

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

LENA CULPEPPER-SMITH,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 96-CV-5855
UNITED STATES OF AMERICA,	:	
Defendant.	:	
	:	
	:	

MEMORANDUM OF DECISION

McGlynn, J.

August , 1998

Before the court is the Rule 12(b)(1) motion of defendant United States of America ("the Government") to dismiss plaintiff's claims for injunctive relief and a tax refund. Plaintiff Lena Culpepper-Smith has responded with three reply motions: (1) a cross-motion for summary judgment which opposes the Government's motion to dismiss and demands judgment as a matter of law on plaintiff's entitlement to a permanent injunction, litigation expenses, and damages; (2) a motion to amend the complaint to include a specific demand for a tax refund under 26 U.S.C. § 7422(a); and (3) a motion to enforce the Government's concession that the IRS failed to serve plaintiff with a notice of deficiency.

For the reasons set forth below, the Government's motion to dismiss will be granted, plaintiff's motion to amend the complaint, cross-motion for summary judgment on her entitlement

to a permanent injunction and damages, and motion to enforce the Government's concession will be denied, and plaintiff's motion for summary judgment on her entitlement to litigation expenses will be denied without prejudice.

I. BACKGROUND

In 1980, plaintiff invested as a sole proprietor in the lease of certain audio recordings for a 7½ year period. Compl. ¶ 8. The following year, plaintiff filed a timely federal income tax return for 1980 claiming no taxes were owed for that year because her claimed deductions and investment credit eliminated any tax liability. Id. ¶¶ 6 & 7.

Ten years later, sometime in 1991, the IRS began sending plaintiff notices of its intent to levy on her for failure to pay taxes for 1980. Id. ¶ 12. On March 6, 1991, the IRS assessed plaintiff for unpaid federal income tax, interest and possible penalties for the 1980 tax year. Id. ¶ 7. Plaintiff claims the assessment was illegal because the IRS did not send her a notice of deficiency as required by 26 U.S.C. § 6212. On April 15, 1994, the IRS credited plaintiff's 1993 tax refund of \$2,618 against the 1980 tax liability. Gov't Mem. of Law in Opp'n to Pl. 1st Summ. J. Mot, Certificate of Assessments & Payments at 2. It did the same with her 1995 tax refund of \$2,640 on May 13, 1996. Id. Plaintiff brought this lawsuit to enjoin the Government's collection of the assessment amount and recover her

1993 and 1995 tax refunds, along with damages and litigation costs. Compl. ¶¶ 3 & 24.

The Government now concedes the IRS never sent plaintiff a statutorily-required notice of deficiency, and that the assessment for tax year 1980 was therefore illegal. Gov't Mem. of Law in Supp. of Mot. to Dismiss at 2. It has agreed to abate the assessment, but refuses to return plaintiff's 1993 and 1995 tax refunds which were applied to the 1980 tax deficiency. See id. & Gov't Mot. to Dismiss, Cohen Decl. Ex. A.

In light of its agreement to abate the assessment, the Government makes three arguments for dismissal under Rule 12(b)(1): (1) plaintiff's request for injunctive relief is now moot; (2) the Anti-Injunction Act, 26 U.S.C. § 7241, precludes the court from enjoining the assessment or collection of taxes and no exception applies; and (3) plaintiff has not exhausted the prerequisite administrative remedies before bringing a refund suit.

II. DISCUSSION

A. Rule 12(b)(1) Standard

Rule 12(b)(1) provides for dismissal where the court lacks jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1). There are two kinds of 12(b)(1) motions, both of which are implicated in this case.

The first kind attacks the legal sufficiency of the

complaint on its face. Mortensen v. First Fed. Sav. and Loan, Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). When considering a facial attack, "the court must consider the allegations of the complaint as true." Id.; Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-09 (3d Cir.), cert. denied, 501 U.S. 1222 (1991). Dismissal in such cases "is proper only when the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous.'" Kehr Packages, 926 F.2d at 1408-09 (quoting Bell v. Hood, 327 U.S. 678, 682 (1946)).

