

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

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 01-0272
	:	
M. ROBERT ULLMAN,	:	
	:	
Defendant.	:	

**MEMORANDUM**

BUCKWALTER, J.

October 30, 2001

The United States filed this action on January 18, 2001, pursuant to 26 U.S.C. § 6672 seeking to reduce to judgment an unpaid tax liability of Defendant M. Robert Ullman, (“Defendant” or “Ullman”). Ullman’s tax liability stems from a determination that he was the responsible person for the employee withholding taxes of Canoe Manufacturing Co., Inc. (“Canoe Manufacturing”). Defendant’s answer to the United States’ complaint includes counterclaims against Internal Revenue Service Commissioner, Charles Rossotti, for certain allegedly unauthorized collection activities in violation of 26 U.S.C. § 7433 and for allegedly failing to deliver written advice of the Internal Revenue Service Chief Counsel in violation of 26 U.S.C. § 6110(i)(4)(B).

Presently before the Court is the United States’ Motion for Summary Judgment and M. Robert Ullman’s Motion for Summary Judgment. For the reasons that follow, the United States’ Motion for Summary Judgment is granted and Defendant’s Motion for Summary Judgment is denied. Defendant’s counterclaims are denied and dismissed as well.

## **I. BACKGROUND**

On or about February 4, 1991, an assessment was made against Ullman pursuant to 26 U.S.C. § 6672 for the unpaid trust fund employment taxes of Canoe Manufacturing for the first and second quarters of 1989 in the amount of \$49,121.51. Prior to this tax assessment, Canoe Manufacturing filed a Petition for Relief seeking reorganization under Chapter 11 of the Bankruptcy Code. As part of the reorganization plan, Canoe Manufacturing entered into a Stipulation and Security Agreement with Meridian Bank in which Meridian Bank consented to Canoe Manufacturing's use of certain cash collateral under explicit terms and conditions in an attempt to keep Canoe Manufacturing a going concern. Ultimately the Chapter 11 Bankruptcy was converted into Chapter 7 liquidation pursuant to a motion by the Internal Revenue Service ("IRS").

Ullman subsequently agreed to pay his tax liability in installments. He first attempted to negotiate a \$400.00 per month payment, which the IRS rejected, contending that Ullman had the ability to make payments of \$1,000.00 per month. Eventually, Ullman and the IRS entered into an Installment Agreement which required Ullman to make monthly payments of \$600.00.

Throughout the installment negotiation process, Ullman consistently maintained that he was not responsible for the tax debt. Ullman claimed that Meridian Bank maintained third party responsibility for the tax debt, because Meridian Bank controlled funds providing payment for wages of Canoe Manufacturing employees by virtue of the Stipulation and Security Agreement. Ullman also claimed that the IRS had miscalculated his ability to pay monthly

installment amounts by including his wife's income in the financial statement analysis and failing to take into account his pension reduction.

Due in part to Ullman's persistence in challenging the tax assessment, the Taxpayer Advocate directed the IRS to abate that portion of the assessment relating to the period in which Ullman no longer had control over Canoe Manufacturing. Therefore, the IRS abated all taxes accruing after the bankruptcy was converted into Chapter 7 liquidation, an amount of \$31,308.96. Following the partial abatement, and despite notice and demand for payment, Ullman has refused to pay the remaining amount assessed by the IRS. As of April 30, 2001, Ullman's total liability on account of the assessment, including penalties and interest, was \$112,010.95.

## **II. LEGAL STANDARD**

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to "do more than simply show that there is some

metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962). The nonmoving party, however, cannot “rely merely upon bare assertions, conclusory allegations or suspicions” to support its claim. Fireman’s Ins. Co. v. Du Fresne, 676 F.2d 965, 969 (3d Cir. 1982). A mere scintilla of evidence in support of the nonmoving party’s position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant. Liberty Lobby, 477 U.S. at 252, 106 S. Ct. at 2512. Therefore, it is plain that “Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). In such a situation, “[t]he moving party is ‘entitled to a judgment as a matter of law’ because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” Id. at 323 (quoting Fed. R. Civ. P. 56(c)).

### **III. DISCUSSION**

#### **A. Validity of Assessment**

The United States’ one-count complaint seeks to reduce to judgment the tax assessment against Ullman plus statutory additions. The United States’ memorandum of law in

support of its Motion for Summary Judgment notes that as of April 30, 2001, Ullman's total liability on account of the assessment was \$112,010.95.

