Life After Fior D'Italia: A New Proposal

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Life After *Fior D’Italia*: A New Proposal

The recent United States Supreme Court decision *United States v. Fior D’Italia* allows for the use of the aggregate estimation method to assess restaurant owner’s Federal Income Contribution Act (FICA) taxes. FICA taxes are employment taxes used to fund the Social Security and Medicare programs. FICA taxes consist of two portions: (1) the employee portion, which is withheld by the employer for the employee and (2) the employer’s portion, which is paid on behalf of the employee. The aggregate method allows the IRS to estimate a restaurant owner’s FICA tax liability by multiplying the average tips left on credit cards by the restaurant’s total receipts. The IRS favors the aggregate method because it decreases the tax gap and increases tax revenues. However, restaurant owners can be blindsided by unexpected tax liabilities under the aggregate method. The restaurant, Fior D’Italia, argued that the IRS lacked statutory authority to use this method. The restaurant contended that the IRS must first assess each individual employee to determine the employer’s FICA tax liability. The aggregate method has serious flaws, such as inaccurate tax liability determination, lack of statutory authority, and impeding the purpose of FICA taxes. In light of the *Fior D’Italia* decision, a new solution is now needed. This article proposes that restaurant owners should be required to track employees’ tips. This proposal will solve the problems associated with the aggregate method. In addition, the new solution will also provide several benefits, such as accurate and equitable tax liability determination and increased taxpayer compliance.

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I. INTRODUCTION

A. Wally the Winded Waiter

They came in waves throughout the entire night. The onslaught began at seven o’clock and did not end until well after midnight. Being an incoming freshman at the local university, and not from the area, Wally could not fathom the multitude of fanatics who had been fraternizing festively all day before the big game—all of whom now seemingly wanted a seat in his section at the Blackout Steakhouse. Despite his best efforts, he dumped a glass of water in a young lady’s lap, served two tables the wrong entrees, and inadvertently double charged another table. Needless to say, Wally received no tip from these tables. He was “stiffed.”

Blackout Steakhouse is an international corporation with restaurants predominantly located throughout the United States. The renowned restaurant chain employs over one thousand waiters,
waitresses, and busboys. While not on the verge of bankruptcy, Blackout's bottom line has seen better times.

Situations similar to Wally's are typical. In fact, Blackout executives estimate that approximately thirty waiters or waitresses are stiffed each night in their restaurants. While, the practice of customers "stiffing" waitpersons is an occupational hazard throughout the food and beverage industry, Blackout is not concerned. The restaurant still receives payment for the bill. Granted, diminished employee morale and possible loss of customers are worthy concerns. These costs are purely speculative though. However, after a recent visit from an Internal Revenue Service agent armed with a new weapon provided by a recent Supreme Court decision, Blackout should evaluate this situation with a greater amount of concern than previously thought.

B. Why the Concern?

In United States v. Fior D'Italia, the Supreme Court recently held that the aggregate estimation method to determine a restaurant owner's Federal Income Contribution Act (FICA) liability is permissible.1 The FICA tax consists of two parts, the employee portion2 and the employer portion.3 The employee portion is withheld by the restaurant owner/employer from the employees' wages, while the employer portion is the amount due from the employer for his employee(s). Due to the nature of the restaurant industry, a significant portion of certain restaurant employees’ pay, particularly waiters and busboys, is in the form of cash. Cash is inherently susceptible to under-reporting. The Internal Revenue Service (IRS) has attempted numerous times to control the problem of under-reporting. Consequently, many disputes have occurred between taxpayers and the IRS in this area.

In one attempt to control under-reporting by restaurant employees and resulting under-payment of taxes by employers, the IRS developed the aggregation method, also known as the aggregate

2. I.R.C. § 3101(a) ("In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages . . . received by him with respect to employment . . .").
3. I.R.C. § 3111(a) ("In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages . . . paid by him with respect to employment . . .").
estimation method or the aggregate method. The aggregation method of determining an employer’s FICA tax liability consists of multiplying the restaurant’s total receipts by a percentage determined by calculating the average tip left on credit card sales. The aggregate method appeals to the IRS primarily because the method decreases the tax gap. The tax gap is the difference between the amount of taxes owed and the amount of taxes actually paid. By collecting revenues that otherwise would not be reported, the IRS decreases this gap.

However, the aggregate method is not without problems. Concerns with the aggregate method include potential for an inaccurate tax liability determination, lack of statutory authority, and application of the method in other industries. Conversely, the method advocated by taxpayers and, arguably, statutorily required involves the IRS determining the FICA taxes of each individual employee before assessing the employer’s share.

After a split in the circuits, the two alternatives squarely confronted the Supreme Court in *Fior D’Italia* with the aggregation method emerging victorious but not without serious defects. Because of pervasive negative ramifications in this decision, such as IRS over-reaching and over-stated employer FICA tax liability assessments, a more viable solution is needed. This note traces the history of the aggregation method, explores the problems inherent in the method, and proposes an alternative solution that would result in accurate determinations of FICA liability for restaurant owners. This article proposes a revision to I.R.C. § 6001 and § 6053 requiring restaurant owners to keep track of their employees’ tips. Part II of this note discusses the historical evolution of the aggregate estimation method as it developed jurisprudentially. Part III analyzes the Court’s majority and dissenting opinions and identifies the problems created by the aggregation method. Part IV proposes an alternative solution, requiring restaurant owners to keep track of their employees’ tips, and details the advantages of using such a method relative to the aggregate method.

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4. For a discussion of the historical development of the aggregate method, see *infra* notes 8–57 and accompanying text.

5. Several federal circuits had previously held that the IRS could use the aggregate estimation method. See 330 West Hubbard Corp. v. United States, 203 F.3d 990 (7th Cir. 2000); Bubble Room, Inc. v. United States, 159 F.3d 553 (Fed. Cir. 1998); Morrison Restaurants, Inc. v. United States, 118 F.3d 1526 (11th Cir. 1997). The Ninth Circuit held that the IRS could not use the aggregate method in *Fior D’Italia, Inc. v. United States*, 242 F.3d 844 (9th Cir. 2001).

6. See *infra* note 143.

7. See *infra* note 144.
II. JURISPRUDENTIAL EVOLUTION OF THE AGGREGATE METHOD

A. Historical Perspective

The aggregate method did not appear in the IRS's arsenal overnight. The origin of the method dates back over forty years with the finished product cumulating in *Fior D'Italia*. Over the forty years, the method morphed through the jurisprudence into its current state. Courtesy of the result in *Fior D'Italia*, the aggregate method is currently a formidable arrow in the IRS's quiver. To better understand the magnitude of *Fior D'Italia*, a historical examination is needed.