The second type challenges the existence of subject matter jurisdiction on the facts. Mortensen, 549 F.2d at 891. "[N]o presumptive truthfulness attaches to plaintiff's allegations and the existence of disputed issues of material fact will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims." Id. The court may consider affidavits and other relevant evidence outside the pleadings to determine whether it has the power to hear the case. See Berardi v. Swanson Memorial Lodge No. 48 of Fraternal Order of Police, 920 F.2d 198 (3d Cir. 1990). The plaintiff bears the burden of persuading the court that the facts support a finding of subject matter jurisdiction. Kehr Packages, 926 F.2d at 1409.

1. Mootness

The Government first contends its agreement to abate the

assessment of the 1980 tax deficiency makes plaintiff's request for injunctive relief moot. As a result, argues the Government, that claim should be dismissed under Flast v. Cohen because it is no longer a justiciable controversy. 392 U.S. 83, 95 (1967) (no justiciable controversy exists "when the question sought to be adjudicated has been mooted by subsequent developments").

Plaintiff responds that under 26 U.S.C. § 6213(a) and the Court of Appeals' decision in Philadelphia & Reading Corp. v. United States, 944 F.2d 1063 (3d Cir. 1991), injunctive relief directing the return of her 1993 and 1995 tax refunds is still appropriate.

Plaintiff's argument fails for two reasons. First, section 6213(a) only authorizes injunctions to prevent "the making of [an illegal] assessment." 26 U.S.C. § 6213(a). It does not provide a cause of action for refund of monies which have already been applied to a tax deficiency. The exclusive remedy for the erroneous or illegal collection of taxes is a suit for refund under 26 U.S.C. § 7422(a).¹ See Brennan v. Southwest Airlines

¹ Internal Revenue Code § 7422 is entitled, "[c]ivil actions for refund," and subsection (a) provides:

[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law

Co., 134 F.3d 1405, 1409 (9th Cir. 1998); Sigmon v. Southwest Airlines, Inc., 110 F.3d 1200, 1204 (5th Cir. 1997); Eisenman v. Continental Airlines, Inc., 974 F. Supp. 425, 430 (D.N.J. 1997).

Plaintiff's contention that the Philadelphia & Reading case allows the court to enter an injunction directing the refund of illegally collected taxes is incorrect. Philadelphia & Reading involved a plaintiff corporation which had previously obtained an injunction against the illegal assessment of nearly \$6 million of a \$10 million tax deficiency. 944 F.2d at 1068-69. It then filed an administrative claim with the IRS for refund of the entire \$10 million. Id. That claim was denied, and the plaintiff brought a refund action in the District of Delaware in which the court determined that equitable considerations precluded the plaintiff from obtaining a refund. Id. On appeal, the Third Circuit addressed only the refund suit, not the prior injunction action², and specifically rejected consideration of the equities in a tax refund case. Id. at 1069, 1073-76. Although the opinion did not state which provision of the tax

in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422(a).

² The injunction action was litigated in the Northern District of Illinois. See Philadelphia & Reading Corp. v. United States, 738 F. Supp. 143, 144 (D. Del. 1990), rev'd, 944 F.2d 1063 (3d Cir. 1991).

code supported the plaintiff's claim, the court explicitly referred to the plaintiff's suit as one for a tax refund and distinguished the case before it from the earlier injunction proceeding. See id. at 1069, 1073.

The second area where plaintiff's argument falters is the basic standard for injunctive relief. Under section 6213(a) the taxpayer must still satisfy the equitable requirements for an injunction, i.e., irreparable harm and the absence of an adequate remedy at law. See Robinson v. United States, 920 F.2d 1157, 1160 (3d Cir. 1990); Flynn v. United States, 786 F.2d 586, 590 (3d Cir. 1986). Section 7422(a) of the Internal Revenue Code provides an adequate remedy at law for obtaining a tax refund. White v. United States Dep't of Treasury, 969 F. Supp. 321, 324 (E.D. Pa.), aff'd, 135 F.3d 768 (3d Cir. 1997); cert. denied, -- U.S. --, 118 S. Ct. 2385, -- L. Ed.2d -- (1998); Pierchoski v. Commissioner, NO. CIV. 87-2047, 1988 WL 95031, at *1 (W.D. Pa. Apr. 19, 1988); see also Bob Jones Univ. v. Simon, 416 U.S. 725, 746 (1974). Because she had an adequate legal remedy, an injunction ordering the refund of plaintiff's 1993 and 1995 tax overpayments is unavailable. See Church of Scientology v. United States, 920 F.2d 1481, 1489 (9th Cir. 1990) ("courts have repeatedly held that the opportunity to sue for a refund is an adequate remedy at law which bars the granting of an injunction"), cert. denied, 500 U.S. 952 (1991).

