In the United States Court of Federal Claims

No. 06-149T
Filed October 31, 2006
NOT TO BE PUBLISHED

TIMOTHY THORNDIKE, and BEVERLY BARTLETT,	*
Plaintiffs, *pro se*,	*
v.	*
THE UNITED STATES,	*
Defendant.	*

Timothy Thorndike and Beverly Bartlett, Cleveland, Ohio, *pro se*.

Jennifer P. Wilson, United States Department of Justice, Tax Division, Washington, D.C., counsel for Defendant.

MEMORANDUM OPINION AND FINAL ORDER

BRADEN, *Judge*

I. RELEVANT FACTS.[1]

Timothy Thorndike and Beverly Bartlett ("Plaintiffs") filed a 2002 joint income tax return on October 16, 2003, pursuant to an extension. *See* DX A; PX A, Pt. 3 at 121. Plaintiffs owed $58,890 in taxes for 2002 ("2002 Original Tax"), but failed to remit payment, citing lack of funds. *See* DX A; *see also* PX A, Pt. 3 at 76 (difference between the reported tax owed ($71,771) and the witholdings ($13,019)). On July 21, 2004, the Internal Revenue Service ("IRS") sent a Final Notice of Intent to Levy Plaintiffs' assets, if the 2002 Original Tax was not paid. *See* PX A, Pt. 3 at 44. As

[1] Facts recited herein were derived from: Plaintiffs' February 27, 2006 Complaint ("Compl.") and a three-part exhibit attached thereto ("PX A"); and the Government's May 17, 2006 Motion to Dismiss ("Gov't Mot.") and exhibits attached thereto ("DX A-B").

of July 21, 2004, the Plaintiffs owed $69,864.26 for the 2002 Original Tax, including interest and penalties assessed for non-payment. *Id.*, Pt. 3 at 45.

On June 9, 2004, a federal bankruptcy court in Las Vegas, Nevada issued a permanent injunction against the National Audit Defense Network ("NADN"), "prohibit[ing] NADN from selling abusive tax schemes and from preparing federal income tax returns." *See* PX A, Pt. 3 at 104-05 (Press Release, United States Department of Justice, Federal Bankruptcy Court Permanently Bars Telemarketing Firm "National Audit Defense Network" From Selling Tax Scams and Preparing Tax Returns, (June 10, 2004)). Thereafter, the IRS reviewed Plaintiffs' 2001 and 2002 joint tax returns based on "information that [Plaintiffs] may be involved in an abusive tax avoidance transaction . . . promoted by . . . NADN." *See* PX A, Pt. 3 at 98. On December 9, 2004, the IRS informed Plaintiffs that they had taken unallowable deductions and credits on their 2001 and 2002 joint tax returns and therefore were assessed additional taxes for both years ("2001 Assessment" and "2002 Assessment"), plus interest and penalties, resulting in an additional $1,442.63 for the 2001 tax year and $12,554.95 for the 2002 tax year. *Id.* Pt. 3 at 109. On December 24, 2004, Plaintiffs responded by letter to the Attorney General and IRS officials, stating that they were unaware of the scheme and would pay the taxes, if the IRS forwarded the appropriate documentation. *Id*. Pt. 3 at 96-97.

On July 22, 2004, the IRS filed a federal tax lien to satisfy the 2002 Original Tax owed by Plaintiffs. *See* PX A, Pt. 3 at 189-91. On August 12 and 27, 2004, Plaintiffs sent letters to various government agencies, including the IRS, alleging that the levy was unlawful and demanded a hearing. *Id.* Pt. 3 at 177-78, 183, 226-27, 240. On December 21, 2004, an IRS Settlement Officer granted Plaintiffs' request for a Collection Due Process ("CDP") Hearing to be held January 20, 2005 via telephone. *Id.* Pt. 3 at 88. The IRS granted Plaintiffs' request to postpone the conference, but Plaintiffs cancelled the rescheduled conference and stated they would reschedule at their convenience. *Id.* Pt. 3 at 76-77. On April 14, 2005, the IRS Appeals Office issued a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 to Plaintiffs, denying Plaintiffs' request for relief from the federal tax lien, because Plaintiffs' arguments were deemed frivolous and groundless. *Id.* Pt. 3 at 76. The IRS Appeals Office further stated that Plaintiffs were "not in compliance with [the] tax laws of the United States." *Id.*

