's Tax Controversy Group >>](#)

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