“Assessments are generally presumed valid and establish a *prima facie* case of liability against a taxpayer.” Freck v. Internal Revenue Serv., 37 F.3d 986, 992 n.8 (3d Cir. 1994) (citing United States v. Janis, 428 U.S. 433, 440-42, 96 S. Ct. 3021, 3025-26, 49 L. Ed. 2d 1046 (1976) (holding that the presumption of correctness that attaches to the assessment in a refund suit also applies in a civil collection suit instituted by the United States)). Furthermore, in order to avoid all or part of a tax debt, a taxpayer in a collection action has the burden of showing the assessment is incorrect. Janis, 428 U.S. at 440-42, 96 S. Ct. at 3025-26.

In an attempt to meet his burden and defeat summary judgment, Ullman argues that the IRS (1) unnecessarily delayed filing the assessment; (2) failed to recognize the third party responsibility of Meridian Bank; (3) failed to honor the Installment Agreement; (4) failed to reduce the monthly payments of the Installment Agreement to reflect a reduction in income; (5) improperly demanded that the income of his wife be included in the financial analysis with respect to Ullman's ability to pay his tax debt in monthly installments; (6) refused to supply requested, written advice of the Chief Counsel; and (7) failed to recognize that Meridian Bank has a prior judgment against Ullman, entitling Meridian Bank priority over any IRS lien.

The Court notes that the alleged undue delay and third party responsibility issues are Ullman's only arguments which could possibly refute the validity of the actual assessment of tax liability. Ullman's arguments pertaining to the Installment Agreement, calculation of monthly payments thereunder, failure to provide written advice of the Chief Counsel, and priority of payments afforded to Meridian Bank have no bearing on the validity of the IRS's assessment,

as these claims only relate to the IRS' attempts to collect Ullman's tax debt subsequent to its actual assessment. However, these tangential claims will be addressed, infra, as they relate to Defendant's counterclaims.

### **1. Timeliness of Assessment**

Ullman argues that the IRS exercised undue delay in assessing his tax liability. The IRS did not make its assessment for the unpaid trust fund employment taxes for the first and second quarters of 1989, ending March 31, 1989 and June 30, 1989 respectively, until February 4, 1991, a period of approximately 23 months. The general rule, set forth in 26 U.S.C. § 6501(a), provides that any imposition of tax must be assessed within three years after a return is filed. Therefore, because 23 months falls within the 3-year period of limitations, the IRS timely assessed Ullman's tax. The tax may be collected by a proceeding in court if the proceeding is begun within 10 years after the assessment of the tax. 26 U.S.C.A. § 6502 (1989 & Supp. 2001). Thus, because the United States filed the instant action on January 18, 2001, the statute of limitation had not yet expired.

Ullman also complains that the subsequent abatement in the amount of \$31,308.96 did not occur until May, 2000, a period just under 10 years from the date of the original assessment. However, 26 U.S.C. § 6404 authorizes the IRS to abate an unpaid assessment whenever it:

- (1) is excessive in amount, or
- (2) is assessed after the expiration of the period of limitation properly applicable thereto, or
- (3) is erroneously or illegally assessed.

26 U.S.C.A. § 6404(a) (1989 & Supp. 2001). Such abatement is not required within a specified period of time, but may occur at any time there remains an “unpaid portion of the assessment.”

See 26 U.S.C.A. § 6404(a) (1989 & Supp. 2001). Therefore, Ullman’s complaints of untimeliness are without merit.

## **2. Third Party Responsibility**

Ullman next supports his assertion that he does not owe any money to the United States by claiming that Meridian Bank is liable for the tax debt pursuant to 26 U.S.C. § 3505.

Section 3505 provides in pertinent part:

. . . if a lender, surety, or other person supplies funds to or for the account of an employer for the specific purpose of paying wages of the employees of such employer, with actual notice or knowledge . . . that such employer does not intend to or will not be able to make timely payment or deposit of the amounts of tax required . . . to be deducted and withheld by such employer from such wages, such lender, surety, or other person shall be liable in his own person and estate to the United States in a sum equal to the taxes (together with interest) which are not paid over to the United States by such employer with respect to such wages. However, the liability of such lender, surety or other person shall be limited to an amount equal to 25 percent of the amount so supplied to or for the account of such employer for such purpose.

26 U.S.C.A. § 3505 (1989). Ullman contends that the Stipulation and Security Agreement between Canoe Manufacturing and Meridian Bank exposes Meridian Bank to Section 3505 liability and that the IRS is therefore under an obligation to collect the tax liability directly from Meridian Bank.