On May 18, 2005, the IRS sent Plaintiffs a Notice of Deficiency for the 2001 Assessment and the 2002 Assessment. *See* PX A, Pt. 3 at 57-70. On July 4, 2005 and August 29, 2005, the IRS also sent Plaintiffs two separate requests for 2002 Original Tax and the 2002 Assessment. *Id.* Pt. 3 at 38, 52. The August 29, 2005 request also included a Final Notice of Intent to Levy Plaintiffs' assets, if the 2002 Original Tax and 2002 Assessment were not paid. *Id.* Pt. 3 at 38. As of August 29, 2005, Plaintiffs owed the IRS $91,579.75, including: the 2002 Original Tax; the 2002 Assessment; and interest and penalties assessed for non-payment. *Id.*

The IRS sent Plaintiffs additional requests for the 2001 Assessments on July 4, 2005, August 8, 2005, October 3, 2005, and November 2, 2005. *See* PX A, Pt. 3 at 3, 7, 35, 49. The November 2, 2005 request also included a Final Notice of Intent to Levy, if the 2001 Assessment was not paid. *Id.* Pt. 3 at 3. As of November 2, 2005, Plaintiffs owed $1,551.47 for the 2001 Assessment,

including interest and penalties. *Id.* Pt. 3 at 4. On November 8, 2005, the IRS filed a federal tax lien against Plaintiffs to satisfy the 2001 Assessment. *Id.* Pt. 3 at 1.

The IRS has also sent two notices requesting that Plaintiffs file a 2003 federal income tax return. *See* PX A, Pt. 3 at 24, 71. On September 16, 2005, Plaintiffs sent a claim to the IRS that again stated they were willing to pay the tax owed, but only if the IRS provided a 23C assessment form and a determination that Plaintiffs are taxpayers, pursuant to the Internal Revenue Code ("IRC"). *Id.* Pt. 3 at 15-16. In addition, Plaintiffs demanded restitution for the expense of responding to the various IRS requests and stated that they would consider any further assertion by the IRS that income taxes were due as extortion. *Id.* Pt. 3 at 16-17.

II. PROCEDURAL HISTORY.

On February 27, 2006, Plaintiffs filed a Complaint in the United States Court of Federal Claims against the United States, John Snow (Bonded Fiduciary, Department of Treasury), Mark W. Everson (Bonded Fiduciary, Commissioner of Internal Revenue), the Official Bond of John Snow, the Official Bond of Mark W. Everson, and the IRS (collectively "Government"). *See* Compl. at 1. The Complaint alleges that Plaintiffs are not taxpayers as defined by Congress or the IRC. *See* Compl. at 5, ¶¶ 4, 5. The Complaint also alleges that no court of competent jurisdiction has determined that Plaintiffs are taxpayers and that the Government cannot take measures to collect income taxes from Plaintiffs until the Government affirmatively establishes that Plaintiffs are taxpayers. *Id*. at 4-5, ¶¶ 3,6,7. The Complaint seeks the following relief: 1.) a declaratory judgment that Plaintiffs have no tax obligation (*Id.* at 11, ¶ 1); 2.) a declaratory judgment that the IRS has not provided a 23C assessment form, and therefore no lawful tax collection can be initiated against Plaintiffs (*Id.* ¶ 2); 3.) a declaratory judgment that Plaintiffs are not taxpayers as defined by Congress (*Id*. ¶ 3); 4.) a declaratory judgment that Plaintiffs do not have any outstanding tax obligation (*Id.* ¶ 4); 5.) an injunction requiring the Government to cease collection or enforcement activities with respect to Plaintiffs' federal income taxes (*Id.* ¶ 5); 6.) an injunction requiring the Government to cease tax collection or enforcement from Plaintiffs without first providing a 23C assessment form, based on income earned by Plaintiffs in a geographical area where Congress has express legislative jurisdiction (*Id.* at 12, ¶ 6); and 7.) restitution in the amount of not less than $5,000.00, legal costs, and expenses (Id. ¶ 7).