Given the Government's agreement to abate the assessment, there is no longer an illegal action for the court to enjoin and plaintiff's prayer for injunctive relief under section 6213(a) will be dismissed as moot, subject to the IRS actually abating the contested assessment and removing all levies against plaintiff's property and/or funds. See Jones v. United States, 889 F.2d 1448, 1449 n.1 (5th Cir. 1989) (request for injunction against collection of taxes moot after assessment was abated); cf. Koger v. United States, 755 F.2d 1094, 1097-98 (4th Cir. 1985) (claim seeking to enjoin Government from collecting assessed tax deficiencies and to order release of tax lien rendered moot by payment of assessment amount).

2. Anti-Injunction Act

Plaintiff's request for injunctive relief ordering the refund of her 1993 and 1995 overpayments is also barred by the Anti-Injunction Act. The act provides that

[e]xcept as provided in sections 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6672(b), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C. § 7421(a).

"The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without

judicial intervention, and to require that the legal right to disputed sums be determined in a suit for refund." Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962). The Government argues the Anti-Injunction Act prevents the court from enjoining the assessment or collection of taxes and no exception applies.

Plaintiff responds that under the judicial exception to section 7421(a) enunciated by the Supreme Court in Williams Packing, his claim for injunctive relief may go forward. Williams Packing allows a taxpayer to obtain an injunction against the collection of a tax if: (1) it is "clear that under no circumstances could the Government ultimately prevail" and (2) "equity jurisdiction" exists in that the taxpayer shows that he would otherwise suffer irreparable injury. Id.

The Williams Packing exception does not apply here because to obtain an injunction the taxpayer must "still plead and prove facts establishing that his remedy in the Tax Court or in a refund suit is inadequate to repair any injury that might be caused by an erroneous assessment or collection of an asserted tax liability." Commissioner v. Shapiro, 424 U.S. 614, 629 (1976).

Taking all the allegations of the complaint as true, plaintiff has failed to plead irreparable injury. She points once more to Philadelphia & Reading for the proposition that

"[t]he omission to send a Notice of Deficiency is so fundamental to the tax procedures Congress has established that the affected taxpayer suffers irreparable harm because he is denied the same treatment other similarly situated taxpayers receive." Pl. Cross-Mot. for Summ. J. at 8. To the contrary, the Philadelphia & Reading court expressly stated, "[e]quitable considerations simply are not relevant to decisions on whether the taxpayer is entitled to a refund of illegally assessed taxes." 944 F.2d at 1075. Further, a taxpayer bringing a Williams Packing claim to enjoin an assessment must still "show that equitable relief is appropriate." Flynn v. United States, 786 F.2d 586, 591 (3d Cir. 1986). There is no authority for the proposition that an illegal assessment or collection of taxes constitutes irreparable injury per se.

Moreover, even if equitable considerations were a factor in refund suits, plaintiff cannot establish irreparable harm under Shapiro, 424 U.S. at 629, because she could have sued for a refund under section 7422(a). See supra part II.A.1. As a result, the Anti-Injunction Act also prevents the court from exercising jurisdiction over plaintiff's claim for injunctive relief.

3. Exhaustion of Administrative Remedies

Although plaintiff's complaint did not expressly state a tax refund claim, the Government argues that the court lacks subject

matter jurisdiction over any such claim because plaintiff failed to exhaust her administrative remedies. Plaintiff responded (1) with a motion to amend the complaint to include a specific section 7422(a) tax refund claim, and (2) contended in her cross-motion for summary judgment that the Government did not affirmatively plead administrative exhaustion in its answer and therefore waived the defense.

i. Section 7422(a) Requirements May Not Be Waived

Plaintiff's waiver argument fails as a matter of law. "It is fundamental that where . . . the sovereign has waived its immunity, no suit can be maintained unless it is in exact compliance with the terms of the statute under which the sovereign has consented to be sued." Bruno v. United States, 547 F.2d 71, 73 (8th Cir. 1976). Section 7422(a) expressly prohibits suits against the United States for tax refunds unless "a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." 26 U.S.C. § 7422(a). Accordingly, the filing of a timely administrative claim for refund is a jurisdictional prerequisite to a tax refund suit and cannot be waived. See Essex v. Vinal, 499 F.2d 226, 231 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975); see also Rosenbluth Trading, Inc. v. United States, 736 F.2d 43, 47 (2d Cir. 1984) ("The filing of a timely refund claim

is a jurisdictional requirement, which cannot be waived."); Bruno, 547 F.2d at 73; United States v. Rochelle, 363 F.2d 225, 231 (5th Cir. 1966).