Section 3505 was enacted to provide the government with an alternative source for the collection of unpaid withholding taxes. See Brandt-Airflex Corp. v. Long Island Trust Co., N.A. (In re Brandt-Airflex Corp.), 843 F.2d 90, 94 (2d Cir. 1988) (citing S. Rep. No. 1708

(1966)). “It is completely within the discretion of the taxing authority whether or not to initiate collection proceedings against the lender of funds where the employer has defaulted on its tax obligations.” In re Brandt-Airflex Corp., 843 F.2d at 94. Because the IRS is under no duty to collect withholding taxes from third parties potentially liable for them, there is no conceivable theory under which Ullman could force the IRS to collect such taxes from Meridian Bank. Without commenting on Meridian Bank’s liability under Section 3505, to the extent that Ullman’s conclusion can be construed as requiring the IRS to pursue Meridian Bank rather than himself, the inference is clearly based on a misinterpretation of Section 3505.

## **B. Defendant’s Counterclaims**

### **1. Unauthorized Collection Activities**

Ullman additionally complains that his wife’s income was improperly included in the IRS’ assessment of his ability to pay a specified monthly installment amount, that the IRS did not reduce his monthly installment payment despite its knowledge of the reduction of Ullman’s pension, and that the IRS did not honor the initial Installment Agreement calling for monthly payments of \$400.00. In his counterclaim, Ullman asserts that the above conduct evidences that the IRS recklessly or intentionally, or by reason of negligence engaged in unauthorized collection actions in violation of 26 U.S.C. § 7433. Without commenting on the propriety of the IRS’ conduct in connection with the collection of Ullman’s tax debt, the Court must dismiss Ullman’s Section 7433 claim as time barred.

An action to enforce liability created under Section 7433 may be brought only within two years after the date of the action accrues, i.e., two years after Ullman became aware of the offending conduct. 26 U.S.C.A. § 7433(d)(3) (1989 & Supp. 2001). Ullman attaches to his

memorandum of law in opposition to the United States' Motion for Summary Judgment numerous letters written by him exhibiting these exact complaints beginning in 1994. Consequently, because Ullman has been aware of the complained of conduct for seven years, the limitations period on Ullman's Section 7433 claim has expired.

To the extent that Ullman's counterclaim asserts that the IRS breached a valid contract in its 1994 rejection of the proposed \$400.00 monthly installment payments, it too is barred by the six year statute of limitations Pennsylvania imposes on contract actions. See 42 PA. Cons. Stat. Ann. § 5527.

## **2. Chief Counsel Advice**

Ullman next claims that the IRS violated 26 U.S.C. § 6110(i)(4)(B) when it failed to honor Ullman's repeated requests to obtain the Chief Counsel's written advice and other background documents pertaining to his particular dispute. Section 6110 requires certain disclosures in the case of written Chief Counsel advice directed to a particular taxpayer. See 26 U.S.C.A. § 6110(i)(4)(B) (1989 & Supp. 2001). Although Section 6110 permits a taxpayer to bring a civil action whenever the IRS fails to follow the procedures set forth in subsection (i)(4)(B), a taxpayer's exclusive remedy is a civil action against the Secretary in the United States Court of Federal Claims. 26 U.S.C.A. § 6110(j)(1) (1989 & Supp. 2001). Therefore, this Court does not have jurisdiction to hear Ullman's Section 6110 claim.

## **3. Attorneys' Fees**

Finally, Ullman asserts that he is entitled to attorneys fees pursuant to 26 U.S.C. § 7430. However, Ullman has not demonstrated that he is a prevailing party permitting the award

of reasonable litigation costs incurred in connection with the instant action. See 26 U.S.C. §7430(c)(4) (1989 & Supp. 2001). Therefore, attorneys' fees are not warranted.

#### **IV. CONCLUSION**

Because the United States has established its *prima facie* case of tax liability against Defendant by virtue of the assessment's presumptive validity, and Ullman has failed to show the IRS' assessment is incorrect, the United States' Motion for Summary Judgment is granted. Furthermore, Defendant's counterclaims are denied and dismissed.

An appropriate Order follows.

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

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CIVIL ACTION
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v.	:	NO. 01-0272
	:	
M. ROBERT ULLMAN,	:	
	:	
Defendant.	:	

**ORDER**

AND NOW, this 30<sup>th</sup> day of October, 2001 upon consideration of the Plaintiff's Motion for Summary Judgment (Docket No. 7), and Defendant's response thereto (Docket No. 11), it is hereby ORDERED that Plaintiff's request for summary judgment is GRANTED. Defendant's Motion for Summary Judgment (Docket No. 12) is DENIED. Defendant's counterclaims are DENIED and DISMISSED.

The Court finding that good cause exists for granting of said motion, it is further ORDERED that judgment be entered in favor of the United States and against the Defendant, M. Robert Ullman, for trust fund recovery penalty taxes and statutory additions owed by the Defendant for the first and second quarters of 1989 in the amount of \$112,010.95, plus statutory additions accruing thereon according to law from May 1, 2001.

BY THE COURT:

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RONALD L. BUCKWALTER, J.