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

ESTATE OF KATHERINE TINARI	:	CIVIL ACTION
	:	
v.	:	NO. 97-1974
	:	
UNITED STATES OF AMERICA	:	

MEMORANDUM AND ORDER

YOHN, J. July , 1998

The United States Tax Court, by a November 1994 order of settlement, determined Katherine Tinari's final tax liability for the years 1985 through 1989. Prior to that order, pursuant to a jeopardy assessment, the Internal Revenue Service placed a tax levy upon property in which Katherine had an interest. Defendant admits that funds seized from accounts owned individually by Katherine and jointly by Katherine and her husband, Nino Tinari, exceeded Katherine Tinari's tax liability by at least $140,000. Plaintiff, the estate of Katherine Tinari, seeks a refund of the excess collection. Defendant has moved to dismiss for lack of subject matter jurisdiction. For the reasons set forth below, I will grant defendant's motion.

BACKGROUND

The following factual background is based on undisputed facts. This account also draws upon the record of prior proceedings by the identical parties in a related case in this court. *Estate of Tinari v. United States*, Civ. No. 93-3555, 1996 WL 472416 (E.D. Pa. Aug. 20, 1996) (hereinafter "Tinari I").

In April of 1993, the Internal Revenue Service ("IRS" or "the Service") issued proposed income tax changes for Katherine Tinari ("Katherine") jointly with her husband, Nino V. Tinari

("Nino"), for tax years 1985-89. These proposed changes exceeded 1.2 million dollars. On May 12, 1993, Katherine filed a petition in Tax Court objecting to the proposed changes and arguing that she was entitled to innocent spouse treatment under 26 U.S.C. § 6013(e), which relieves an unknowing spouse from liability for tax attributable to misrepresentations made by the other spouse on their joint return.

On June 9, 1993, while her Tax Court case was pending, the IRS issued a Notice of Jeopardy and Right of Appeal ("jeopardy assessment") to Katherine and Nino,[1] assessing them jointly for unpaid federal income taxes, interest and penalties totaling $1,249,624. On June 15, 1993, Katherine filed an administrative appeal with the IRS challenging the jeopardy assessment, which was denied. Pursuant to the jeopardy assessment, the IRS served levies on Katherine and Nino's bank accounts. During July and August of 1993, the IRS collected over $680,000 from the levies. The IRS seized approximately $230,000 from Katherine's individual assets, approximately $110,000 from Katherine and Nino's joint assets, and the balance from Nino's individual assets.

On June 29, 1993, Katherine filed suit in this court, seeking review of the jeopardy assessment as it pertained to her. I approved a stipulation by the parties, based upon their negotiated agreement, to stay that action until the Tax Court resolved her petition. On November 15, 1994, Katherine settled her case in the Tax Court. The order of settlement approved by the Tax Court determined that Katherine was liable, jointly with Nino, for taxes and interest totaling

1. Internal Revenue Code § 6861 provides, in relevant part, that "[i]f the Secretary believes that the assessment or collection of a deficiency . . . will be jeopardized by delay, he shall . . . immediately assess such deficiency . . . and notice and demand shall be made by the Secretary for the payment thereof." 26 U.S.C. § 6861(a).

$200,000. She was determined to be an innocent spouse with respect to all other taxes, interest, and penalties, for which Nino remained individually liable. Less than one month after the settlement, Katherine died in an automobile accident, and her estate succeeded her as plaintiff in the pending district court action.

On August 20, 1996, the stay having been lifted, this court dismissed plaintiff's previous action. Plaintiff had asked the court, pursuant to 26 U.S.C. § 7429, to abate the jeopardy assessment, extinguish the associated levies, reallocate the funds seized pursuant to the levies, and refund monies collected from Katherine in excess of her tax liability. *Tinari I*, 1996 WL 472416. Because § 7429 narrowly limits a district court's jurisdiction in review of jeopardy assessments and levies to a review of their reasonableness, and because such review was moot, I granted defendant's motion to dismiss for lack of subject matter jurisdiction. *Id.*

In the instant case, plaintiff brings an action for refund of the amounts that were collected in excess of Katherine's tax liability. Plaintiff's complaint in this action includes this court's opinion in *Tinari I* as an exhibit, and expressly incorporates that opinion and the facts as therein stated into its statement of claim for relief. (Pl.'s Compl. ¶ 23, Ex. C.)