ii. Plaintiff Failed to Exhaust Administrative Remedies

According to the Government, plaintiff never filed an administrative claim for refund of her 1993 and 1995 tax overpayments and the court is without subject matter jurisdiction over her refund suit. Plaintiff objects that under 26 C.F.R. § 301.6401-3(a)(5) her 1993 and 1995 tax returns were themselves claims for refund which satisfy the administrative filing requirement.

Section 301.6401-3(a)(5) indeed provides that an individual's original income tax return shall constitute a claim for refund for the amount of the overpayment disclosed by the return. 26 C.F.R. § 301.6401-3(a)(5). The Government concedes that plaintiff's 1993 and 1995 tax returns qualified as refund claims for her 1993 and 1995 tax overpayments and were allowed as such. Gov't Mot. to Dismiss, Cohen Decl. Ex. A. at 2. But the Government also maintains that once those overpayments were applied to plaintiff's 1980 tax liability in accordance with 26 U.S.C. § 6402(a)³, "they lost their character as overpayments of

³ 26 U.S.C. § 6402(a) provides:

[i]n the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such

1993 and 1995 taxes" and plaintiff's only recourse was to file a separate administrative claim for refund of the 1980 tax. Id.

That position is correct. Section 7422(d) of the tax code provides, "[t]he credit of an overpayment of any tax in satisfaction of any tax liability shall, for the purpose of any suit for refund of such tax liability so satisfied, be deemed to be a payment in respect of such tax liability at the time such credit is allowed." 26 U.S.C. § 7422(d). Thus, when the IRS credited plaintiff's 1993 and 1995 refunds to the 1980 tax liability, those refunds were deemed payments under section 7422(d). Plaintiff was consequently required to file a separate claim for refund with respect to the money credited against the 1980 tax liability.⁴

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.

⁴ Courts generally treat a tax refund credited against an outstanding tax liability as a payment which can only be recovered by filing a separate refund claim. Bazargani v. Commissioner, NO. CIV. A. 91-4709, 1992 WL 121607, at *2 (E.D. Pa. May 26, 1992) ("Following the seizure of her 1986 overpayment to satisfy the 1982 liability, it was incumbent upon the plaintiff to file a claim for refund of the 1982 tax within the statutory period."); Schick v. United States, No. 97-0971, 1997 WL 732624, at *3 (D.N.J. July 28, 1997) (plaintiff's tax return constituted administrative claim for refund of overpayment claimed on return, but not for refund of credit applied to outstanding tax liability); see also Simmonds v. United States, 29 Fed. Cl. 136 (Fed. Cl. 1993) (plaintiff's refund claim was timely because credit to tax deficiency constituted payment under

Moreover, plaintiff has made no showing that her 1993 and 1995 tax returns addressed the IRS' decision to credit those overpayments against the 1980 tax liability. To satisfy the jurisdictional prerequisites for bringing a refund suit, a claim for refund filed with the IRS must detail each claimed ground for a tax refund, and provide sufficient facts to apprise the IRS of its basis. See Chicago Milwaukee Corp. v. United States, 40 F.3d 373, 375-74 (Fed. Cir. 1994) (citing 26 C.F.R. § 301.6402-2(b)(1) (1994)).⁵ This includes refund claims which are submitted as federal income tax returns in accordance with the regulation

section 7422(d)); Newman v. United States, No. C-2-76-822, 1977 WL 1291, at *2 (S.D. Ohio Nov. 16, 1977) (limitations period for tax refund suit begins running on date tax deemed paid, which was date tax overpayment was applied to prior tax liability).

