

**In the United States Court of Federal Claims**

No. 11-583 T

(Filed: March 12, 2012)

**UNPUBLISHED**

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SEGLEND A CRIGLER,

*Plaintiff,*

v.

THE UNITED STATES,

*Defendant.*

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**ORDER**

Before the court is defendant’s motion to dismiss plaintiff’s complaint pursuant to Rules 12(b)(1) and (6) of the Rules of the United States Court of Federal Claims (“RCFC”). Oral argument is deemed unnecessary. For the reasons set forth herein, defendant’s motion to dismiss for lack of jurisdiction is granted in part. The motion to dismiss pursuant to RCFC 12(b)(6) is converted to a motion for summary judgment and granted.

Plaintiff, Seglenda Crigler, is seeking a tax refund in the amount of \$2,781 for the tax year 2010. She filed her 2010 tax refund on January 21, 2011. Pl.’s Ex. 1. Plaintiff’s 2010 tax return reflects an overpayment in the amount of \$2,781. *Id.*

In addition to seeking a refund of her 2010 tax overpayment, plaintiff asserts that the Internal Revenue Service (“IRS”) “deprived the plaintiff of her property neglecting to pay plaintiff her 2010 tax return” in violation of the Fourteenth Amendment of the U.S. Constitution. Compl. ¶ 2. Plaintiff seeks \$250,000 as punitive damages for stress caused by the IRS’s negligence.

On November 18, 2011, defendant filed a motion to dismiss pursuant to RCFC 12(b)(1) and (6). Defendant asserts that the court lacks jurisdiction to hear a claim for damages based on negligence of the IRS or for violation of the Fourteenth Amendment of the U.S. Constitution. In addition, defendant moves to dismiss plaintiff’s refund claim because the IRS allowed the 2010

refund and under I.R.C. § 6402 (2006)<sup>1</sup> properly applied it to plaintiff's 2008 tax liability.

On November 29, 2010, defendant sought leave to file exhibits to its motion to dismiss. The court granted the motion. The exhibits demonstrate that the IRS allowed the overpayment of \$2,781 claimed on plaintiff's 2010 return and, on February 14, 2011, applied the entire amount as a credit against plaintiff's outstanding tax liability for 2008.

Plaintiff did not respond to defendant's motion to dismiss within the 28 days allowed by RCFC 7.2. On January 9, 2012, the court ordered plaintiff to respond by February 9, 2012, or her complaint could be dismissed for failure to prosecute. Because it is clear that the complaint is subject to dismissal both for lack of jurisdiction and for failure to state a claim, it is not necessary to address plaintiff's failure to respond to the motion to dismiss or the court's January 9 order.

The Tucker Act gives this court jurisdiction to hear claims for money damages founded upon acts of Congress. 28 U.S.C. § 1491 (2006). This Act "does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists." *United States v. Testan*, 424 U.S. 392, 398 (1976) (citation omitted). Plaintiff must demonstrate that each of her claims falls within the Tucker Act's jurisdictional grant. *See Barrett v. Nicholson*, 466 F.3d 1038, 1041 (Fed. Cir. 2006) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188-89 (1936)).

We have jurisdiction over plaintiff's tax-refund claim,<sup>2</sup> *see* 28 U.S.C.

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<sup>1</sup> "In 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." 26 U.S.C. § 6402 (2006). All I.R.C. references are to the Internal Revenue Code of 1986, as amended, contained within Title 26 of the United States Code, unless otherwise noted.

<sup>2</sup> The jurisdictional grant of 28 U.S.C. § 1346 (2006), allowing for a tax refund suit, provides this court with jurisdiction to hear plaintiff's tax refund claim and provides the taxpayer with due process. It is thus unnecessary to

§ 1346(a)(1) (2006); *Ledford v. United States*, 297 F.3d 1378, 1382 (Fed. Cir. 2002), however, defendant challenges plaintiff's punitive damages claim on jurisdictional grounds. The complaint does indeed seek damages for negligence and infliction of stress. Such claims sound in tort and are expressly excluded from the jurisdiction of this court. 28 U.S.C. § 1491(a)(1). We therefore grant defendant's RCFC 12(b)(1) motion to dismiss with regard to the tort aspects of the claim.