Plaintiff alleges that there was in fact an overpayment by Katherine for the tax years from 1985 through 1989. (Pl.'s Compl. ¶ 23.) Defendant admits that "funds collected by the United States pursuant to the jeopardy assessment exceeded Katherine Tinari's liability by at least $140,000." (Def.'s Answer ¶ 20.) In April 1996, defendant refunded to plaintiff $30,000 plus interest. (Pl.'s Agreed Findings of Fact ¶ 17.) $30,000 is equal to the difference between Katherine's $200,000 tax liability and the $230,000 collected from Katherine's individual accounts. Defendant takes the position that plaintiff is not entitled to any further refund. (Def.'s

Answer ¶¶ 21, 24, 25.)

STANDARD OF REVIEW

A motion under Rule 12(b)(1) may present either a facial or a factual challenge to subject matter jurisdiction. *Mortensen v. First Federal Savings and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A facial challenge contests the existence of subject matter jurisdiction on the face of a complaint, while a factual challenge contests the existence of subject matter jurisdiction in fact. *Id.*

In the case of a factual challenge, the court is free to consider and weigh evidence outside the pleadings to resolve factual issues bearing on jurisdiction. *Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997). However, "[a] factual jurisdictional proceeding cannot occur until plaintiff's allegations have been controverted." *Id.* at 892 n.17. Both parties have stated, and the court agrees, that the material facts in this case are not disputed. (Pl.'s Mem. at 1; Def.'s Mem. at 1.) This motion will therefore be treated as a facial challenge. In the case of a facial challenge, the court must accept as true all well-pleaded allegations and draw reasonable inferences in favor of the plaintiff. *Mortensen*, 549 F.2d at 891.

Defendant contends that this court lacks subject matter jurisdiction for reasons of res judicata and because the plaintiff has not established that it has satisfied the jurisdictional requirements of the applicable statute of limitations. The threshold to withstand a Rule 12(b)(1) motion to dismiss is lower than that of Rule 12(b)(6), and a court must address any factual and legal issues as jurisdictional issues, rather than on their merits. *White v. U.S. Government Dep't of Treasury*, 969 F.Supp. 321, 323 (E.D. Pa. 1997) (citing *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277 (3d Cir. 1993)).

While it is the plaintiff who has the burden of proving that jurisdiction exists, *Mortensen*, 549 F.2d at 891, dismissal would not be appropriate "merely because the legal theory alleged is probably false, but only because the right claimed is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Kulick v. Pocono Downs Racing Ass'n*, 816 F.2d 895, 899 (3d Cir. 1987) (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666, 94 S.Ct. 772, 776 (1974)).

DISCUSSION

1. Effect of Petition to Tax Court

The government contends that this court lacks jurisdiction over plaintiff's refund claim because Katherine Tinari previously litigated her tax liability for the years in question before the Tax Court. Ordinarily, a taxpayer who initially chooses to proceed in the Tax Court may not thereafter sue for a refund in a federal district court. The Internal Revenue Code provides:

> If the Secretary has mailed to the taxpayer a notice of deficiency . . . and if the taxpayer files a petition with the Tax Court . . . no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court.

26 U.S.C. § 6512(a); *see Solitron Devices v. United States*, 862 F.2d 846, 848 (11th Cir. 1989) (district court lacked jurisdiction to redetermine tax liability after final determination in Tax Court for subject year, even where later events raised new claim that could not have been litigated in Tax Court). However, 26 U.S.C. § 6512(a) provides several exceptions under which a district court may have jurisdiction as to a suit for recovery. Where the Tax Court expressly makes a final determination of overpayment, judicial enforcement of the taxpayer's remedy is permitted by § 6512(a)(1). Where no such determination is made by the Tax Court, § 6512(a)(2) provides that the taxpayer may nevertheless file suit to recover "any amount collected in excess

of an amount computed in accordance with the decision of the Tax Court which has become final." *Cf. Roach v. United States*, 106 F.3d 720, 723-24 (6th Cir. 1997) (exception did not apply where plaintiff did not pay in excess of liability as determined by Tax Court).