A split in the circuits necessitated the granting of the petition for certiorari by the Supreme Court in *Fior D'Italia*. By tracing the historical development of the aggregate estimation method, one can better understand the issues that confronted the court in *Fior D'Italia* and recognize that a new solution is now needed. The aggregate estimation method can be traced to the following decisions: (1) *Mendelson v. Commissioner* and *Meneguzzo v. Commissioner*; (2) *McQuatters v. Commissioner*; (3) *Morrison Restaurants, Inc. v. United States*; (4) *Bubble Room, Inc. v. United States*; (5) *Quietwater Entertainment, Inc. v. United States*; and (6) *330 West Hubbard Restaurant Corp. v. United States*.

1. The Beginning: Mendelson and Meneguzzo

The origin of the aggregate estimation method is rooted in jurisprudence. Two 1960s cases, *Mendelson v. Commissioner* and *Meneguzzo v. Commissioner*, provide the method's underpinnings. In both cases, the court relied on section 446(b) of the Internal Revenue Code for authority to use an indirect method to estimate

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8. See supra note 5.
9. 305 F.2d 519 (7th Cir. 1962).
10. 43 T.C. 824 (1965).
11. 32 T.C.M. (CCH) 1122 (1973).
12. 118 F.3d 1526 (11th Cir. 1997).
13. 159 F.3d 553 (Fed. Cir. 1998).
15. 203 F.3d 990 (7th Cir. 2000).
16. 305 F.2d 519 (7th Cir. 1962).
17. 43 T.C. 824 (1965).
18. I.R.C. § 446(a) ("Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books."); id. § 446(b) ("If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the
income. The court in *Meneguzzo* commented that in absence of taxpayer records the IRS "... is authorized by section 446 to compute income in accordance with such method as ... does clearly reflect income." Mendelson and Meneguzzo both involved using an indirect method to estimate income of individuals.

2. McQuatters: Aggregate Method Approved if Logically and Factually Sufficient

With the holdings in Mendelson and Meneguzzo as bases, the Supreme Court visited the issue in 1975 in *McQuatters v. Commissioner of Internal Revenue*. McQuatters involved a tax dispute between waitresses at the Space Needle Restaurant and the IRS over the under-reporting of tip income. As in Mendelson and Meneguzzo, the confrontation in McQuatters occurred between the IRS and the employees and not between the IRS and the employer, Space Needle Restaurant.

In McQuatters, the Tax Court held an indirect aggregate estimation method to determine employees' tip income for income tax purposes permissible as long as the method was logically and factually sufficient. The court approved the formula involved in the method except for reducing the estimation percentage to account for tip-sharing with the other employees.

3. Morrison: McQuatters Against Employers and Punitive Element Acknowledged

Equipped with ammunition provided by the McQuatters decision, the IRS extended the application of the aggregate estimation method to employers and FICA tax determinations in *Morrison Restaurants*, computation of taxable income shall be made under such method as, in the opinion of the Secretary, does clearly reflect income.

21. Id.
22. The specific formula approved by the Tax Court involved the following details: (1) total sales of food and beverages for the restaurant were reduced by ten percent to allow for low or non-tippers and for sharing among other employees (2) the amount calculated in (1) divided by the total number of hours worked by all waitresses during the year in question to determine a sales per-waitress-hour average (3) the resulting average was multiplied by the number of hours worked each year by each waitress to determine yearly sales for each waitress (4) the yearly sales for each waitress was then multiplied by twelve percent to determine the tip income of each waitress. Id.
23. Id.
Inc. v. United States

Previously, courts had only used an aggregate estimation method to determine employees' income tax liability. The IRS investigated one of Morrison's restaurants, Ruby Tuesday, resulting in an additional assessment of employer FICA taxes for unreported tips in 1990 and 1991. The assessment was based on a modified McQuatters formula. Morrison contended that the IRS lacked the statutory authority to utilize an aggregate estimation method. Thus, the focus primarily centered on statutory interpretation.

Morrison's statutory authority claim rested on the contention that, in view of Congress's silence, the IRS lacked the power to assess the employer's share of FICA taxes without determining the individual employees' unreported tips. Conversely, the IRS claimed that the authority existed under § 3121(q), § 3101, and § 3111. I.R.C. § 3121(q) is a definitional section providing that "wages" include "tips" received by an employee during the course and scope of his employment. I.R.C. § 3101 imposes the employee's share of FICA tax liability, while § 3111 imposes the employer's share. The latter two provisions are located in different subchapters. In ruling statutory authority existed, the United States Court of Appeals for the Eleventh Circuit relied on congressional intent evidenced by separation of the provisions into different chapters. The Court reasoned that this separation indicated that the employer's and employee's obligations could be imposed separately.

Also, the Court implied that a punitive element was a possible prerequisite for using the McQuatters formula. The Court noted that the employer only informed employees that they were required to report tips. The Court voiced concern that calculating employer FICA tax exclusively on employees reported tips would result in an incentive to the employer to discourage or ignore tip reporting. This conduct would result in the employer paying less tax. This implied

24. 118 F.3d 1526 (11th Cir. 1997).
25. Id. at 1527.
26. Id. at 1528.
27. Id.
28. Id.
29. Id. at 1529.
30. Id.
31. See supra note 2 (text reproduction).
32. See supra note 3 (text reproduction).
33. Morrison, 118 F.3d at 1529.
34. Id.
35. Id. at 1527.
36. Id. at 1530.
37. Id.
punitive element was then addressed by the United States Court of Appeals for the Federal Circuit.

4. Bubble Room: Notion of Punitive Requirement Shunned

In addition to Morrison, the United States Court of Appeals for the Federal Circuit visited the aggregate estimation issue in Bubble Room, Inc. v. United States. In a similar factual situation to Morrison, the court in Bubble Room allowed the use of the McQuatters formula to determine a restaurant owner’s FICA tax liability. The restaurants in Bubble Room encouraged employee tip reporting by informing the employees of the obligation to report tips. The restaurants also distributed an employee policy manual outlining the employees’ reporting responsibilities to the IRS. Despite these attempts to encourage employee tip reporting, the Court ruled in favor of the IRS.

As in Morrison, the decision focused on the existence of statutory authority to assess FICA tax liability using the McQuatters formula. In finding authority existed, the Court relied on section 3121(q) of the Internal Revenue Code, as did the court in Morrison. In addition, the Court emphasized the importance of section 6201. Section 6201 provides that the IRS is “authorized and required to make the inquiries, determinations, and assessments...which have not been duly paid...in the manner provided by law.” Thus, according to the court, “I.R.C. § 6201 implicitly authorizes the IRS to use an indirect formula in order to carry out the general power granted in I.R.C. § 6201.”

