

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HUMES HOUSTON HART : CIVIL ACTION  
v. :  
UNITED STATES, : No. 96-5639  
INTERNAL REVENUE SERVICE,  
COMMISSIONER OF INTERNAL REVENUE :

Ludwig, J.

November 21, 1997

M E M O R A N D U M

This memorandum accompanies an order entered this date granting the motion of defendants United States, Internal Revenue Service, and Commissioner of Internal Revenue Service to dismiss this action under Fed.R.Civ.P. 12(b)(1) and 12(b)(6),<sup>1</sup> excepting as to one issue that will be considered under Rule 56.

In the amended and supplemented complaint, plaintiff Humes Houston Hart, pro se, challenges individual income tax actions taken against him by the IRS from 1991 to 1993 as violative

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<sup>1</sup> In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the allegations in the complaint are accepted as true as are all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

of federal and state statutes<sup>2</sup> and state common law.<sup>3</sup> Many of these claims sound in wrongful collection under 26 U.S.C. §7433 and must be dismissed, as a matter of law, for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12 (b)(6). Others sound in tort. Here, because of the sovereign immunity of the United States, subject matter jurisdiction is lacking, which necessitates dismissal. Fed.R.Civ.P. 12(b)(1). The remaining claims either fail to state a claim upon which relief could be granted, Fed.R.Civ.P. 12(b)(6), or do not properly invoke subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1). These claims must also be dismissed.

#### 1. Wrongful Collection Claims

For the years 1991-1993, the IRS is charged with reckless or intentional violations of the tax code in the course of collection efforts against plaintiff.<sup>4</sup> Specifically, it is alleged

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<sup>2</sup> Claims are asserted under the following substantive provisions: 5 U.S.C. §552a; 8 U.S.C. §1512; 15 U.S.C. §1692; 26 U.S.C. §§ 6012, 6213, 7430, 7433; 28 U.S.C. §2674; and 37 Pa.C.S. §303. In a suit against the IRS, a taxpayer must show "an explicit waiver of sovereign immunity." Lonsdale v. United States, 919 F.2d 1440, 1443-44 (10th Cir. 1990). Subject matter jurisdiction is claimed under these substantive statutes, as well as under 28 U.S.C. §§1331, 1340, 1346, 1356, 1361, and 1367. None of these jurisdictional statutes waives sovereign immunity, however.

<sup>3</sup> The essential averments are that IRS conduct constituted common law negligence, intentional tort, and harassment.

<sup>4</sup> It is not disputed that plaintiff's claims were presented to and denied by the IRS, Am. compl. ¶ 7. Therefore, under 26 U.S.C. §7433(d)(3), plaintiff has exhausted available administrative remedies with respect to wrongful collection claims.

that the IRS failed to send notices of deficiency and improperly sent notices of intent to levy for tax years 1991, Am. compl. ¶ 91, and 1992, Am. compl. ¶¶ 91, 101, 235, 353; threatened liens, Am. compl. ¶ 91; harassed plaintiff with telephone calls and letters, Am. compl. ¶¶ 370, 372; and ignored his complaints and requests for investigation, Am. compl. ¶¶ 49, 50.

Plaintiff misperceives the applicable statutory law. Title 26 U.S.C. §7433(a) creates a right of action for damages if, "in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards" the tax laws (emphasis added). See Shaw v. United States, 20 F.3d 182, 184 (5th Cir. 1994). Section 7433(a) was not intended to confer a cause of action where taxes have been improperly assessed, see Ivory v. United States, 1995 W.L. 724522 at \*4 (S.D. Ohio 1995), or where collection activities have followed invalid assessments, see Byrd v. United States, 1996 WL 196705 at \*3 (W.D. Ark. 1996).

The claims set forth in the plaintiff's pleadings concern the validity of tax assessments, not intentional or reckless collection violations. The claims as to lack of notice of deficiency and improper notice of intent to levy on plaintiff focus on procedural deficiencies in assessment.<sup>5</sup> However, a taxpayer may

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<sup>5</sup> One claim should be noted. Under 26 U.S.C. §§6212 and 6213, collection of taxes may be enjoined where the IRS fails to mail the taxpayer a notice of deficiency. This provision is a statutory exception to the Anti-Injunction Act. 26 U.S.C. §7421(a). Plaintiff admits in his complaint that the IRS did send him a notice of deficiency for the 1992 tax year, Am.

(continued...)

not sue the IRS under §7433 because of the invalidity of an underlying assessment. See Shaw, 20 F.3d at 184 ("Therefore, based upon the plain language of the statute, which is clearly supported by the statute's legislative history, a taxpayer cannot seek damages under §7433 for an improper assessment of taxes.").