⁵ 26 C.F.R. 301.6402-2 details the administrative requirements for filing a claim for refund with the IRS, and subsection (b)(1) provides:

No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that it is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

relied upon by plaintiff, 26 C.F.R. 301.6401-3(a)(5). See Hefti v. IRS, 8 F.3d 1169, 1173 (7th Cir. 1993) (amended tax return lacked statement of necessary factual basis for refund as required under 26 C.F.R. § 301.6402-2(b)(1)); Levitsky v. United States, 27 Fed. Cl. 235, 240 (Ct. Cl. 1992). "What is essential is that the taxpayer must inform the Internal Revenue Service that a claim for a refund is being asserted, and must provide enough information so that the IRS can adequately examine the merits of the claim." Evans v. United States, 618 F. Supp. 621, 622-23 (E.D. Pa. Jun 28, 1985), aff'd, 787 F.2d 581 (3d Cir. 1986).

In this case, the court cannot determine whether plaintiff's 1993 and 1995 tax returns adequately notified the IRS of the bases plaintiff may have asserted for refund of the 1993 and 1995 overpayments credited to the 1980 tax liability, because plaintiff has not shown those tax returns to the court. "When a defendant raises a jurisdictional defense under Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of proving that jurisdiction exists." Ellis v. Mohenis Services, Inc., No. Civ. A. 96-6307, 1997 WL 364468, at *2 (E.D. Pa. Jun 18, 1997) (citing Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir.), cert. denied, 510 U.S. 964 (1993)). Without a showing that her 1993 and 1995 tax returns constituted sufficient claims for refund of the credited overpayments under 26 C.F.R. §

301.6402-2(b)(1), plaintiff has failed to establish that she properly availed herself of the IRS' administrative remedies.

For the above-stated reasons, plaintiff's tax refund claim will be dismissed pursuant to Rule 12(b)(1).⁶

B. Amending the Complaint

Turning to plaintiff's motion to amend, the court is aware that leave to amend the complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). However, leave to amend should not be granted when amendment would be futile. Foman v. Davis, 371 U.S. 178, 183 (1962). "An amendment is futile if it . . . could not withstand a motion to dismiss." 3 James W. Moore, Moore's Federal Practice § 15.15[3] (3d ed. 1998). Plaintiff's failure to file a timely administrative claim with the IRS deprives the court of jurisdiction over any tax refund suit by her and compels the conclusion that amending the

⁶ In any event, plaintiff's claim for refund appears to be beyond the statute of limitations. In cases where no return was filed, a claim for refund of a tax overpayment must be filed "within 2 years from the time the tax was paid." 26 U.S.C. § 6511(a). "The limitations period is jurisdictional in nature and cannot be waived." Gabelman v. Commissioner, 86 F.3d 609, 611 (6th Cir. 1996) (citing United States v. Dalm, 494 U.S. 596, 602 (1990)); see also Schick v. United States, No. 97-0971, 1997 WL 732624, at *2 (D.N.J. Jul 28, 1997). The IRS credited plaintiff's 1993 refund against the 1980 tax liability on April 15, 1994, and did the same with her 1995 refund on April 15, 1996. Gov't Mem. of Law in Opp'n to Pl. 1st Summ. J. Mot., Certificate of Assessments & Payments at 2. As a result, "[a] claim for refund for the 1993 offset would have to have been filed by April 15, 1996, and the claim for refund for the 1995 offset would have to have been filed by April 15, 1998." Id.

complaint to include a specific section 7422(a) action would be futile. Accordingly, plaintiff's motion to amend must be denied. See Debbs v. California W.C.A.B., No. 95-15646, 1996 WL 328799, at *2 (9th Cir. June 14, 1996) (amending complaint considered futile where court lacks subject matter jurisdiction); Moore v. Indiana, 999 F.2d 1125, 1128 (7th Cir. 1993).

C. Motion to Enforce Concession

Given the Government's concession that the IRS did not send plaintiff the required notice of deficiency before making its assessment, plaintiff moves to "force the Service's hand and order that the Service void and strike all liens and levies pertinent to the Service's assessment against [plaintiff] for 1980." Pl. Mot. to Enforce at 2.

Plaintiff's request falls under section 6213(a), which allows the court to enjoin levies which are made prior to the mailing of a notice of deficiency to the taxpayer. 26 U.S.C. § 6213(a). In opposition to plaintiff's motion, counsel for the Government has declared that, based upon her conversations with counsel for the IRS, the IRS is already in the process of abating the 1980 assessment, releasing the notice of tax lien on file, and informing Smith Barney, Inc. that it need not comply with the August 23, 1996 levy on plaintiff's account. Gov't Opp'n to Pl. Mot. to Enforce Concession, Cohen Decl. ¶¶ 3 & 4. Plaintiff's motion to enforce the concession will therefore be denied as

moot, subject to the IRS removing all liens and levies against plaintiff's property and/or funds.

