

Court of Federal Claims Approves Second Bite of the Apple

Asking a trial judge to revisit a ruling and issue a contrary one is a heavy lift as Rule 59, the rule governing motions for reconsideration, reflects. Under Rule 59, the party moving for reconsideration must satisfy one of the three grounds, and each one is plainly intended to encourage the applicant to rethink the motion:

1. An intervening change in the controlling law;
2. The availability of previously unavailable evidence; or
3. The necessity of preventing manifest injustice.

But in the right circumstances, a motion for reconsideration may be just the ticket to turning around a losing decision. On October 9, 2013, the CFC granted the Government's motion to dismiss a lawsuit challenging employment tax penalties assessed by the I.R.S. against Jonathan L. Kaplan, for employees at the Merchants Restaurant SA, LLC. The Government successfully argued that Kaplan's three \$100 payments toward the penalties allegedly owed did not satisfy the jurisdictional requirement that a plaintiff first pay the amount the I.R.S. claims is owed, and then sue in the CFC for a refund.

In Kaplan's motion, he contended that dismissal would constitute manifest injustice because he was not the responsible party for payment of the payroll taxes and he was unable to provide additional records because he was unable to obtain the records. The latter argument apparently was what changed the judge's mind. In Kaplan's motion, the court noted, Kaplan described "in detail his diligent but futile efforts at obtaining these records." The court concluded that Kaplan was caught in a Catch-22 situation—he could not establish that he was not responsible for paying the taxes allegedly owed because he could not meet the jurisdictional requirement of showing that taxes had been paid:

Kaplan is caught in an "evidentiary Catch-22." In order to prove the merits of his argument that he is not a "responsible person," he must first produce the evidence for which he is not responsible. This inequity is magnified by the fact that the Government is itself unable to state what minimum payment would be sufficient.

The trial court therefore granted to motion for reconsideration.

To read the decision, click [here](#).