The IRS is also alleged to have acted wrongfully in trying to collect taxes where none were due, and that the IRS harassed plaintiff with phone calls in an attempt to effectuate collection, Am. compl. ¶¶ 391, 396.<sup>6</sup> While plaintiff's view may be understandable, the relief requested by him has not been authorized by Congress. See Gonsalves v. Internal Revenue Service, 975 F.2d 13, 16 (1st Cir. 1992) (recounting the legislative history of Section 7433 that "an action under this provision may not be based

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<sup>5</sup>(...continued)

compl. ¶ 262(c)), and that plaintiff's claims as to tax liability for 1992 were resolved in Tax Court, Am. compl. ¶¶ 264-65. However, the IRS apparently did not mail a notice of deficiency to plaintiff concerning his 1991 taxes, Am. compl. ¶ 101. However, as pleaded in the amended complaint, that matter is now resolved: the IRS subsequently determined that plaintiff was owed a refund of \$190 for that year and withdrew a "backup withholding order" it had erroneously applied to plaintiff's obligations for 1994 and subsequent tax years based on the 1991 assessment, Am. compl. ¶¶ 73, 77. Thereafter, the IRS refunded \$190. Order, August 28, 1997. Plaintiff's refund claim under 28 U.S.C. §1345(a)(1) is now moot, and there is no pending collection action enjoinable under this statute.

<sup>6</sup> The validity of assessments for 1991 and 1992 were litigated in Tax Court; that case is now closed. Hart v. Commissioner Internal Revenue Service, T.C. Docket No. 19975-95. As noted supra, there is no open issue as to the 1991 tax year. On May 13, 1996 the Tax Court determined that the IRS did mail plaintiff a notice of deficiency for 1992, but that plaintiff owed no tax for that year. The validity of the 1993 assessment is currently under review in the Tax Court, docket no. 6622-97.

on alleged ... disregard in connection with the determination of tax." ). The contention that no taxes were owed is, basically, a matter of assessment, not collection.

## 2. Tort Claims

It is alleged that the "course of outrageous conduct" taken by the IRS, Am. compl. ¶¶ 183, 311, eventually affected plaintiff's physical and emotional health, Am. compl. ¶ 383, and interfered with his Tax Court litigation, Am. compl. ¶¶ 206, 333. Included in this course of conduct are the assessment issues; requiring plaintiff to file tax returns for years in which he owed no tax, Am. compl. ¶ 240; denying his request to view a document alleged to have been used for an invalid tax assessment, Am. compl. ¶ 114; and "harassing" him with the specific intent to harm his health, Am. compl. ¶¶ 415, 425.

In the absence of explicit statutory waiver, suits against the United States and its officers acting in their official capacity are barred by sovereign immunity. United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 769-70, 85 L.Ed. 1058 (1941); Koss v. United States, 69 F.3d 705, 707 (3d Cir. 1995). Plaintiff's claims are alleged to be actionable under the Federal Tort Claims Act, 26 U.S.C. §2674, which effectively waives the sovereign immunity defense in certain specified instances. However, as defendants contend, there are two difficulties with plaintiff's position. First, to the extent that wrongful tax assessment or collection is at issue, there is a lack of subject

matter jurisdiction, regardless of the F.T.C.A. Secondly, 26 U.S.C. §2680(c) expressly bars claims against the government in connection with assessment or collection of taxes.<sup>7</sup>

According to the amended complaint, 26 U.S.C. §2680(c) is not applicable in this case. Plaintiff's theory is that, with respect to invalid tax assessments against plaintiff, the monies sought by the IRS actually constituted a "sum certain" debt and not a "tax", Am. compl. ¶¶ 78-87. However, nothing convincingly supports the assertion either that the IRS is analogous to a private debt collector,<sup>8</sup> or that it was engaged in the unlawful act of "withholding information," Am. compl. ¶ 121. Moreover, 26 U.S.C. §2860(c) also bars claims of intentional tort against the government.<sup>9</sup> See Stone v. United States, 1996 W.L. 806634, \*2 (E.D. Pa. 1996) (when claims against the IRS are based on "allegedly wrongful or illegal assessment and collection of taxes," such claims are barred by 26 U.S.C. 2680(c)'s exception to the F.T.C.A.).

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<sup>7</sup> The Anti-Injunction Act, 26 U.S.C. §7421(a), also is a barrier to taxpayer suits to enjoin the collection of taxes. There are some exceptions; none pertain.

<sup>8</sup> A correlative claim is that the government's intentionally tortious conduct amounted to "malicious prosecution," Am. compl. ¶ 302; and that it warranted criminal witness tampering charges under 15 U.S.C. §1512, Am. compl. ¶ 339. These charges do not withstand a 12(b)(6) motion.

<sup>9</sup> Contrary to plaintiff's assertions, the government's positions on the applicability of 28 U.S.C. §7433 and the inapplicability of the F.T.C.A. are not inconsistent. The essential point is that collection actions taken because of an invalid assessment are not actionable under §7433.