On April 28, 2006, the court issued an Order Denying Plaintiffs' February 27, 2006 Motion for a Preliminary Injunction. On August 31, 2006, the court issued a Memorandum Opinion and Order Denying Reconsideration or Certification For Interlocutory Review. *See Thorndike* v. *United States*, 72 Fed.Cl. 580 (2006).

On May 17, 2006, the Government filed a Motion to Dismiss all of Plaintiffs' Complaint based on lack of subject matter jurisdiction. On June 9, 2006, Plaintiffs filed a response. On June 22, 2006, the Government filed a reply.

III. DISCUSSION.

A. Relevant Precedent Regarding Jurisdiction.

Under the Tucker Act, the United States Court of Federal Claims has "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2001).

The Tucker Act, however, is merely "a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages . . . the Act merely confers jurisdiction upon it whenever the substantive right exists." *U.S.* v. *Testan*, 424 U.S. 392, 398 (1976). Therefore, in order to pursue a substantive right, a plaintiff must identify and plead an independent contractual relationship, constitutional provision, federal statute, and/or executive agency regulation that provides a substantive right to money damages. *See Todd* v. *United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004) ("[J]urisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act[.]"); *see also Roth* v. *United States*, 378 F.3d 1371, 1384 (Fed. Cir. 2004) ("Because the Tucker Act itself does not provide a substantive cause of action, however, a plaintiff must find elsewhere a money-mandating source upon which to base a suit."); *Khan* v. *United States*, 201 F.3d 1375, 1378 (Fed. Cir. 2000) ("[T]he plaintiff 'must assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States.'") (quoting *James* v. *Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998)). Specifically, a plaintiff must demonstrate that the source of substantive law upon which he or she relies "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States* v. *Mitchell*, 463 U.S. 206, 216-17 (1983); *see also Testan*, 424 U.S. at 400.[2]

---

[2] In considering the money-mandating requirement of the Tucker Act, the United States Supreme Court has held that: "This 'fair interpretation' rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity . . . . It is enough, then, that a statute creating a Tucker Act right be *reasonably amenable* to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be 'lightly inferred' . . . a *fair inference* will do." *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003) (emphasis added). The United States Court of Appeals for the Federal Circuit has recognized, but not resolved, whether the United States Supreme Court, in restating the money-mandating test, may have made it less stringent. *See Fisher*, 402 F.3d 1167, 1173-74 (Fed. Cir. 2005) (citing *White Mountain*, 537 U.S at 472-73). For the purposes of this case, however, under either interpretation,

Additionally, the Tucker Act "does not provide independent jurisdiction over such claims for equitable relief." *Brown* v. *United States*, 105 F.3d 621, 624 (Fed. Cir. 1997). Pursuant to the Tucker Act, the court has the authority to award equitable relief only when such relief is "an incident of and collateral to" a monetary judgement. *See* 28 U.S.C. § 1491(a)(2); *see also United States* v. *King*, 395 U.S. 1, 3 (1969) (refusing to assume that the United States Court of Federal Claims has the authority to render declaratory judgements absent an express jurisdictional grant from Congress).

The Anti-Injunction Act bars the maintenance, in any court, of a suit "for the purpose of restraining the assessment or collection of any tax," with certain specified exceptions. 26 U.S.C. § 7421(a) (2000); *see also Skillo* v. *United States*, 68 Fed.Cl. 734, 740 (2005) (holding "this court has no jurisdiction to hear claims seeking to 'restrain[ ] the assessment or collection of any tax'") (quoting 26 U.S.C. § 7421(a)).