Significantly, the Court in Bubble Room rejected the notion of a punitive element as a prerequisite for the McQuatters formula. The taxpayer in Bubble Room encouraged employees to report their tip income as opposed to ignoring the problem. In rejecting the punitive element prerequisite, the court cleared any ambiguity and expanded the use of the aggregate estimation formula. The court expanded the formula to evident instances of tax underpayment, regardless of whether the employer attempted to promote employee tip reporting. This extension is readily apparent compared to the

38. 159 F.3d 553 (Fed. Cir. 1998).
39. Id. at 558.
40. Id.
41. Id.
42. Id. at 565.
43. Id.
44. Id.
45. Id.
46. Id. at 558.
Morrison court’s reasoning. In approving the aggregate method, the Morrison court emphasized that the restaurant owner only informed employees that they are required to report all tips, while noting that the employer did not perform other more encouraging procedures.  

5. Quietwater Entertainment: Moral Victory for the Taxpayer

Along with Morrison and Bubble Room, a Florida District Court visited the aggregate estimation method in Quietwater Entertainment, Inc. v. United States. Quietwater provided a small victory for the taxpayer by holding that a modified McQuatters formula is not allowable. “Although . . . reversed and vacated in part without a published opinion, the district court’s opinion is instructive.” The court illuminated the deficiencies in the McQuatters estimation formula. Particularly, the court emphasized that the formula did not take into account wage band considerations and was lacking in statutory support. These exposed weaknesses later served as formidable weapons for the taxpayer in Fior D’Italia.

6. 330 West Hubbard Restaurant Corporation: Employee Tip Amounts Known

The final case with a significant impact on the Fior D’Italia decision is 330 West Hubbard Restaurant Corp. v. United States. The IRS scored another victory in West Hubbard as the United States Court of Appeals for the Seventh Circuit affirmed the district court’s decision allowing the aggregate method. West Hubbard Restaurant Corporation owned the eating establishment Coco Pazzo. After comparing Coco Pazzo’s reported charge tips to employees reported, the IRS determined that Coco Pazzo had a large FICA tax deficiency for 1993-1995. The IRS then assessed the restaurant using the aggregate method.

47. Id. at 572 (Plager, J., dissenting) (citing Morrison, 118 F.3d 1526, 1527).
50. Id.
51. See infra notes 127–130 and accompanying text for a discussion of wage band exceptions and an explanation of tip amounts that are erroneously included in FICA tax calculations under the aggregate method.
52. Peckron, supra note 49, at 12.
53. Id. at 13.
54. 203 F.3d 990 (7th Cir. 2000).
55. Id. at 993.
Essentially, the facts in *West Hubbard* are the same as the previous cases with one distinction. Coco Pazzo collected all employee tips, cash and credit card, each day and redistributed the tips at the end of the week.\(^5\) Thus, unlike the restaurant owner/employer in the previously discussed cases, Coco Pazzo actually knew the amount of total tips the employees were receiving.\(^5\)

### III. DISSECTING THE OPINION AND IDENTIFYING PROBLEMS WITH THE RESULT

#### A. The IRS's Key Victory: *United States v. Fior D'Italia*

In *Fior D'Italia*, the stage was set for the Supreme Court to decide the permissibility of the aggregate method. Ultimately, the Court held that the aggregate method was permissible. However, before analyzing the result, a brief recitation of the facts is necessary.

In 1991 and 1992, the San Francisco restaurant Fior D'Italia reported tip income of $247,181 and $220,845, respectively.\(^5\) These amounts, which were used to calculate the restaurant's FICA liability, were determined from reports provided to Fior D'Italia by the restaurant's employees.\(^5\) Because of a discrepancy between the tips reported by employees versus tips reported on charge slips, the IRS conducted a compliance check.\(^6\) This check resulted in a notice and demand to Fior D'Italia, the employer.\(^6\) The IRS eventually assessed Fior D'Italia for additional FICA taxes.\(^6\) The IRS calculated the assessment using an aggregate estimation method.

First, the IRS examined the credit card slips for 1991 and 1992, noting that customers tipped approximately 14.49% of their bills in 1991 and 14.29% in 1992.\(^5\) Next, the IRS simply multiplied these percentages by the restaurant's total receipts to determine total tips.\(^5\) This calculation resulted in $403,726 of tips in 1991 and $368,374 in 1992.\(^5\) Actual tips reported by employees amounted to $247,181 for

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56. *Id.*

57. *Id.*


59. *Id.*


61. *Id.*


63. *Id.*

64. *Id.*, 122 S. Ct. at 2122.

65. *Id.*
1991 and $220,845 for 1992.\textsuperscript{66} The difference, \textit{i.e.} the unreported amount, between the IRS calculation and the actual reported tips equaled $156,545 for 1991 and $147,529 for 1992. Based on these unreported variances, the IRS issued an assessment against the restaurant for additional FICA taxes owed.\textsuperscript{67} Litigation soon followed with the District Court ruling in favor of Fior D'Italia. The Court held the aggregate method impermissible.\textsuperscript{68} The Court of Appeals for the Ninth Circuit affirmed, creating a split in the circuits. The Supreme Court granted the Government's petition for certiorari.\textsuperscript{69} The Supreme Court ultimately ruled in the IRS's favor approving the use of the aggregate estimation method for determining an employer's FICA tax liability.\textsuperscript{70}

\section*{B. Fior D'Italia: Supreme Court Approves Aggregate Method}

\subsection*{1. IRS is the Victor: The Majority Opinion}

In ruling for the IRS and allowing use of the aggregate estimation method, the Supreme Court in \textit{Fior D'Italia} refuted five key arguments. The Court began by acknowledging that section 6201 of the Internal Revenue Code provides the IRS with the authority "to make the inquiries, determinations, and assessments of all taxes... which have not been duly paid..."\textsuperscript{71} Also, the Court noted that this provision must simultaneously grant the IRS power to decide how to make the assessment, including using reasonable estimates.\textsuperscript{72} Fior D'Italia did not challenge this principle but argued that the principle did not apply to their situation.\textsuperscript{73}