Both parties agree that no determination of overpayment was made by the Tax Court.[2] It is also undisputed that the final determination of the Tax Court, pursuant to Katherine Tinari's settlement, resulted in a tax liability lower than the amount that the government has collected from Katherine's separate and joint accounts under the jeopardy assessment. Therefore, the excess collection exception in § 6512(a)(2) applies here.

2. Res Judicata and 26 U.S.C. § 7422

Defendant attempts to raise, under the rubric of "res judicata," an argument that this court lacks jurisdiction based upon 26 U.S.C. § 7422(e). Defendant contends that because plaintiff filed a petition with the Tax Court in May 1993, jurisdiction over all issues relating to the taxpayer's liability was transferred to the Tax Court. Defendant's argument fails in the procedural posture of the present action. Section 7422(e) provides as follows:

> If the Secretary prior to the hearing of a suit brought by a taxpayer in a district court . . . mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's [district court] suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court . . . shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court.

26 U.S.C. § 7422(e). This provision requires a stay, and loss of district court jurisdiction, only

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2. Since the decision of the Tax Court in this case is unpublished and has not been furnished by the parties, I will accept the undisputed allegations as to its contents as true for purposes of this motion to dismiss. (Pl.'s Compl. ¶ 17; Pl.'s Mem. at 3; *see also* Def.'s Mem. at 3.)

when a specific sequence of events occurs: first, the taxpayer must file suit in the district court; second, the Service issues a deficiency notice prior to the hearing of the suit; and third, a petition is filed with the Tax Court. There was no action filed in the district court prior to Katherine Tinari's petition to the Tax Court. The Tax Court petition was filed on May 12, 1993. A jeopardy assessment followed, and an action in this court appealing the assessment was subsequently filed on June 29, 1993.[3] Plaintiff's complaint in the instant case was filed on March 17, 1997. Because this sequence of events does not correspond to the circumstances specified by § 7422(e), I conclude that § 7422(e) may not be applied to transfer some portion of this court's jurisdiction to the Tax Court.

Plaintiff does not now seek to relitigate any matter that was decided by the Tax Court, which made a final determination of plaintiff's liability for the tax years in question. The principal issue being litigated in the instant action is whether this plaintiff is entitled to a refund of amounts that the IRS collected from Katherine's jointly owned accounts, but applied to Nino's individual tax liability. There is no evidence indicating that this issue was before the Tax Court. Accordingly, res judicata may not be applied to preclude consideration of this case on its merits.

3. Requirement to File a Claim for Refund

The section of the Internal Revenue Code relating to jeopardy assessments provides, in relevant part:

> When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court

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3. The district court action was stayed during the pendency of Tax Court proceedings. That stay was not ordered pursuant to § 7422(e), but rather pursuant to a negotiated agreement and stipulation between the parties. *Tinari v. United States*, Civ. No. 93-3555 (E.D. Pa. Sept. 16, 1993) (order); *see Tinari I*, 1996 WL 472416, at *1 & n.6.

> which has become final, then . . . any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 6402, without the filing of claim therefor.

26 U.S.C. § 6861(f). Notwithstanding the clear language of § 6861(f), stating that a refund is due "without the filing of claim therefor," defendant asserts that a claim for refund should have been filed within the applicable limitations period defined by § 6511.

The starting point in interpreting a statute is the language of the statute itself, and generally, "the plain language rule is the preferred method of statutory interpretation." *United States v. Gollapudi*, 130 F.3d 66, 70 (3d Cir. 1997) (interpreting statute of limitations in criminal tax statute) (quoting *United States v. Zheng*, 768 F.2d 518, 523 (3d Cir. 1985)). Departure from that language can be justified only by "'the most extraordinary showing of contrary intentions' in the legislative history." *Id.* (quoting *Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479, 482-83 (1984)).