B. *Pro Se* Plaintiff Pleading Requirements.

In the United States Court of Federal Claims, the pleadings of a *pro se* plaintiff are held to a less stringent standard than those of the litigants represented by counsel. *See Hughes* v. *Rowe*, 449 U.S. 5, 9 (1980) (quoting *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972)) (*pro se* complaints, "however inartfully pleaded," are held to "less stringent standards than formal pleadings drafted by lawyers"). Indeed, it has been the tradition of the court to examine the record "to see if [a *pro se*] plaintiff has a cause of action somewhere displayed." *Ruderer* v. *United States*, 188 Ct. Cl. 456, 468 (1969).

C. Standard For Motion to Dismiss.

A dispute as to the court's "general power to adjudicate in specific areas of substantive law . . . is properly raised by a [Rule] 12(b)(1) motion." *Palmer* v. *United States*, 168 F.3d 1310, 1313 (Fed. Cir. 1999); *see also Fisher*, 402 F.3d at 1173 ("If the court's conclusion is that the source as alleged and pleaded is not money-mandating, the court shall so declare, and shall dismiss the cause for lack of jurisdiction, a Rule 12(b)(1) dismissal-the absence of a money-mandating source being fatal to the court's jurisdiction under the Tucker Act."); *see also* RCFC 12(b)(1) ("Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter [.]").

In determining whether to grant a motion to dismiss, the court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke* v. *United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). Plaintiff, however, bears the burden of

---

the court does not have jurisdiction over the claims alleged in this complaint. *Id.* at 1174.

establishing jurisdiction by a preponderance of the evidence. *See Reynolds* v. *Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) ("[O]nce the [trial] court's subject matter jurisdiction [is] put in question it [is] incumbent upon [the plaintiff] to come forward with evidence establishing the court's jurisdiction.").

D. Resolution Of The Government's Motion To Dismiss.

The Government asserts that the court does not have jurisdiction to adjudicate Plaintiffs' claims either for declaratory or other equitable relief, and moves to dismiss the Complaint for lack of subject matter jurisdiction. *See* Gov't Mot. at 4. The court concurs.

1. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiffs' Tax Refund Claim.

To the extent that the Complaint's "restitution" claim for $5,000.00 seeks a tax refund, Plaintiffs have not pleaded the requisite jurisdictional facts. Specifically, a taxpayer must fully pay the assessed income tax and then timely file a refund claim with the IRS. *See* 26 U.S.C. §§ 7422(a), 6532(a) (1998), 28 U.S.C. § 1346(a)(1) (1997). If the claim is denied and the taxpayer timely files suit, this court will have jurisdiction over the tax refund claim. *See* 26 U.S.C. §§ 7422(a), 6532(a), 28 U.S.C. § 1346(a)(1); *see also Shore* v. *United States*, 9 F.3d 1524, 1526 (Fed. Cir. 1993) (holding tax refund claims are dismissed where "principal tax deficiency has not been paid in full").

In this case, however, Plaintiffs have not pleaded the jurisdictional facts required to maintain an income tax refund claim, *i.e.*, payment of the assessed tax and filing of a claim with the IRS. *See* DX B.

2. The United States Court Of Federal Claims Does Not Have Jurisdiction To Adjudicate Plaintiffs' Claims For Equitable Relief.

First, the Complaint seeks a declaratory judgment that Plaintiffs have no outstanding tax obligation and Plaintiffs are not taxpayers as defined by Congress in the IRC. *See* Compl. at 11, ¶¶ 1, 3, 4. In addition, the Complaint seeks a declaratory judgement that Government records do not contain a signed, 23C assessment form, necessary for lawful tax assessment and collection activity. *Id.* ¶ 2.

Second, the Complaint asks the court to enjoin the Government from "conducting any further tax collection and/or enforcement activities" "unless and until" the Government provides Plaintiffs with a 23C assessment form, based on income earned by Plaintiffs within a geographical area in which Congress has express legislative jurisdiction, and the court determines that Plaintiffs are "taxpayer[s]," as defined in the IRC. *Id.* at 11-12, ¶¶ 5, 6.

