17-503

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN M. LARSON
Petitioner-Appellant,
V.

UNITED STATES of AMERICA
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS BRIEF FOR THE APPELLANT SUPPORTING REVERSAL

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Legal Services Center of Harvard Law School Federal Tax Clinic represents low-income taxpayers in controversies with the IRS, both before the IRS and in federal court, with the goal of maximizing financial wellbeing and protecting taxpayer rights. We write to describe to the court how applying the *Flora* full payment rule to assessable penalties harms low-income taxpayers. Pursuant to this court's order dated May 25, 2017 granting leave to file this *amicus curiae* brief in support of Appellant, the Legal Services Center of Harvard Law School Federal Tax Clinic submits the following brief.

ARGUMENT

I. INTRODUCTION: THE CURRENT APPLICATION OF *FLORA* AFFECTS MORE THAN TAX SHELTER PROMOTERS

It may seem odd that a low-income taxpayer clinic is weighing in on a case involving a tax shelter promoter. It is safe to say that our clients generally do not encounter the types or amount of penalties facing Mr. Larson. However, the crusade against such tax shelter promoters unintentionally ensnares low-income taxpayers against whom the Internal Revenue Service (hereinafter the IRS) has imposed assessable penalties. The impact of the decision below effectively bars taxpayers with an assessable penalty from any opportunity to challenge their liability in court. When it adopted the full payment rule, the *Flora* Court noted that poor taxpayers would still have the opportunity to challenge their liability in the Tax Court prior to payment. *Flora v. United States*, 357 U.S. 63, 75 (1958) ("*Flora I*"); *Flora v. United States*, 362 U.S. 145, 175 (1960) ("*Flora II*"). But the Court did not foresee the current assessable penalty regime, in which taxpayers are regularly shut out of the Tax Court. Were *Flora* decided fifty years later, we believe that the Court would have restricted the full payment requirement to those taxpayers who had the option of prepayment litigation in the Tax Court.

Congress has acted more recently to ensure that taxpayers have the ability to meaningfully contest their liability, but the legislation did not solve the problem for taxpayers facing assessable penalties. In 1998, Congress created Collection Due Process (CDP) hearings in order to create another route into the courts for taxpayers who would otherwise not have a judicial remedy. But due to the IRS's interpretation of the CDP statute and recent case law in the Fourth,[1] Seventh,[2] and Tenth[3] Circuits, taxpayers are still unable to challenge assessable penalties in court without first making full payment. Many of these penalties result in multi-million dollar liabilities that almost no taxpayer has the ability to prepay, as in Mr. Larson's case. But even a modest amount of assessable penalty is a barrier to low-income taxpayers. Often, they are unable to pay even a $1000 penalty. Because

[1] *Iames v. Comm'r*, 850 F.3d 160 (4th Cir. 2017).
[2] *Our Country Home Enters. v. Comm'r*, 855 F.3d 773 (7th Cir. 2017).
[3] *Keller Tank Servs. II v. Comm'r*, 854 F.3d 1178 (10th Cir. 2017).

CDP is not the safety valve for these taxpayers that Congress intended, we urge this court to reevaluate its application of the *Flora* full payment rule for the reasons discussed more fully below.

II. THE FULL PAYMENT RULE SHOULD NOT APPLY TO ASSESSABLE CIVIL PENALTIES

A. *Flora* Was Decided When the Assessable Penalty Regime Did Not Exist

When the *Flora* rule was adopted, neither Congress nor the Court contemplated the large number of assessable penalties that exist today. As a result, we have arrived at an unfair set of circumstances in which the IRS has tremendous power to levy severe assessable penalties and effectively deny taxpayers any judicial recourse due to their inability to fully pay the penalties before challenging them in court.