First, Fior D'Italia made a statutory construction argument. Fior D'Italia contended that section 3121(q) of the Internal Revenue Code "refers to 'tips' as those 'received by an employee in the course of his employment,' \textit{i.e.}, to tips received by each employee individually."\textsuperscript{74} Fior D'Italia emphasized the reference to the employee in the singular as a basis for concluding that the employer's FICA tax liability attaches to each individual payment and not when the payments are later summed and reported.\textsuperscript{75} Justice Breyer eloquently sidestepped

\begin{itemize}
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Id. at 242, 122 S. Ct. at 2122.
\item \textsuperscript{69} United States v. Fior D'Italia, Inc., 534 U.S. 1102, 122 S. Ct. 865 (2002)
\item \textsuperscript{70} Fior D'Italia, 536 U.S. at 242, 122 S. Ct. at 2122.
\item \textsuperscript{71} Id. at 243, 122 S. Ct. at 2122 (citing I.R.C. § 6201).
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Id. at 244, 122 S. Ct. at 2123.
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id. (citing Brief for Respondent at 28).
\end{itemize}
this argument, noting that it "makes too much out of too little."\textsuperscript{76} The Court reasoned that the provision relied on by Fior D’Italia is a definitional section; however, the operational section, section 3111, speaks in the plural.\textsuperscript{77} The Court concluded that the statutory language, as a whole, does not support an argument against using an aggregate estimation method to determine a restaurant owner’s FICA tax liability.\textsuperscript{78}

Next, the Court disposed of a negative implication argument relied on by the Ninth Circuit.\textsuperscript{79} The Ninth Circuit relied on two I.R.C. sections, sections 446(b) and 6205(a)(1), to contend that the Code negatively implies a lack of authority to use an aggregate estimation method to determine employer FICA taxes.\textsuperscript{80} The Ninth Circuit reasoned that section 446(b) had been interpreted to authorize the IRS to use estimation methods for determining income tax liability.\textsuperscript{81} Then, the Ninth Circuit further reasoned by negative implication that an aggregate estimation method could not be used to determine liability for other taxes, such as FICA taxes.\textsuperscript{82} However, the Supreme Court disagreed with the Ninth Circuit, finding no negative implication. The Supreme Court noted that reading § 446 negatively would significantly limit the IRS’s authority both in and outside the field of income tax law.\textsuperscript{83} The Court found no reason to believe Congress intended such a limitation.\textsuperscript{84} Indeed, Fior D’Italia did not advance the negative implication argument relied on by the Ninth Circuit before the Supreme Court.\textsuperscript{85}

In addition to the statutory construction argument, Fior D’Italia also contended that the aggregate estimation method was unreasonable. To support this contention, Fior D’Italia offered two reasons. First, Fior D’Italia argued that an aggregate estimation method sometimes includes tips that should not be used in calculating an employer’s FICA tax.\textsuperscript{86} Second, Fior D’Italia contended that an aggregate estimation method based on credit card slips can result in overstated employer FICA tax liability.\textsuperscript{87} Fior D’Italia argued the overstatement can occur because an aggregate calculation based on

\textsuperscript{76.} Id. \\
\textsuperscript{77.} Id. \\
\textsuperscript{78.} Id. at 245, 122 S. Ct. at 2123. \\
\textsuperscript{79.} Id. \\
\textsuperscript{80.} Id. \\
\textsuperscript{81.} Id. \\
\textsuperscript{82.} Id. \\
\textsuperscript{83.} Id., 122 S. Ct. at 2124. \\
\textsuperscript{84.} Id. at 246, 122 S. Ct. at 2124. \\
\textsuperscript{85.} Id. \\
\textsuperscript{86.} Id. See infra notes 127–130 and accompanying text, for analysis of tips that should not be included in employer FICA tax determinations. \\
\textsuperscript{87.} Fior D’Italia, 536 U.S. at 247, 122 S. Ct. at 2124.
credit card slips does not account for realistic possibilities in the food and beverage industry.\footnote{88} The Court disagreed with Fior D’Italia, noting that a taxpayer is free to present evidence that a calculation is inaccurate.\footnote{89}

Fior D’Italia’s next argument focused on fairness and an IRS regulation. The regulation provides that an employer must only include employees’ reported tips when calculating employer FICA tax.\footnote{90} Fior D’Italia questioned how an employer could have a tax calculated on tips reported and tips received but not reported.\footnote{91} Presumably with this regulation as support, Fior D’Italia only reported FICA tax based on tips reported by employees.\footnote{92} Based on this logic, Fior D’Italia contended that assessing the tax deficiency based on reported tips and received but unreported tips was extremely unfair.\footnote{93} However, the Court dispelled this argument by noting that I.R.C. § 3121(q) responds to Fior D’Italia’s concern.\footnote{94} The Court noted that the statute provides that received but unreported tips shall not be considered paid by the employer until the date notice and demand for the taxes is made by the Secretary to the employer.\footnote{95} The Court concluded that assessing a tax deficiency on the unreported tips was not unfair.\footnote{96} The Court reasoned that penalties would not attach and interest would not accrue unless the IRS demands the money and the taxpayer refuses to pay the amount.\footnote{97}

Finally, the Court considered an abuse of power argument by Fior D’Italia.\footnote{98} Fior D’Italia contended that the aggregate method would allow the IRS to threaten restaurant owners, such as reopening back tax years.\footnote{99} Consequently, Fior D’Italia suggested that this threat of power would result in restaurant owners forcing their employees to report all tips.\footnote{100} The Court rejected this argument stating that Fior D’Italia’s abuse argument discussion was insufficient to show the aggregate method was prohibited by law.\footnote{101} The Court further added

\begin{itemize}
  \item \footnote{88} Id. See also infra notes 141–142 and accompanying text, for an analysis of these possibilities.
  \item \footnote{89} Fior D’Italia, 536 U.S. at 247, 122 S Ct. at 2125.
  \item \footnote{90} Id. at 248, 122 S. Ct. at 2125 (citing IRS regulation, 31.6011(a)-1(a)).
  \item \footnote{91} Id. at 249, 122 S. Ct. at 2125 (citing Brief for Respondent at 16–17).
  \item \footnote{92} Id. (citing Brief for Respondent at 16–17).
  \item \footnote{93} Id.
  \item \footnote{94} Id.
  \item \footnote{95} Id., 122 S. Ct. at 2126 (citing I.R.C. § 3121(q)).
  \item \footnote{96} Id.
  \item \footnote{97} Id. (citing Rev. Rul. 95-7, 1995-4 I.R.B. 44).
  \item \footnote{98} Id. at 250, 122 S. Ct. at 2126.
  \item \footnote{99} Id. at 251, 122 S. Ct. at 2126 (citing Brief for Respondent at 14).
  \item \footnote{100} Id. (citing Brief for Respondent at 14).
  \item \footnote{101} Id. at 252, 122 S. Ct. at 2127.
\end{itemize}
that Fior D'Italia remained free to assert policy-related arguments to Congress.\textsuperscript{102}