If the amount collected under a jeopardy assessment exceeds a taxpayer's finally determined liability, the Code plainly states in mandatory terms that "such excess shall be credited or refunded to the taxpayer." 26 U.S.C. § 6861(f). This refund is not conditioned upon the existence of a specific finding by the Tax Court that there was an overpayment. Congress knew how to create just such a narrow distinction, if it had so intended. *Compare* § 6512(a)(1) (referring to overpayments determined by final decision of Tax Court) *with* § 6512(a)(2) (referring to amounts collected in excess of liability finally determined by Tax Court). Here, the only condition precedent to the mandatory refund of an excess collection is satisfied "[i]f the amount already collected exceeds the amount determined as the amount which should have been assessed." *Id.*

A refund under § 6861(f) is not conditioned upon the timely filing of a claim for refund; rather, it shall occur "without the filing of claim therefor." *Id.* The applicable Treasury regulation adopts the phrase without modification or further clarification: "If any part of the excess amount has been paid, it will be credited or refunded to the taxpayer as provided in section 6402, without the filing of claim therefor." 26 C.F.R. § 301.6861-1(d).

As defendant points out, section 6402 makes reference to a limitations period, mandating that

> [i]n the case of any overpayment, the Secretary, within the applicable period of limitations, *may* credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and *shall*, subject to subsections (c) and (d), refund any balance to such person.

26 U.S.C. § 6402(a) (emphasis added). Subsections (c) and (d) are not applicable in this case. Defendant argues that the reference to a limitations period in § 6402(a) means that the taxpayer must file a claim within that period. Defendant disputes the relevance and meaning of the phrase "without the filing of claim therefor" in § 6861(f). While it is "commonplace to note that the Internal Revenue Code is remarkably complicated," *Koss v. United States*, 69 F.3d 705, 712 (3d Cir. 1995), it appears to this court that the phrase in question is as perfectly clear as a tax law could be. Where a taxpayer is faced with the extraordinary situation of a jeopardy levy in excess of her liability, as finally determined by the Tax Court, a claim for refund need not be filed to trigger a credit or refund to the taxpayer. Any other interpretation of the words "without the filing of claim therefor" would render them nugatory.

Section 6861(f) expressly relieves a taxpayer within its scope of the duty to file a claim for refund. However, § 6402 provides in relevant part that "the Secretary, within the applicable period of limitations . . . *shall* refund any balance to such person." 26 U.S.C. § 6402 (emphasis added). I conclude that in cases where a taxpayer is subject to the provisions of § 6861(f), the person required by § 6402 to take timely action is not the taxpayer, but the Secretary.

4. Result of IRS's Failure to Comply with § 6402

Section 6402 leaves unstated what happens if the Secretary fails to comply within the applicable limitations period. Such a failure to comply may be the result of a dispute in good faith over whether the taxpayer is entitled to a refund.[4] Indeed, in this case that appears to be the cause. Whatever the reason may be for the IRS's failure to comply within the applicable limitations period, defendant contends that a taxpayer seeking a refund under section 6512(a)(2) has no judicial remedy after that period has expired. Defendant relies on *Hollie v. Commissioner of Internal Revenue*, 73 T.C. 1198 (1980), to argue that it is the limitations period mentioned in § 6402 that compels this result. *Id.* at 1212.