According to *Flora I*, "the final step in the evolvement of 28 U.S.C. § 1346(a)(1) took place in the Act of July 30, 1954." *Flora I*, 357 U.S. at 74. As of that date, the Code contained precisely three assessable penalties, the so-called 100% penalty (I.R.C. § 6672), damages for instituting Tax Court proceedings merely for delay (I.R.C. § 6673), and a penalty for a fraudulent statement or failure to furnish a statement to employees (I.R.C. § 6674). However, § 6672 (also known as the 100% penalty or the trust fund recovery penalty) is more accurately described as a collection device, rather than a penalty. *Botta v. Scanlon*, 314 F.2d 392, 393 (2d Cir. 1963). This penalty also permits a taxpayer to obtain judicial review by paying the withheld employment taxes for just one employee for one quarter, a nominal sum. At the time *Flora I* was decided and continuing until today, § 6673 referred to the imposition of "damages"—not a penalty at all. And § 6674 applied (and applies today) only to "willful" failures, and is "in addition to the criminal penalty provided by section 7204." In 1954, the category of civil assessable penalties consisted of a collection device, damages imposed for delaying Tax Court proceedings, and what was essentially a criminal penalty. Today, by contrast, Subchapter B of Chapter 68 contains about 50 different civil assessable penalties.

In *Flora II*, affirming *Flora I* on rehearing, the Court referred to "a vexing situation—statutory language which is inconclusive and legislative history which is irrelevant", 362 U.S. at 152, and added, "[i]f this were all the material relevant to a construction of § 1346(a)(1), determination of the issue at bar would be inordinately difficult." *Id.* at 157. Instead, "additional factors" were "dispositive." *Id*. Among these factors were Congress's creation of the Board of Tax Appeals (the Tax Court's predecessor) and the concomitant enactment of the Declaratory Judgment Act and § 7422(e), resulting in a "system in which there is one tribunal for prepayment litigation and another for post-payment litigation, with no room contemplated for a hybrid" regime, where the same tax could be litigated in both tribunals. *Id.* at 163. (Flora apparently had the opportunity to litigate his claim in Tax Court but did not take it.) The Court called this "the harmony of our carefully structured . . . system of tax litigation . . ." *Id.* at 176.

In other words, in enacting the jurisdictional statute, Congress intended a full payment rule to apply when the regime with which Congress was familiar—the deficiency regime—applied. It could not have intended the rule to apply to civil assessable penalties, which are not subject to this regime and did not even exist when the jurisdictional statute was enacted. The harmony that the Supreme Court referred to in *Flora II* no longer exists.

B. Applying the Full Payment Rule to Assessable Penalties Immunizes Them from Judicial Review

"There is a strong presumption favoring judicial review of administrative action." *Salazar v. King*, 822 F.3d 61, 75 (2d Cir. 2016), citing, *inter alia*, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) and *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984). That is, judicial review of a final agency action will not be cut off unless "there is persuasive reason to believe that such was the purpose of Congress." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). In the absence of an express statutory prohibition, the agency "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [the Agency's] decision." *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975). This presumption applies in a tax refund proceeding brought under 28 U.S.C. § 1346(a), not only in proceedings brought under the Administrative Procedure Act. *See Starr Int'l Co. v. United States*, 139 F. Supp. 3d 214 (D.D.C. 2015). Because of this presumption, 28 U.S.C. 1346(a) should not be interpreted to bar jurisdiction if doing so would result in an assessment being judicially unreviewable, unless it is very clear that this is what Congress intended.

But whether Congress intended this is at best unclear. If a taxpayer may not contest an assessment—an agency action—without prepaying all of it, that assessment will be judicially unreviewable for those unable to pay all of the tax whether this is because their economic circumstances allow them to pay very little, as with low-income taxpayers, or the amount of the assessment bars all but the extremely wealthy from the opportunity for judicial review, as with Larson. In *Flora I* and *Flora II*, the Court pointed to the statute's ambiguity and its murky legislative history. According to the Court, the statute was far from clear, and it was the existence of a deficiency procedure available to the taxpayer in *Flora* that was dispositive. Absent the availability of a deficiency procedure, the "statutory language" remains "inconclusive" at best, *Flora II*, 362 U.S. at 152, so the presumption in favor of judicial review should apply.