The United States Court of Federal Claims' authority to grant equitable remedies is limited to relief that is "an incident of and collateral to" a monetary judgment. *See* 28 U.S.C. § 1491(a)(2). Plaintiffs have not pled a monetary claim within the jurisdiction of this court. Therefore, the

declaratory and injunctive relief sought by Plaintiffs is not "an incident of and collateral to" a monetary judgment. Rather, Plaintiffs' claims are equitable, and the court does not have jurisdiction to provide such relief when it is the "primary focus of the plaintiff's suit." *Rice* v. *United States*, 31 Fed. Cl. 156, 164 (Fed. Cl. 1994), *aff'd* 48 F.3d 1236 (Fed. Cir. 1995); *see also Brown*, 105 F.3d at 624 (plaintiffs' demands for declaratory and injunctive relief in a tax case were held to be outside the jurisdiction of the United States Court of Federal Claims, because "[t]he Tucker Act does not provide independent jurisdiction over such claims for equitable relief"); *Betz* v. *United States*, 40 Fed. Cl. 286, 291 (1998) (where plaintiff sought both declaratory judgment that he was not liable for income tax and an injunction to remove tax liens and levies, the court held "[e]xcept in narrow circumstances inapplicable here, the Tucker Act does not authorize the Court of Federal Claims to grant declaratory or injunctive relief of the type requested by plaintiff.").

Third, the Complaint seeks restitution in the amount of "not less than $5,000" "for the time, counsel, and expenses of responding to the LETTER[.]" Compl. at 12, ¶ 7; *Id.* at 5, ¶ 8 (emphasis in original). Additionally, the Complaint asserts that any further Government income tax collection action constitutes an unlawful "extortion," for which Plaintiffs are entitled to restitution in the "common-law value of five thousand (5000) ounces of .999 fine silver (or its commercial equivalent)." *Id.* at 6, ¶ 9.

The Complaint's claims for restitution for allegedly unlawful Government actions, however, sound in tort. *See Betz*, 40 Fed. Cl. 286, 292 (1998) (". . .claims for relief . . . premised on alleged negligent, wrongful, or unauthorized conduct by the IRS . . . sound in tort."). The Tucker Act expressly excludes cases sounding in tort from the jurisdiction of this court. *See* 28 U.S.C. §1491(a)(1) (the United States Court of Federal Claims only has jurisdiction to adjudicate claims against the United States "in cases not sounding in tort"); *see also Keene Corp.* v. *United States*, 508 U.S. 200, 214 (2005) (stating "tort cases are outside of the jurisdiction of the Court of Federal Claims[.]"); *Brown*, 105 F.3d at 623 ("The Court of Federal Claims . . . lacks jurisdiction over tort actions against the United States."); *Westfed Holdings, Inc.* v. *United States*, 52 Fed.Cl. 135, 149 (2002) (declaring "[s]ubstantive restitution claims are not within the court's jurisdiction"). Therefore, the court does not have jurisdiction to adjudicate Plaintiffs' claims for restitution based on the Government's allegedly unlawful income tax assessment, collection, and enforcement activities.

Finally, the Anti-Injunction Act prohibits any court from maintaining a suit "for the purpose of restraining the assessment or collection of any tax[.]" U.S.C. § 7421(a); *see also* Betz, 40 Fed. Cl. at 291 (Anti-Injunction Act barred plaintiffs' requests for declaratory judgment regarding federal income tax collection and enforcement). To the extent that Plaintiffs seek to restrain the Government from collecting assessed income tax, the court is barred by statute from granting such relief.

IV. CONCLUSION.

For the aforementioned reasons, the Government's May 17, 2006 Motion to Dismiss Plaintiffs' Complaint is granted. The Clerk of the United States Court of Federal Claims is directed to dismiss the February 27, 2006 Complaint, with prejudice.

IT IS SO ORDERED.

SUSAN G. BRADEN
Judge