2. Dissenting Opinion

Justice Souter wrote the dissenting opinion which was joined by Justices Scalia and Thomas. Justice Souter focused on five primary areas in the dissent. First, Justice Souter noted that the aggregate estimation method created a problem with crediting employees for amounts earned for purposes of the Social Security system.\textsuperscript{103} The dissent reasoned that the aggregate method results in a disproportion between the employee’s ultimate benefits and the employer’s tax.\textsuperscript{104} This effect occurs because an aggregate assessment does not update the earnings records of the individual employees for whose benefit the taxes are purportedly collected.\textsuperscript{105}

Secondly, the dissent noted the tendency of the aggregate method to result in an inaccurate and inflated FICA tax liability determination.\textsuperscript{106} The dissent focused on the questionable assumptions involved in using the method, such as every patron tipping and tipping the calculated percentage.\textsuperscript{107} The dissent also mentioned that the aggregate method ignores the wage band entirely.\textsuperscript{108}

The dissent’s third argument related closely with the court’s fifth contention. The third argument centered on the unfairness of expecting employers to keep reports necessary to refute any contested assessment based on an aggregate estimate.\textsuperscript{109} The dissent noted that the only way an employer can refute probable inflation by estimate is to keep track of every employee’s tips.\textsuperscript{110} This contention led to the dissent’s final argument that Congress’s intent has always been to refuse to place the reporting burden for FICA taxes on employers.\textsuperscript{111}

The dissent’s fourth argument identified a procedural problem inherent in the aggregate method. Typically, tax collection involves an assessment of the tax liability followed by a notice of the assessment and demand for payment.\textsuperscript{112} An assessment is simply the formal recording of a tax liability. However, under the aggregate method, this code-mandated procedure is reversed with notice and

\begin{itemize}
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} Id. at 254, 122 S. Ct. at 2128.
  \item \textsuperscript{104} Id.
  \item \textsuperscript{105} Id.
  \item \textsuperscript{106} Id. at 255, 122 S. Ct at 2129.
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id.
  \item \textsuperscript{111} Id. at 261, 122 S. Ct. at 2132.
  \item \textsuperscript{112} I.R.C. §§ 6201 & 6303.
\end{itemize}
demand preceding assessment. This anomaly occurs because the employee does not report the tips to the employer in the first place. It is the report and not the employee’s receipt of tips that raises the employer’s liability to pay the FICA tax. Therefore, some event must trigger FICA tax liability on unreported tips before the IRS can make an assessment. This event turns out to be notice and demand. However, procedurally this result is incorrect. Assessment should precede notice and demand.

C. The Aggregate Method: The Problems

After Fior D’Italia, the IRS may now use the aggregate method to estimate an employer’s FICA tax liability. Although convenient, difficulties abound in using the estimation-based method. Identifying and analyzing the problems associated with the aggregate method will foster an appreciation and a desire for a better solution that serves the interest of the IRS as well as the taxpayer. Significant problems with the aggregate method are as follows:

1. Statutory Authority

One of the largest criticisms of the aggregate method is the lack of statutory authority. Opponents of the method, including Fior D’Italia, argue that no code provision exists that provides explicit authority to use the aggregate method. As the court in West Hubbard correctly noted, no statute expressly authorizes or prohibits the IRS from using the aggregate method. Thus, the issue then surrounds statutory construction and interpretation. The applicable Internal Revenue Code statutes in this area are sections 3101, 3111, 3121, 6201, and 446. Courts have placed hefty reliance on the specific

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114. *Id.* at 258, 122 S. Ct. at 2130.
115. *Id.*
116. *Id.* at 259, 122 S. Ct. at 2131.
117. *Id.*
118. 330 West Hubbard Restaurant Corp. v. United States, 203 F.3d 990, 995 (7th Cir. 2000).
119. *Id.*
120. Section 6201(a) of the Internal Revenue Code provides assessment authority:

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law.

I.R.C. § 6201.
location in the I.R.C. of the employer and employee FICA obligations to support the use of the aggregate method.\textsuperscript{121} I.R.C. § 3101, which imposes the employee’s share, is located in Subchapter A. I.R.C. § 3111, which imposes the employer’s portion, is located in Subchapter B. Specifically, the \textit{Morrison} court noted, “The separation of the provisions into different parallel subchapters suggests that Congress contemplated that employees’ and employer’s shares could be imposed separately.”\textsuperscript{122} In \textit{Fior D’Italia}, the Court did not clarify the issue but, instead, left the water muddied. The court’s interpretation creates a series of statutory anomalies.\textsuperscript{123} After \textit{Fior D’Italia}, these anomalies will persist until Congress legislates.\textsuperscript{124} Also, because no statute expressly provides authority for the IRS to employ the aggregate method, courts have been forced to read implied authority\textsuperscript{125} into § 6201 to justify use of the aggregate method.\textsuperscript{126}

2. Wage Band

In addition to the statutory authority issue, critics of the aggregate assessment also contend that the method does not account for two statutorily provided FICA tax exceptions known collectively as the “wages band.”\textsuperscript{127} Generally, according to § 3121(q), tips are treated as wages for both the employee and employer for purposes of FICA tax determination.\textsuperscript{128} The “wages band” exceptions are provided by sections 3121(a)(1) and 3121(a)(12)(B) of the Internal Revenue Code.\textsuperscript{129} Section 3121(a)(1) states that “wages” does not include compensation in excess of the contribution and benefit base. Secondly, section 3121(a)(12)(B) provides that “wages” does not include cash tips of less than twenty dollars per month received by an employee. “Thus, . . . tips received by an individual employee are

\begin{itemize}
  \item \textsuperscript{121} Morrison Restaurants, Inc. v. United States, 118 F.3d 1526, 1529 (11th Cir. 1997).
  \item \textsuperscript{122} \textit{Id.}
  \item \textsuperscript{124} \textit{Id.} at 111.
  \item \textsuperscript{125} Implied authority is authority given to the agent as a result of the principal’s conduct, such as the principal’s earlier acquiescence to the agent’s actions. Black’s Law Dictionary 53. In this context, the court is considered an agent of the legislature. As such, the court(s), in allowing the use of the aggregate method, consider the statutory authority needed to permit the method to be implied since no statute expressly provides authority.
  \item \textsuperscript{126} See \textit{supra} notes 42-45 and accompanying text, for a discussion concerning the existence of implied authority.
  \item \textsuperscript{127} Bubble Room, Inc. v. United States, 159 F.3d 553, 555 (Fed. Cir. 1998).
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} \textit{Id.}
\end{itemize}
treated as 'wages' only if the employee received at least $20 of tips in a particular month ... and the employee has not already received tips and other remuneration during the year in excess of the annual wage limitation . . . "\textsuperscript{130}

However, since the aggregate method is estimation based, these two statutory exceptions are not taken into consideration. As a result, FICA tax assessments determined using the aggregate method can easily be overstated.