C. *Magnone* Does Not Apply to Assessable Penalties

In *Magnone v. United States*, 902 F.2d 192 (2d Cir. 1990), this Court wrote that "the full payment rule requires as a prerequisite for federal court jurisdiction over a tax refund suit, that the taxpayer make full payment of the assessment, including penalties and interest." *Id.* at 193. However, *Magnone* is distinguishable because it does not address *assessable* penalties. Its holding should be limited to interest on tax deficiencies. Additionally, the taxpayers seemed to rely, in part, on the restrictions on further interest under § 6601(c) that apply either if a taxpayer signs a consent to assess a deficiency during an audit or as part of a stipulated Tax Court decision. *Id.* Thus, it was unclear from the facts of the case whether the deficiencies were assessed after a Tax Court proceeding or after the taxpayers signed a consent to assessment.

III. ACTUAL EFFECTS ON LOW-INCOME TAXPAYERS

The *Flora* Court did not foresee the eventual explosion of civil assessable penalties, but it did recognize the potential injustice of requiring poor taxpayers to pre-pay before allowing them to challenge their liability. At the time, the Court dismissed the hardship argument because a poor person who could not prepay the entire tax was free to litigate in Tax Court without any advance payment. *Flora I*, 357 U.S. at 75. In *Flora II*, the Court reiterated that concern about the harshness of the full payment rule "seems to ignore entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent." *Flora II*, 362 U.S. at 175. The Court would likely respond quite differently to the present-day reality where taxpayers, particularly those of very modest means, are often unable to litigate in Tax Court and have no judicial recourse because they do not have the ability to make full payment prior to commencing litigation.

A. An Illustrative Example

In order to demonstrate how the government's position can have a draconian effect on low-income taxpayers, we describe a paradigmatic fact pattern seen on several occasions by low-income tax clinic directors Professors Keith Fogg and Ted Afield. Consider the hypothetical "Ms. Smith," a 52-year-old single mother of three who earns $20,000 per year. In 2012, she is introduced to someone she believes to be a legitimate tax expert, but who turns out to be a tax shelter promoter. This promoter offers to help Ms. Smith ensure that she is getting all of the tax return deductions to which she is entitled. He tells her that she can deduct the amounts she owes in personal credit card debt by filing a 1099-OID for each line of credit. Not knowing any better, Ms. Smith innocently follows the advice of the seemingly trustworthy "tax expert."

Ms. Smith files a 1099-OID for each of her four personal lines of credit, believing this to be a legitimate use of the form. Eventually, the IRS sends her a letter stating that her filings were in error and require correction. The tax promoter insists to Ms. Smith that the 1099-OID is allowable but rarely processed by the IRS, and that she should be patient while her file is escalated to someone familiar with the 1099-OID. To reassure her, the promoter tells Ms. Smith that he had just gone through the same experience and shows her a copy of his own refund as evidence that his advice was correct. Eventually, the tax promoter is arrested and Ms. Smith realizes she had been misled. Ms. Smith immediately submits corrected tax returns to the IRS, but she has already been assessed $20,000 in § 6702 penalties, and because a § 6702 penalty is directly assessable, she is unable to contest these penalties in Tax Court.[4]

B. The Collections Process Subverts Congressional Anti-Poverty Policy

Although Ms. Smith will likely never be able to make full payment, partial payments will be taken from her by administrative offset of later-year overpayments. Like a majority of low-income taxpayers, Ms. Smith is ordinarily due a refund when she files because of over-withholding on her wages and

[4]The § 6702 penalty was chosen as an example because of the number of cases Professors Afield and Fogg have encountered, but there are other assessable penalties that impact low-income taxpayers. One such penalty to note is the § 6676 penalty for making an erroneous claim for a refund or credit. This penalty covers a broad range of taxpayers, especially low-income taxpayers who may claim dependents for the earned income credit who are simultaneously claimed by other filers, resulting in an erroneous claim. Previously, the IRS tended to use the non-assessable § 6662 and § 6663 penalties for disallowed refundable credits instead, but following the Tax Court's decision in *Rand v. Comm'r*, 1141 T.C. 376 (2013) disallowing the use of those penalties when the taxpayer did not owe any tax in the first place, the IRS seriously considered using the § 6676 penalty instead. Ultimately, the IRS appears to have decided not to use the § 6676 penalty at this time, but it could decide to start enforcing the § 6676 penalty at any time.

entitlement to refundable credits (the earned income tax credit of § 32 and the additional child tax credit of § 24(d)). However, rather than refunding these overpayment amounts, the IRS, under § 6402(a), can apply them as payments towards the unpaid assessment.