Defendant is correct that the filing of a claim is not entirely excused by § 6861(f). If the taxpayer wishes to preserve a judicial remedy in case of the Secretary's inaction, a timely claim

4. However, where the IRS has admitted that a refund was due, but offered as its exclusive defense that payment of the refund was time-barred because of the statute of limitations referred to in § 6402, the extraordinary remedy of a writ of mandamus has been granted to compel payment. *In re First Federal Sav. & Loan Ass'n of Durham*, 860 F.2d 135, 140 (4th Cir. 1994) (terms of settlement indicated refunds were to be automatic); *Vishnevsky v. United States*, 581 F.2d 1249, 1253-55 (7th Cir. 1978) (taxpayer relied on IRS notice suggesting refund would be paid with no further action required). Because the IRS has not here admitted that a refund would be due but for the statute of limitations, and because the present case implicates other issues relating to the application of the overpayment, no precedent supports mandamus in this case.

must still be filed.[5] I conclude that this result is compelled not by § 6402, but by the interplay of sections 7422(a) and 6511(a). A civil action for refund may not be instituted in any court unless a claim for refund has been filed. 26 U.S.C. § 7422(a). When a claim is filed, it must be filed within the properly applicable period of limitation. 26 U.S.C. § 6511(a).

The applicable limitations period in this case is "within . . . 2 years from the time the tax was paid." 26 U.S.C. § 6511(a). Plaintiff filed a formal claim for refund with IRS on November 8, 1996.[6] That date is not within two years of the levies in July and August 1993. The claim was, however, filed within two years of the date of the Tax Court's final order of settlement on November 15, 1994. Plaintiff argues that under the exceptional circumstances of a levy on a jeopardy assessment, the applicable statute of limitations cannot be triggered until the Tax Court's final determination that the taxpayer actually had a tax liability to be paid, and of the

5. A timely claim also extends the period during which the IRS might agree to a refund without judicial action. While § 6402 compels the Secretary to refund an overpayment within the limitations period, the applicable Treasury regulation prohibits any refund after the expiration of that period, unless the taxpayer has filed a timely claim. "Credits or refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable unless, before the expiration of such period, a claim therefor has been filed by the taxpayer." 26 C.F.R. § 301.6402-2(a)(1).

6. Plaintiff also made a number of earlier oral and written requests, and asks the court to characterize these as informal claims for refund. In plaintiff's previous district court action, which was dismissed for lack of jurisdiction under 26 U.S.C. § 7429, plaintiff made a written demand for the return of these funds. *Tinari I*, 1996 WL 472416, at *2 & n.8. However, documents in that case were filed in this court, rather than submitted to the IRS. Plaintiff also notes that a refund was discussed at meetings with IRS District Counsel and IRS collection officers, which occurred at some time between November 15 and December 5, 1994, and again shortly after the latter date. (Pl.'s Mem. at 3.) An oral demand to the IRS is not sufficient to be considered an informal refund claim, which must at minimum include "some sort of written instrument." *D'Amelio v. United States*, 679 F.2d 313, 315 (3d Cir. 1982); *accord Gustin v. United States*, 876 F.2d 485, 488 (5th Cir. 1989). If plaintiff is able to provide evidence showing that a written informal claim was submitted to the IRS within the applicable limitations period, plaintiff may offer it in a motion for reconsideration.

amount of that liability. "It would be illogical to hold, as the United States contends, that the statute of limitation began to run against a claim for refund before . . . the fact that there was an overpayment, and if so the amount thereof, became ascertainable." *Ford v. United States*, 618 F.2d 357, 359 (5th Cir. 1980) (quoting *Thomas v. Mercantile National Bank*, 204 F.2d 943, 944 (5th Cir. 1953)). Plaintiff suggests that for statute of limitations purposes, the date of the final Tax Court determination should be deemed to be the date the tax was paid.

Defendant proposes that for statute of limitation purposes, "payment" occurred on the dates of the levies, which took place in July and August 1993.[7] In *McFarland v. United States*, 490 F.Supp. 238 (N.D. Ga. 1980), a levy to satisfy a jeopardy assessment was held, for statute of limitation purposes, to be a payment of the tax allegedly due. *Id.* at 242; *see Hollie*, 73 T.C. at 1213 (assuming without discussion that payment occurred on date of collection of funds). "[W]here amounts are collected pursuant to an assessment, those amounts clearly constitute tax payments." *McFarland*, 490 F.Supp. at 251 (citing *Rosenman v. United States*, 323 U.S. 658, 662-63, 65 S.Ct. 536, 538 (1945); *Fortugno v. Commissioner*, 353 F.2d 429, 435 (3d Cir.