3. Purpose of FICA Taxes Thwarted

The claimed authority to use the aggregate method by the IRS would impede the original purpose of FICA taxes, which is to provide individuals with protection under the social security system.\textsuperscript{131} Congress chose earned wages as the basis for calculating the benefits to be received.\textsuperscript{132} Authorizing an assessment using an aggregate estimation method, while not requiring the Service to make an income determination of each individual employee, creates two problems. First, employees' wage earnings credits for tips could not be credited to those employees.\textsuperscript{133} Second, "...assessing employer FICA taxes on tip income while failing to credit employees for tip earnings distorts FICA into a general welfare tax and provides a windfall for the government."\textsuperscript{134}

4. Concern of Applying the Estimation-Based Method into Other Industries

Armed with confidence from the \textit{Fior D'Italia} victory, the IRS may attempt to pursue other industries more boldly. This concern prompted the American Gaming Association (AGA) to file an amicus curiae brief in support of \textit{Fior D'Italia}.\textsuperscript{135} AGA members employ a large number of workers who receive tip income in the course of their employment, including casino gaming employees, food and beverage workers, hotel staff and parking valets.\textsuperscript{136} Due to the large number of tipped employees, AGA members have a "direct and substantial interest" in the issue of the validity of the aggregate estimation

\textsuperscript{130} \textit{Id.}
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.} at 23.
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} Brief of Amicus Curiae for the American Gaming Association in Support of Respondent, \textit{Fior D'Italia}, 536 U.S. 238, 122 S. Ct. 2117.
\textsuperscript{136} \textit{Id.} at 2.
method. As indicated by the AGA’s amicus brief, other industries are concerned and have vested interests in the *Fior D’Italia* decision. The *Fior D’Italia* decision will likely result in pervasive effects in these other industries. The IRS will potentially use this decision to collect employer FICA tax liability in any industry with a significant number of tipped employees. To prevent a broad application of the inherently inaccurate aggregate estimation method, a more viable alternative that clearly delineates boundaries for the IRS is needed.

5. How to Calculate Aggregate Estimates for Unreported Tips

Although the court held the aggregation estimation method permissible, the Court did not provide any specific guidelines as to how the method should be calculated. Since *Fior D’Italia* did not challenge the accuracy of the estimation, the court did not reach the issue.

6. Inaccuracy

More importantly, the aggregate estimation method results in inaccurate and possibly overstated FICA tax liability. This inaccuracy occurs because the aggregate method does not account for the following possibilities:

(a) Customers tipping the same percentage regardless of whether the tip is cash or credit card.
(b) Waiters and waitresses always being “tipped” and not “stiffed.”
(c) Customers paying with a credit card tip always leave the full amount of the tip and do not receive cash back resulting in a lower net amount.
(d) Restaurants not deducting the credit card company fee from the tip resulting in a lower net amount.

These possibilities are common occurrences in the food and beverage industry. When assessing employers’ FICA tax liability, a method that considers these possibilities should be used to ensure accurate and not over-stated tax liability determination. Simply stated, the

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137. *Id.*
138. Other concerned industries are those industries with a significant number of tipped employees, such as the hotel and airline industries.
139. Crowson, *supra* note 123, at 111.
140. *Id.*
Court in *Fior D'Italia* left unanswered the following question: "what would constitute a reasonably accurate calculation when using aggregate estimates of unreported tips." Thus, a solution that either answers or eliminates the necessity of that question is needed. The following proposal results in the latter.

IV. THE PROPOSAL: REQUIRING RESTAURANT OWNERS TO TRACK EMPLOYEE TIPS

A new more viable alternative is needed that adequately addresses and, hopefully, alleviates the issues surrounding the aggregate estimation method. The alternative proposed in this note accomplishes these objectives. The proposed solution is as follows: Congress should revise sections 6001 and 6053 of the Internal Revenue Code and require restaurant owner/employers to keep track of their employees’ tips.

A. The Specific Language

Sections 6001 and 6053 are the two primary sections of the Internal Revenue Code dealing with the employer’s reporting obligations for employee tips. The specific language is as follows:

142. Crowson, supra note 123, at 111.

143. I.R.C. § 6001 (“The only records which an employer shall be required to keep under this section in connection with charged tips shall be charge receipts, records necessary to comply with section 6053(c), and copies of statements furnished by employees under section 6053(a).”).

144. I.R.C. § 6053(a) (“Every employee who, in the course of his employment by an employer, receives in any calendar month tips which are wages . . . shall report all such tips in one or more written statements furnished to his employer on or before the 10th day following such month. Such statements shall be furnished by the employee under such regulations, at such other times before such 10th day, and in such form and manner, as may be prescribed by the Secretary.”). Section 6053(c)(1) provides the following additional employer reporting requirements for large restaurants:

In the case of a large food or beverage establishment, each employer shall report to the Secretary . . . the following information with respect to each calendar year:

(A) The gross receipts of such establishment from the provision of food and beverages (other than nonallocable receipts).

(B) The aggregate amount of charge receipts (other than nonallocable receipts).

(C) The aggregate amount of charged tips shown on such charge receipts.

(D) The sum of:

(i) the aggregate amount reported by employees to the employer under subsection (a), plus

(ii) the amount the employer is required to report under section 6051 with respect to service charges of less than 10 percent.

(E) With respect to each employee, the amount allocated to such employee under paragraph (3).

I.R.C. § 6053(c)(1).
responsibilities for employee FICA taxes. Employees of large food and beverage establishments have a required eight percent tip allocation.\footnote{145. Section 6053(c)(4) defines a large food and beverage establishment as any trade or business "which provides food or beverages . . . with respect to which the tipping of employees serving food or beverages by customers is customary, and . . . which normally employed more than 10 employees on a typical business day during the preceding calendar year." I.R.C. § 6053.} In light of the Fior D'Italia decision, § 6001 and § 6053 should be revised to place the employee FICA tax reporting responsibility on the employers. Specifically, § 6001 should be revised to state, "Employers shall be required to keep records of cash and charged tips to employees."