This confiscation of her refunds causes Ms. Smith to lose her earned income credits for the next three or four years, plunging her and her children back into poverty. She must rely on public assistance in the form of food stamps and Medicaid to provide for the basic needs of her and her children. Moreover, by applying her credits toward her penalty, the IRS disincentives her from continuing to work. This directly contradicts Congress's intent in enacting the earned income credit. If she stops working, she will never have the additional funds necessary to pay the rest of the assessment and then bring a refund suit. If the *Flora* rule applies, and the amounts credited do not ever achieve full payment of the assessments of assessable penalties, Ms. Smith has no judicial forum in which she can prove that the assessable penalties are incorrect.[5] And even if she continues to work, her credits finally pay the penalty in full, and she proves in district court that the assessed penalty is incorrect, she will only be allowed to recover a refund for two years of her credits. I.R.C. § 6511.

[5] As discussed in the next section, a CDP hearing will not be useful to her in getting a refund for her partial payments, leaving her with no recourse whatsoever, judicial or administrative.

In short, Ms. Smith has been denied the judicial safeguard that the *Flora* Court relied upon to dismiss the hardship concerns vocalized by the dissent. She has been denied the poverty relief that Congress intended in enacting the earned income credit. And she has been denied full recovery of payments she made toward an erroneously-assessed penalty.

IV. THE ADMINISTRATIVE REGIME DOES NOT PROVIDE AN ADEQUATE OPPORTUNITY FOR PREPAYMENT REVIEW OF ASSESSABLE PENALTIES

Congress recognized that the tax system did not allow taxpayers the opportunity for judicial review in many circumstances. In 1998, it created the Collection Due Process (CDP) provisions (I.R.C. §§ 6320 and 6330) allowing taxpayers to have an additional administrative hearing with the possibility of judicial review to discuss the proposed collection action and, if they did not previously have the opportunity to do so, the merits of the underlying liability. Congress intended CDP to serve as a safety valve for taxpayers unable to obtain judicial review for a liability.

When the CDP provisions were created, it might have been plausible that they would have remedied the situation concerning assessable penalties that went unaddressed in *Flora*. Unfortunately, CDP does not remedy the problem of judicial review for assessable penalties because the Treasury Regulations interpreting IRC

§ 6330 establish that taxpayers may not contest the underlying liability of an assessable penalty in a CDP hearing—that would be subject to judicial review—if they were provided a prior administrative opportunity to challenge the liability, even though the prior opportunity would not be subject to judicial review.

CDP hearings allow the taxpayer to raise "any relevant issue relating to the unpaid tax or the proposed levy." I.R.C. § 6330(c)(2)(A). But she may not raise an issue if it was "raised and considered at a … previous administrative or judicial proceeding" in which she "participated meaningfully." I.R.C. § 6330(c)(4)(A). And a taxpayer may contest the assessed liability, but only if she "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." I.R.C. § 6330(c)(2)(B). Crucially, the Treasury Regulations note that "[a]n opportunity to dispute the underlying liability includes a prior opportunity for a conference with [the] Appeals [Office] that was offered either before or after the assessment of the liability." Treas. Reg. § 301.6330-1(e)(3) Q&S-E2.

The opportunity for judicial review of the assessable penalty usually does not exist in CDP cases because, in almost every case, the IRS affords persons assessed an assessable penalty the opportunity for administrative review. According to the IRS, taxpayers may not contest the liability in the CDP hearing that could serve as a gateway to judicial review, even where no judicial review existed prior to the collection proceeding. *Id.* Recent opinions from the Fourth, Seventh, and Tenth Circuits have upheld these IRS regulations, making it clear that CDP hearings do not provide a relief valve from the full payment rule of *Flora* for taxpayers assessed with an assessable penalty. *See Iames v. Comm'r*, 850 F.3d 160 (4th Cir. 2017); *Keller Tank Servs. II v. Comm'r*, 854 F.3d 1178 (10th Cir. 2017); *Our Country Home Enters. v. Comm'r*, 855 F.3d 773 (7th Cir. 2017).