It is also claimed that the conduct of the IRS violates Pennsylvania common law, Am. compl. ¶¶ 114, 194. An action in tort against the United States under state law cannot be maintained when sovereign immunity has not been waived. See Boyle v. United Technologies Corp., 487 U.S. 500, 504, 108 S.Ct. 2510, 2514, 101 L. Ed.2d 442 (1988) (the scope of civil liability of federal officers for actions taken in official capacity is controlled by federal law); Carley v. Wheeled Coach, 991 F.2d 1117, 1119-20 (3d Cir. 1993).

An additional claim - again utilizing the analogy of private debt collection - is that telephone calls made by the IRS in 1993 constituted violations of the Consumer Protection Act, 15 U.S.C. §1692, Am. compl. ¶ 175-81, 413. While this is another ingenious hypothesis on plaintiff's part, it is without legal merit. No claim is stated under 15 U.S.C. §1692 upon which relief can be granted. F.R.C.P. 12(b)(6).

Some of these matters may become actionable as the result of legislation presently before Congress. However, given the current state of the law, the courts lack jurisdiction to consider them.

### 3. All Other Claims

Several claims are asserted that do not sound in tort or unlawful collection.

There is a request to mandamus the government under 28 U.S.C. §1361 so as to compel a waiver of sovereign immunity and to require the IRS to perform its duties owed to plaintiff

in a certain fashion, Am. compl. ¶ 4; pl. obj. ¶¶ 44-48. However, even if it were appropriate,<sup>10</sup> the alleged facts are insufficient for a grant of mandamus.<sup>11</sup>

Next, an award of attorney's fees and costs is requested under 26 U.S.C. §7430(a) as a result of plaintiff's successful proceeding in the United States Tax Court, Am. compl. ¶ 4; pl. obj. ¶ 13. That claim must be brought in the court in which the litigant prevailed, not here. 26 U.S.C. §7430(a).

One claim cannot be decided under Rule 12. It concerns a certain document that plaintiff contends was used by the IRS in reaching invalid assessments against him. Plaintiff cites 5 U.S.C. §552a as authority for requiring the IRS to divulge such

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<sup>10</sup> The conditions for mandamus are the statement of a clear right to the relief sought and the unavailability of any other adequate remedy. See In re Asbestos School Litigation, 46 F.3d 1284, 1288-89 (3d Cir. 1994). Furthermore, mandamus is a drastic remedy to be restricted to "extraordinary situations," and invoked "sparingly" and with discretion. Id. at 1288.

<sup>11</sup> The amended complaint also requests an injunction against the IRS, Am. compl. demand ¶ 4. Even if not styled a petition for a writ of mandamus, such a request is barred by the Anti-Injunction Act, 26 U.S.C. §7421(a). Our Circuit has held that even under a statutory exception to the Anti-Injunction Act, taxpayers will not be successful unless they can allege facts sufficient to meet the "traditionally required" conditions necessary for injunctive relief: irreparable harm, absence of legal remedy, and unlikelihood no chance the government will prevail on merits. Robinson v. United States, 920 F.2d 1157, 1160 (3d Cir. 1991) (citing Flynn v. United States, 786 F.2d 586, 590 (3d Cir. 1986)).

information, Am. compl. ¶¶ 113-15. The IRS denies that it is aware of such a document, def. memorandum at 15.

Defendants refer to an affidavit by an attorney with the IRS District Counsel in Philadelphia in support of their factual position ("Curran Declaration"). Because the issue involves facts outside plaintiff's pleadings, the procedural posture changes from Rule 12 to Rule 56 - summary judgment.<sup>12</sup> Information was also submitted by plaintiff at a status conference on August 13, 1997 to rebut the affidavit. Under Rule 12(b)(1), before such an issue may be considered "and disposed of as provided in Rule 56, ... all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12(b). At this stage, under the law of summary judgment, plaintiff must produce or point to matters that show a genuine issue of material fact - i.e., as to the existence of the controverted document. See Celotex Corp., 477 U.S. at 324, 106 S.Ct. at 2553. Otherwise, summary judgment must be granted for defendant-movants. Id. The matters that may be offered must be in the form recognized by Rule 56, such as "depositions, answers to interrogatories ... admissions ... together with affidavits." Fed.R.Civ.P. 56(c). Plaintiff will be granted until December 12, 1997 to submit any further evidence or argument on the document in question.

Otherwise, for the reasons given, the amended complaint does not appear to have stated a claim either upon which relief could

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<sup>12</sup> Summary judgment is appropriate when after considering the record in the light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgement as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323-325, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986); Charlton v. Paramus Board of Education, 25 F.3d 194, 197 (3d Cir. 1994).

be granted or over which this court has subject matter jurisdiction. With the exception of the contested document, defendants' motion to dismiss will be granted.

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Edmund V. Ludwig, J.

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O R D E R

AND NOW, this 21st day of November, 1997, defendants' motion to dismiss plaintiff Hart's amended complaint is granted excepting as to the contested document. Plaintiff is granted until December 12, 1997 within which to submit any additional Rule 56(c) evidence and argument on this issue. Defendants are granted 10 days thereafter within which to make any further submission.

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Edmund V. Ludwig, J.