Theoretically, the proposed revision is sound, but one might question the practicality of the suggested change. However, doubters should not worry; the implementation of the proposed revision is feasible. With respect to larger restaurants, such as Blackout and Fior D'Italia, technology already exists within many of them that would allow for a relatively painless transition. Without delving into minutiae, restaurant managers, while performing their other duties, could pick up the cash tips or credit card receipts and input the tip amount for the corresponding employee into a spreadsheet program. This password-protected program would automatically calculate each employees' tips for a certain time period. Employees would be instructed not to remove tips from tables under any circumstances. While susceptible to inaccuracies due to theft or other uncontrollable factors, this method would provide an extremely accurate tip determination.

For smaller establishments and those businesses that do not have the technological infrastructure to implement a similar system, the proposed method is still feasible. For those businesses without computers, the tip recording could be done manually. Concededly, implementation of the proposed solution will be more difficult for some establishments than for other restaurants. However, these relatively minor difficulties do not outweigh the benefits obtained by using the suggested method.

\section*{B. In Comparison to the Aggregate Estimation Method}

The proposed method will resolve the problems\footnote{146. See supra notes 118--142 and accompanying text, for a discussion of problems created by the aggregate estimation method.} created by the aggregate method. In addition, the proposed solution also offers several key advantages.

First, the aggregate method will eliminate the statutory authority issue. Since the proposed solution would be expressly authorized by
statute, no issues regarding statutory authority would exist. Consequently, statutory construction and interpretation problems would also be eliminated.

Secondly, wage band concerns will be eliminated. Under the suggested method, the wage band exceptions will be effective. This effect will occur because the suggested method will result in an accurate tip determination for each employee. This accurate tip determination will enable restaurant owners to identify those employees who earned less than $20/month in tips and who earned income in excess of the annual wage limitation.\textsuperscript{147}

Thirdly, the purpose of FICA Taxes will not be impeded. Both issues surrounding the purpose of the FICA tax, not crediting employees wage earnings credits and distorting the FICA tax into a general welfare tax, would be resolved. Since requiring employers to keep track of employees tips would result in accurate documentation for each employee, credits could be applied correctly. In turn, the FICA tax would not be distorted into a general welfare tax. Also, the purpose of the FICA tax, which is to provide individuals with protection under the Social Security system, would be furthered under the proposed method and not constrained as under the aggregate estimation method.

Fourthly, application of the estimation-based method into other industries would not be a concern. The suggested solution will be specifically designed and intended for the food and beverage industry. Limiting the proposal to the food and beverage industry is necessary because implementation in other industries would not be feasible. For example, in the airlines industry, skycaps\textsuperscript{148} receive tips as a primary source of income. However, the tips are given directly to the skycap and not left on the table or a credit card. Tracking these tips would be practically impossible. A similar situation exists in the hotel industry with bellhops. Thus, absent legislation providing otherwise, the IRS will be restricted from applying the method into other industries.

In addition, uncertainty in calculating aggregate estimates for unreported tips would no longer be an issue. The proposed method requires no estimation. Thus, uncertainty surrounding the calculation would not exist.

Finally, unlike the aggregate estimation method, the proposed alternative will result in an accurate determination of FICA tax liability. Since the proposed solution is not estimation based, the

\textsuperscript{147} See \textit{supra} notes 127–130 and accompanying text for a discussion of the wage band exceptions.

\textsuperscript{148} Skycaps are airline employees who assist travelers in loading and unloading baggage.
method will account for the realities of the food and beverage industry, such as the stiffing of waiters. Under the proposed method, employers and employees will pay the correct amount of tax, fostering confidence in the tax system and increasing taxpayer compliance as well.

C. Advantages of the Proposed Method

(a). Fairness—In addition to providing a more accurate determination of FICA tax liability, the proposed solution is more equitable than the aggregate estimation method. Fairness is a vital characteristic for maintaining the legitimacy of taxpaying.\(^{149}\) The suggested alternative is more equitable because employers will pay the correct amount of FICA tax as opposed to an incorrectly estimated amount. Also, currently, one restaurant owner who is not audited would pay only FICA tax based on his employees' reported tips. At the same time, another restaurant owner who is audited could be assessed a possibly overstated FICA tax liability using the aggregate estimation method. Assuming both employers' conduct is similar, this disparate treatment is unfair. Equitable concerns dictate a solution resulting in comparable treatment of both employers and a correct liability determination. The proposed solution accomplishes these objectives.

As a result of the increased equity, one can also expect an increase in taxpayer compliance or, alternatively, less compliance difficulties.\(^{150}\) One commentator provides support for this contention noting that allocating a tax based on guesswork among a group of individuals who are aware of the treatment, while giving relief to others, might result in greater compliance problems.\(^{151}\) Providing further support, another commentator contends taxpayers spend less time reporting when they feel that taxes are unfair.\(^{152}\) These taxpayers might also be motivated to produce what they perceive to be an equitable outcome even if this conduct is illegal.\(^{153}\) Similar effects on taxpayer behavior could result from the aggregate estimation method.

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150. This positive relationship between fairness and taxpayer compliance was noted in the ABA Report and Recommendations on Taxpayer Compliance, 41 Tax Lawyer 329 [hereinafter The Committee Report]. See also Steven M. Sheffrin & Robert K. Triest, *Can Brute Deterrence Backfire*, in *Why People Pay Taxes* 193, 194 (Joel Slemrod ed., 1992) (Evidence suggests that perceptions of the fairness of the tax system does influence taxpayer compliance behavior).
152. See Carroll, *supra* note 149, at 47.
153. *Id.*
"In short, people may be motivated to work hard to report accurately and pay what they owe by their sense that the laws and their application are fair in terms of...the process of tax reporting and paying, and the way they are treated by the IRS." Increased equity and related taxpayer compliance are two key benefits that support the proposed legislation requiring employers to keep track of employees' tips.

(b). Accuracy—In addition to fairness, another advantage of the suggested proposal is an accurate FICA tax liability determination. This effect is consistent with one of the IRS's key goals. "The objective is not simply to collect as much possible in taxes, but rather to collect the correct amount in taxes." Because the aggregate method does not account for common occurrences in the food and beverage industry, the aggregate estimation method does not result in an accurate tax liability calculation. However, requiring employers to keep track of employees' tips would ensure such accuracy because the calculation would not be based on inherently inaccurate estimations. The proposed solution is also a better method than the method in place before the aggregate estimation method. Prior to the aggregate estimation method, employers often underpaid FICA liability due to employees' under-reporting. Therefore, the suggested alternative would provide a more accurate FICA tax liability determination than the aggregate estimation method or the previous method.