D. Litigation Expenses

Plaintiff also seeks summary judgment on her entitlement to litigation expenses under 26 U.S.C. § 7430. The Government objects that this request is not ripe for adjudication because Rule 54(d)(2)(B) requires that motions for attorney's fees and costs must be filed after entry of judgment. Fed. R. Civ. P. 54(d)(2)(B).

Rule 54(d)(2)(B) states,

[u]nless otherwise provided by statute or order of the court, the motion [for attorney's fees and related nontaxable expenses] must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought.

Fed. R. Civ. P. 54 (d)(2)(B).

A judgment "includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). Under Rule 54(d)(2)(B), plaintiff's motion is deficient in that it was filed before "entry of judgment," did not "specify the judgment" entitling plaintiff to litigation expenses, and failed to "provide a fair estimate of the amount sought." Plaintiff's request for summary judgment on her entitlement to litigation expenses is consequently denied without prejudice to renew the motion in

accordance with the provisions of Rule 54 and 26 U.S.C. § 7430.

E. Civil Damages for Unauthorized Collections

Plaintiff lastly moves for summary judgment on her entitlement to damages under 26 U.S.C. § 7433(a).⁷ That section provides a civil remedy for damages against the United States “[i]f, 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 any provision” of the tax code, or any regulation promulgated under it. 26 U.S.C. § 7433(a).

Plaintiff asserts she is entitled to judgment as a matter of law on her section 7433 claim because: (1) the IRS wrongfully levied against her IRA, which could have caused a penalty for early withdraw; (2) the IRS wrongfully levied against joint tax returns, even though her husband was not liable; (3) the IRS either knew or should have known that the tax matters partner rules could not apply to her 1980 tax return; and (4) the IRS wrongfully placed a lien against her home, preventing her from selling the home and retiring to Florida.

Summary judgment is inappropriate on this issue because

⁷ Summary judgment should be granted when, after consideration of the evidence in the light most favorable to the non-moving party, no genuine issue of material fact remains in dispute and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

plaintiff has not provided undisputed evidence of reckless or intentional disregard of the tax laws by the IRS. Although the Government concedes that the IRS failed to send plaintiff a notice of deficiency within the statutory time period, the Government also maintains that IRS employees Robert Como and Michael T. Crutchley earlier believed plaintiff or her agent had indefinitely waived the statute of limitations on assessment. See Como Decl. ¶ 5; Crutchley Decl. ¶ 5. In addition, the Government expressly has not conceded "the issue of whether the assessment was timely made." Gov't Mot. to Dismiss, Cohen Decl. Ex. A. at 1. In view of the IRS' prior belief that its actions were proper, the issue of the recklessness or intentionality of the IRS' conduct remains in dispute.

Moreover, "to prove a claim for improper collection practices, the taxpayer must demonstrate that the IRS did not follow the prescribed methods of acquiring assets." Shaw, 20 F.3d at 184. Here, even if the underlying assessment was wrong, the IRS' collection activities against plaintiff's IRA, joint tax returns and home were not contrary to the tax code or its regulations.

First, the IRS may levy upon a taxpayer's IRA to effectuate collection under 26 U.S.C. § 6331(a), regardless of whether that action causes the taxpayer to incur a withdrawal penalty. See Kane v. Capital Guardian Trust Co., 145 F.3d 1218, 1223 (10th

Cir. 1998) (“[The taxpayer’s] right to liquidate his IRA and withdraw the funds therefrom (even if subject to some interest penalty) undoubtedly constituted a ‘right to property’ subject to the IRS’ administrative levy power under 26 U.S.C. § 6331(a).”); First Fed’l Sav. & Loan Ass’n of Pittsburgh v. Goldman, 644 F. Supp. 101, 103 (W.D. Pa. 1986) (IRS levy on taxpayer’s IRAs was authorized by 26 U.S.C. § 6331).