7. Defendant cites *Qureshi v. United States*, 75 F.3d 494 (9th Cir. 1995), for the proposition that any remittance received by virtue of a levy is deemed to be a payment. In *Qureshi*, funds remitted to the IRS as a result of levies were deemed "payments triggering the statute of limitations established by § 6511(a)" because they were amounts "collected to discharge the taxpayer's *finally determined* 1983 tax liability." 75 F.3d at 496-97 (emphasis added). Unlike the instant case, there was a final determination of liability prior to the levy. *Qureshi* did not address levies on jeopardy assessments under § 6861, but instead addressed ordinary tax levies in which the taxpayer is procedurally protected by 26 U.S.C. § 6213(a). In cases that do not involve jeopardy assessments, § 6213(a) prohibits the IRS from collecting by levy during the pendency of a Tax Court petition, until the decision of the Tax Court is final. Tax levies associated with jeopardy assessments present an extraordinary situation in which the taxpayer is denied protection during the pendency of a Tax Court petition. *Friko Corp. v. Commissioner*, 26 F.3d 1139, 1142 (D.C. Cir. 1994) (citing 26 U.S.C. §§ 6213(a), 6861(a)).

1965)).[8]

Where the IRS makes a finding that collection of any tax is in jeopardy, it makes "notice and demand for immediate payment" of the amount assessed, and collection of such tax may be made by levy immediately "upon failure or refusal to pay." 26 U.S.C. § 6331(a). The use of the word "overpayment" in § 6402, which is referenced in the jeopardy assessment provisions of § 6861(f), suggests that collected funds are payments. The ordinary meaning of "overpayment" is "payment in excess of what is due." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1609 (1981). I conclude for these reasons and for the reasons stated in *McFarland* that for statute of limitations purposes, the levy on a jeopardy assessment is a payment, and the date of such payment is the date of collection by levy.

For this plaintiff, the limitations period expired in July or August of 1995, two years from the date of payment. The final decision of the Tax Court was made in November 1994, and plaintiff was shortly thereafter made aware that the IRS did not intend to refund any amount that may have been overpaid by Katherine Tinari. (Pl.'s Mem. at 3.) Therefore, plaintiff had at least several months to file a timely claim for refund, and did not do so.

The requirements of the various statutes of limitations found in the Internal Revenue Code are jurisdictional in nature, because they allow for suits against the sovereign. *See Koss*, 69 F.3d at 707 (citing *United States v. Dalm*, 494 U.S. 596, 601, 110 S.Ct. 1361, 1364 (1990)).

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8. The *McFarland* court noted that "to reach a contrary result would create a situation in which no statute of limitations existed for refund claims for amounts involuntarily collected by the IRS." 490 F.Supp. at 242. This dire prediction would not come to pass if the statute of limitations were tolled during the pendency of judicial proceedings to finally determine the taxpayer's liability, but Congress has not chosen that course of action where jeopardy assessments are involved.

Because plaintiff did not file a claim for refund within the applicable statute of limitations, this court lacks jurisdiction over the refund action.

CONCLUSION

Section 6861(f) of the Internal Revenue Code provides that the IRS shall refund overpayments on jeopardy assessments without the filing of a claim for refund, and the IRS must do so in order to comply with the law. However, if the IRS fails to comply with the law, a taxpayer who wishes to preserve the opportunity to seek a remedy in the district court must file a claim for refund within the applicable limitations period. Because plaintiff did not file a timely claim for refund, this court lacks subject matter jurisdiction over plaintiff's claim, and defendant's motion to dismiss will be granted. An appropriate order follows.

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UNITED STATES OF AMERICA	:	

O R D E R

AND NOW, this day of July, 1998, upon consideration of defendant's motion to dismiss and plaintiff's response thereto, IT IS HEREBY ORDERED that the motion to dismiss is GRANTED and plaintiff's complaint is dismissed.

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William H. Yohn, Jr., Judge