One can also expect a related effect on taxpayer compliance as a result of an accurate liability determination. An instinctively correct method of taxation will increase taxpayer compliance. One commentator provides insight relating to the importance of compliance and accuracy noting, "Taxpayers must share a genuine belief in the importance of taxpayer compliance and the ability of the taxing system to assess and collect the correct amount of tax from every taxpayer." Requiring employers to keep track of employees' tips will increase compliance because restaurant owners will know intuitively that they are paying the correct amount of tax. They will know that this method provides an accurate FICA tax liability

154. Id.
155. The Committee Report, supra note 150, at 339.
156. This effect is similar to the effect on taxpayer behavior resulting from a more equitable method. For a detailed analysis, see supra notes 149–154 and accompanying text.
determination for every restaurant owner, and this knowledge will then increase compliance.

(c). Decrease tax gap—With limited success, both the IRS and Congress have attempted to reduce the tax gap. Although Congress enacted legislation in the early 1980s specifically designed to reduce the tax gap, it has dramatically increased.\textsuperscript{159} Also in the 1980s, the IRS initiated an attempt to recover the tax gap by including a balanced strategy incorporating modifications to existing IRS programs.\textsuperscript{160} These attempts have had some success, but the tax gap is still a problem, particularly in the unreported tip area. Recent estimates show a 5 to 10 billion dollar gap in all industries on unreported tip income.\textsuperscript{161}

Continuing to address the problem, the IRS has initiated two types of voluntary tip reporting programs. The first program is the Tip Report Alternative Commitment Program (TRAC), and the second is the Tip Rate Determination Agreement (TRDA). TRAC and TRDA are the IRS's versions of compliance programs that offer restaurant owners the opportunity to voluntarily track employees' tip income. However, these programs have not been widely used\textsuperscript{162} and, thus, have had limited effectiveness. In fact, only 600 TRAC agreements were in place for approximately 10,000 food and beverage establishments in 1998.\textsuperscript{163} Due to the lack of participation in the TRAC and TRDA agreements and the existing, large tax gap in unreported tip income, a new method is needed. Requiring restaurant owners to keep track of employees' tips would decrease the tax gap compared to the aggregate estimation method or the previous method. Under the aggregate estimation method, the tax gap will decrease relative to the previous method used pre-\textit{Fior D'Italia}. However, the decrease will not be as large as the decline that would be experienced under the proposed solution. Under the aggregate method, the gap would be decreased only when restaurants are assessed using the estimation-based method and pay the resulting deficiency. Conversely, requiring restaurant owners to track employee's tips should theoretically result in every restaurant owner paying the correct amount of tax, thus decreasing the tax gap.

\textsuperscript{159} See Ian M. Comiskey et al., Tax Fraud and Evasion § 1.03 (6th ed. 1995).
\textsuperscript{163} Id. (citing William A. Raabe, \textit{Power Swings to IRS on Assessment of Employer FICA Tax on Tipped Employees}, 6 Employee Benefits Tax Journal 260 (1999).
(d). Increase revenue—In addition to the tax gap decreasing, the proposed solution will also result in increased revenues for the IRS. Since previously uncollected taxes will now be collectible, revenues will rise accordingly.

D. Criticisms

Although substantial benefits will be obtained by requiring restaurant owners to track employees’ tips, the new method will not be perfect. Expected criticisms are as follows:

(a). Increased administrative costs—Opponents will argue that the proposed solution will increase administrative costs. Critics will contend that the restaurant industry already operates on very small margins, and small individually owned restaurants, in particular, will be adversely affected. While these arguments are not meritless, the new method should not be judged based on increased administrative cost alone. A careful weighing of the costs versus the benefits of the new method will illuminate the more viable method. The impact of the new method could be lessened by a § 162 business expense deduction or the allowance of a tax credit. This credit could be offered as a dollar for dollar offset for the increased administrative costs associated with implementing the proposed method. However, calculating the implementation cost could be difficult. Also, restaurants, small or large, have the ability to spread the increased costs by increasing prices.

(b). Congressional intent for IRS to have the responsibility of keeping track of employees’ tips—The legislative history and language of Congressional enactments during the past several decades evidences a Congressional refusal to impose the reporting burden on employers. However, in light of the Fior D’Italia decision, the circumstances have changed. Consequently, a different solution is needed.

(c). Equal Protection Claim—Since the proposed solution is intended solely for the food and beverage industry, members of this industry will contend that they are being treated unequally. These contentions will likely result in equal protection claims. For example, restaurant owners will argue that they are being treated differently than hotel owners who employ skycaps. However, courts have held that similarly situated taxpayers do not have to be treated similarly.

164. Concededly, the introduction of another tax credit would increase the complexity of the code.


166. See International Business Machines, Inc. v. United States, 343 F.2d 914
This line of jurisprudence provides sufficient support to defeat an equal protection claim.

(d). Effect on the "Underground Economy"—The underground economy is basically the segment of the economy in which a worker will accept cash for compensation or will charge a higher amount if payment is in some non-cash form. Requiring restaurant owners to track employees' tips would eliminate this fringe benefit of non-taxable cash income that waiters are accustomed to having. Essentially, the proposed method would result in a pay cut to waiters. Consequently, restaurant owners will either lose workers or be forced to pay them a higher rate to compensate for the lost unreported cash income. Concededly, significantly raising wage costs in the restaurant industry will result in disruption costs. However, the suggested solution will only force waiters and restaurant owners to pay the amount of taxes actually owed.

V. CONCLUSION

Equipped with the Fior D'Italia decision, the IRS can currently wreak havoc on a restaurant owner. Large, unexpected tax liabilities can now be assessed using estimation. This estimation does not account for real occurrences in the food and beverage industry, such as the "stiffing" of waiters like Wally from Blackout, Inc. Requiring restaurant owners to track employees' tips would be an equitable and accurate alternative, possibly resulting in increased taxpayer compliance. Also, no issues would arise over statutory interpretation and construction. Furthermore, taxes are the lifeblood of our government. The great Oliver Wendell Holmes noted that "Taxes are what we pay for civilization." Similarly, methods of collection should be civilized as well. Tax revenues allow the government to perform its invaluable functions. Decreasing the tax gap will provide more revenue for our government. In light of the large, existing tax gap and the inherent problems surrounding the aggregate estimation method, the time has come for change—revising sections 6001 and 6053 to require restaurant owners to keep track of employees' tip income.

Cole Smith*

(Ct. Cl. 1965); Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen v. United States., 129 F.3d 195 (D.C. Cir. 1997). See also Lawrence Zelenak, Should Courts Require the Internal Revenue Service to be Consistent?, 40 Tax L. Rev. 411 (1985).

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