Defendant asks that plaintiff's remaining claim, for refund of her \$2,781 overpayment for the 2010 tax year, be dismissed for failure to state a claim upon which relief can be granted. A complaint can be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). To support the motion to dismiss, however, defendant attaches exhibits in order to demonstrate that the IRS applied plaintiff's 2010 overpayment to her outstanding tax liability for 2008 in accordance with I.R.C. § 6402.

Under RCFC 12(d), if matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under RCFC 56. Accordingly, in an order dated February 16, 2012, we notified plaintiff that the motion was converted into a motion for summary judgment and gave her until March 2, 2012 to respond. Plaintiff did not respond.

Summary judgment is granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. RCFC 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The burden of demonstrating "the absence of any genuine issue of material fact and entitlement to judgment as a matter of law" is on the moving party. *Crater Corp. v. Lucent Techs., Inc.*, 255 F.3d 1361, 1366 (Fed. Cir. 2001). A genuine issue as to a material fact exists if evidence could support a finding for the non-moving party. *Anderson*, 477 U.S. at 255.

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address plaintiff's claim that the application of her tax overpayment to another year constituted an unconstitutional taking under the Fifth and Fourteenth Amendments of the U.S. Constitution. In any event, the imposition of the federal income tax does not constitute an unconstitutional taking. *See U.S. Shoe Corp. v. United States*, 296 F.3d 1378, 1383 (Fed. Cir. 2002).

Defendant's Exhibit 1 is an IRS Certificate of Assessments and Payments for plaintiff's 2010 tax year. It shows that plaintiff's overpayment was allowed by the IRS on February 14, 2011, and applied as a credit against plaintiff's outstanding tax liability for 2008. Def.'s Exs. 1 & 2. An IRS Certificate of Assessments and Payments is presumptive proof of a valid assessment and indicates that plaintiff has an outstanding liability. See *Rocovich v. United States*, 933 F.2d 991, 994 (Fed. Cir. 1991) (citations omitted); *Harris v. United States*, 33 Fed. Cl. 470, 472 (1995). Further, as discussed above, I.R.C. § 6402 allows the IRS to credit any overpayment against any liability in respect to tax for a previous year.

Plaintiff alleges in the complaint that she has paid all taxes due for 2008. She offers two checks drawn on HSBC Bank USA to show that she made payments as to her tax liability for 2008. The Certificate of Assessments and Payments is presumptive proof of a valid assessment, however. *Rocovich*, 933 F.2d at 994. The Certificate of Assessments and Payments for plaintiff's 2008 tax year shows that between January 23, 2009, and June 1, 2009, plaintiff filed five amended returns with the IRS, all of which were disallowed. Def.'s Exs. 2 & 3. The IRS charged plaintiff penalties under I.R.C. § 6702(a) (2006) for filing returns based on a position the IRS determined to be frivolous. Def.'s Ex. 3.

To challenge the 2008 assessment and penalties, plaintiff must establish she has no tax liability for 2008 and is due a refund for the 2008 tax year or that the penalties were improperly assessed. The complaint does not allege plaintiff is due a refund for the 2008 tax year nor does it challenge a statutory notice of deficiency. Further, full payment of the 2008 tax deficiency is required before a tax suit for that year may be brought in this court. *Flora v. United States*, 362 U.S. 145, 149 (1960); *Rocovich*, 933 F.2d at 993.

Because defendant has established that plaintiff is not owed the claimed refund, defendant is entitled to judgment as a matter of law. Defendant's motion, therefore, is granted.

## **CONCLUSION**

Defendant's motion to dismiss for lack of jurisdiction is granted with respect to plaintiff's tort claims. The balance of defendant's motion to dismiss is converted to a motion for summary judgment and is granted with respect to all other claims. The Clerk is directed to dismiss the complaint. No costs.

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ERIC G. BRUGGINK  
Judge