Second, if plaintiff and her husband filed a joint return for 1980, it was legal for the IRS to levy upon their joint tax refund -- regardless of her spouse’s lack of fault in the matter. See 26 U.S.C. § 6013(d)(3) (“[I]f a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.”). If they share joint liability for the 1980 tax deficiency under section 6013(d)(3), refunds from plaintiff’s and her husband’s joint tax returns could be applied to that liability under section 6402(a). See 26 U.S.C. § 6402(a).

However, if plaintiff and her husband filed separate returns in 1980, or if they were not married in 1980, then plaintiff’s husband would not be liable for the 1980 tax deficiency. An overpayment on a joint income tax return is apportionable to a spouse to the extent that he or she contributed to the overpaid tax. Rosen v. United States, 397 F. Supp. 342, 343-44 (E.D. Pa.

1975).⁸ "Accordingly, if a penalty is assessed against one spouse, either personally or in his or her business, the other spouse may nonetheless be entitled to a refund commensurate with his or her contribution to the tax paid." Wollman v. United States, 571 F. Supp. 824, 828 (S.D. Fla. 1983). It is unclear from the record what liability, if any, plaintiff's husband had for the alleged 1980 tax deficiency. In any case, even if plaintiff's husband was not liable, plaintiff has not presented evidence of reckless or intentional disregard of the tax laws by the IRS in applying plaintiff's and her husband's joint tax refunds to the 1980 liability. Plaintiff's assertion that her spouse's innocence supports summary judgment on the issue of damages is without factual support.

Third, section 7433(a) applies only to the reckless or intentional disregard of the tax laws in the collection of taxes, not to the improper assessment of taxes. Miller v. United States, 66 F.3d 220, 223 (9th Cir. 1995) (claim challenging determination of tax not actionable under section 7433), cert.

⁸ See also United States v. Elam, 112 F.3d 1036, 1038 (9th Cir. 1997) ("A joint return does not itself create equal property interests for each party in a refund. Spouses who file a joint return have separate interests in any overpayment, the interest of each depending upon his or her relative contribution to the overpaid tax."); Gordon v. United States, 757 F.2d 1157, 1160 (11th Cir. 1985); Gens v. United States, 673 F.2d 366 (Fed. Cir. Cir. 1982), cert. denied, 459 U.S. 906 (1982); Michelson v. Commissioner, 73 T.C.M. (CCH) 1809 (1997) (citing Rodney v. Commissioner, 53 T.C. 287, 307 (1969)).

denied, 517 U.S. 1103 (1996); Shaw v. United States, 20 F.3d 182, 184 (5th Cir.) (“[A] taxpayer cannot seek damages under § 7433 for an improper assessment of taxes.”), cert. denied, 513 U.S. 1041 (1994); cf. Gonsalves v. IRS, 975 F.2d 13, 16 (1st Cir. 1992) (taxpayer cannot circumvent refund action process by litigating merits of tax assessment in § 7433 damage claim). “Section 7433(a) was not intended to confer a cause of action where taxes have been improperly assessed⁹, or where collection activities have followed invalid assessments.”¹⁰ Hart v. United States, NO. CIV. A. 96-5639, 1997 WL 732466, at *1 (E.D. Pa. Nov 21, 1997). The IRS previously believed that a tax matters partner had waived the statute of limitations for assessment on plaintiff’s behalf. Pl. App. to Br. in Opp’n to Gov’t Mot. to Dismiss, App. 3, Ex. B, 7/9/96 Tunnell Letter. Thus, the applicability of the tax matters partner rules to plaintiff’s 1980 tax liability goes to the timeliness and validity of the underlying assessment, not to the reckless or intentional disregard of the tax laws in the collection of taxes under section 7433(a).

Fourth, while a taxpayer’s principal residence is exempt

⁹ Citing Ivory v. United States, No. C-3-94-353, 1995 WL 724522, at *4 (S.D. Ohio Sept. 21 1995).

¹⁰ Citing Byrd v. United States, No. 94-6119, 1996 WL 196705, at *3 (W.D. Ark. Feb. 22, 1996).

from levy under 26 U.S.C. § 6334(a)(13), levy on principal residences is permitted if "(1) a district director or assistant district director of the Internal Revenue Service personally approves (in writing) the levy of such property, or (2) the Secretary finds the collection of tax in jeopardy." 26 U.S.C. § 6334(e). Plaintiff has not argued that the IRS violated collection procedures by levying on her home, and plaintiff has failed to make even a minimal showing that this levy was procedurally deficient. Her desire to sell the home and move to Florida notwithstanding, the IRS' house levy does not favor summary judgment on plaintiff's section 7433 claim.