Thus, a taxpayer who has been given a prior opportunity to challenge the merits of the penalty in the Appeals process, even if he does not take advantage of it, is barred the opportunity to challenge the underlying liability in a CDP hearing. This is true even where, as in cases like Larson or the hypothetical Ms. Smith, a taxpayer who avails himself of the conference with Appeals after the assessment of this penalty cannot contest the decision of the Appeals Officer supporting the imposition of the penalty in court. The administrative discussion with Appeals is the only opportunity to contest the assessment of the penalty. Based on the regulation provisions and recent court decisions cited above, the Tax Court does not have jurisdiction to hear a challenge to the underlying liability because of the administrative hearing opportunity of the taxpayer to contest the assessment. Accordingly, taxpayers such as Larson and Smith have no opportunity for prepayment judicial review through the CDP process.

Moreover, even if the IRS did not provide an initial opportunity for an appeals conference upon the assessment of the penalty, low-income taxpayers could easily find themselves unable to avail themselves of the CDP process because of the administrative offset of future refunds. For example, consider the common situation of the IRS imposing an assessable penalty of $10,000, and then applying $2,000 from later-year earned income credits to satisfy a portion of that penalty. This application would be done without the taxpayer obtaining CDP hearing rights. I.R.C. § 6402(d); 31 C.F.R. § 285.2(i). If the low-income taxpayer is never able to afford to pay the $8,000 balance in order to initiate refund litigation, the $2,000 will be forever lost even though the taxpayer should not have been subject to the penalty in the first place.

Even if she somehow does get issued a notice and gets a CDP hearing in which the restrictions of 6330(c)(2)(B) and (c)(4) do not prevent her from contesting the penalty, the Tax Court has held that it has no power under CDP to determine any overpayment; it only has the power to find *further* collection improper. *Greene-Thapedi v. Comm'r*, 126 T.C. 1 (2006).

CONCLUSION

The *Flora* Court adopted the full payment rule believing that the availability of Tax Court litigation would be an adequate safeguard against the possibility of the "harsh injustice" envisioned by the dissent. *Flora II*, 362 U.S. at 198

(Whittaker, J., dissenting). But the Court did not envision the current roster of assessable penalties which are not litigable in Tax Court. The extension of the full payment rule to assessable penalties not only strips taxpayers like Mr. Larson of the right to judicial review, but it also prevents low-income taxpayers from obtaining judicial review even when the penalty assessed is a fraction of the amount assessed against Mr. Larson. This eviscerates the safeguard envisioned by the majority in *Flora II* for poor taxpayers. In the absence of legislative and administrative relief, we respectfully request that this Court reassess its application of the *Flora* full payment rule in light of its purpose, its context, and its effect on the poor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(a)(5) of the Federal Rules of Appellate Procedure because it is less than one-half the maximum length authorized by these rules for a party's principal brief.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

Dated: June 23, 2017 Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of this amicus brief was served on counsel for the appellee, Andrew E. Krause, by filing it with the CM/ECF system on June 23, 2017, of which he is a member. All counsel in the case are members of the CM/ECF system.

s/ T. Keith Fogg
T. Keith Fogg
Amicus Curiae

Dated: June 23, 2017

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of May, two thousand seventeen.

Before: Raymond J. Lohier, Jr.,
Circuit Judge.

John M. Larson,

Plaintiff - Appellant,

v.

United States of America,

Defendant - Appellee.

ORDER

Docket No. 17-503

The Legal Services Center of Harvard Law School Federal Tax Clinic filed an unopposed motion for leave to file an *amicus curiae* brief in support of Appellant and for an extension of time until June 23, 2017, to do so.

IT IS HEREBY ORDERED that the motion is GRANTED.

For the Court**:**

Catherine O'Hagan Wolfe,
Clerk of Court

Catherine O'Hagan Wolfe

UNITED STATES SECOND CIRCUIT COURT OF APPEALS