Lastly, damages in section 7433 actions are limited to the lesser of either \$1,000,000 or the sum of "actual, direct economic damages sustained by plaintiff as a proximate result of" the IRS' conduct plus "the costs of the action." 26 U.S.C. § 7433(b)(1)&(2). Here, plaintiff has not asserted any "actual, direct economic damages" sustained by her as a proximate result of the IRS' conduct. See 26 U.S.C. § 7433(b)(1). The court cannot rule that plaintiff is entitled to damages where she has not demonstrated that she suffered the kind of damages available under the statute. See Kruse v. Chevrolet Motor Div., NO. CIV. A. 96-1474, 1997 WL 408039, at *2-3 (E.D. Pa. Jul 17, 1997) (granting defendant summary judgment on breach of warranty claim where plaintiff did not prove he suffered actual damages

available under Magnuson-Moss Act and Uniform Commercial Code); Protocomm Corp. v. Fluent, Inc., NO. CIV. A. 93-0518, 1994 WL 719674, at *7 (E.D. Pa. Dec 27, 1994) (granting summary judgment where plaintiff failed to show it suffered damages due to defendant's alleged breach of contract).

The moving party bears the burden of showing the court its basis for summary judgment, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Plaintiff has not met this burden, and her motion for summary judgment on her entitlement to damages must be denied.

III. CONCLUSION

Because plaintiff's request for injunctive relief against the illegal assessment for the 1980 tax deficiency is moot, the Government's motion to dismiss that claim will be granted, subject to the IRS' abatement of the assessment and removal of all levies against plaintiff's property and/or funds. Plaintiff's claim for an injunction ordering the refund of her 1993 and 1995 tax overpayments and her section 7422(a) tax refund claim will be dismissed for lack of subject matter jurisdiction. Plaintiff's motion to amend the complaint must be denied as futile. Plaintiff's motion to enforce the Government's concession will be denied as moot, subject to the IRS' abatement of the assessment and removal of all levies against plaintiff's

property and/or funds. Her motion for summary judgment on her entitlement to litigation expenses is denied without prejudice to renew the motion in accordance with Fed. R. Civ. P. 54 and 26 U.S.C. § 7430. And finally, plaintiff's motion for summary judgment on her 26 U.S.C. § 7433 claim for damages is denied because issues of material fact remain in dispute.

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

LENA CULPEPPER-SMITH,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 96-CV-5855
UNITED STATES OF AMERICA,	:	
Defendant.	:	
	:	
	:	

O R D E R

AND NOW, this day of August, 1998, upon consideration of defendant United States of America's motion to dismiss for lack of subject matter jurisdiction, plaintiff Lena Culpepper-Smith's cross-motion for summary judgment, motion to amend the complaint, and motion to enforce defendant's concession, as well as the parties respective replies thereto, it is hereby

ORDERED that:

(1) defendant's motion to dismiss plaintiff's claim for an injunction against the assessment of deficiency for the tax year 1980 is **GRANTED**, subject to the IRS' abatement of the assessment and removal of all levies against plaintiff's property and/or funds;

(2) defendant's motion to dismiss plaintiff's claims for (a) injunctive relief directing the return of her 1993 and 1995 overpayment

of taxes, and (b) refund of those overpayments under 26 U.S.C. § 7422(a) is **GRANTED**;

(3) plaintiff's motion to amend the complaint to include a specific demand for refund of her 1993 and 1995 tax overpayments pursuant to 26 U.S.C. § 7422(a) is **DENIED**;

(4) plaintiff's motion to enforce the IRS' concession is **DENIED** as moot, subject to the IRS removing all liens and levies against plaintiff's property and/or funds;

(5) plaintiff's cross-motion for summary judgment is:
(a) **DENIED** as to her entitlement to a permanent injunction under 26 U.S.C. § 6213 and damages under 26 U.S.C. § 7433; and
(b) **DENIED** without prejudice to renew the motion in accordance with Fed. R. Civ. P. 54 and 26 U.S.C. 7430 as to her entitlement to litigation expenses.

BY THE COURT:

JOSEPH L. McGLYNN, JR., J.