

In the United States Court of Federal Claims

No. 10-456T
(Filed: June 30, 2011)

GILBERT LAU,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

Pending before the court is defendant’s motion to dismiss pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims (“RCFC”). The motion is fully briefed and ready for disposition. We deem oral argument unnecessary. For the reasons set forth below, we grant defendant’s motion.

BACKGROUND¹

This suit arises from Mr. Lau’s alleged overpayment of income taxes for the 2007 tax year. Mr. Lau timely filed an income tax return for 2007 claiming no tax liability and seeking a refund of \$217. Shortly thereafter, he filed a revised 2007 tax return on which he reported an additional \$658,101 of income received from a lease termination settlement. This amended return reported an additional tax liability of \$100,828, which he simultaneously paid. The IRS has no record of, nor does Mr. Lau supply evidence of, any additional

¹ These facts are taken from the complaint, the government’s motion, and the appendices thereto and, except as otherwise noted, are undisputed.

return or refund claim filed for the 2007 tax year or of any returns or claims filed for the 2008 or 2009 tax years.²

Mr. Lau filed suit here *pro se* on July 12, 2010, alleging a right to a tax refund of an unspecified amount. He subsequently amended his complaint. The government moved for a more definite statement to include the information required by RCFC 9(m) in a tax refund suit. We granted the motion, and in early 2011, Mr. Lau filed a second amended complaint, claiming a right to a tax refund for 2007 and 2009 in the amount of \$23,500 as a result of his alleged overpayment of the taxes resulting from his 2007 lease settlement agreement.

Appended to the second amended complaint is Mr. Lau's revised 2007 tax return and an unsigned 2009 return allegedly filed on December 23, 2010.³ Mr. Lau also alleges he filed a "form 208 and form 209" and spoke with two unnamed female IRS agents, one of whom said he was entitled to a refund for the 2009 tax year.

DISCUSSION

Before the court considers the merits of a complaint, it must determine the threshold matter of subject matter jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). If the court lacks jurisdiction, it must dismiss the complaint. *See* RCFC 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Although complaints filed by *pro se* litigants are typically held to "less stringent standards than formal pleadings drafted by lawyers," *Haines v. Kerner*, 404 U.S. 519, 520 (1972), this relaxed standard does not relieve a plaintiff from establishing jurisdiction. *See Bernard v. United States*, 59 Fed. Cl. 497, 499 (2004).

Under the Little Tucker Act, we have concurrent jurisdiction with the district courts over claims "for the recovery of any internal revenue tax alleged

² In his reply to the government's motion, styled an "Affirmation in Opposition," Mr. Lau alleges that he did file a return or refund claim which the government lost.

³ As of January 13, 2011, the Internal Revenue Service had no record of the alleged 2009 tax year filing, though its records show that Mr. Lau had received an extension of time through October 15, 2010 in which to file his 2009 tax return.

to have been erroneously or illegally assessed or collected.” 28 U.S.C. § 1346(a)(1) (2006); *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 4 (2008). Before filing such a complaint, however, a taxpayer must comply with the tax refund scheme established by the Internal Revenue Code. *Clintwood*, 553 U.S. at 4. Specifically, the taxpayer must file a timely claim for a refund with the IRS before bringing suit:

No 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 [IRS] according to the provisions of law in that regard, and the regulations of the [IRS] established in pursuance thereof.

26 U.S.C. § 7422(a) (2006). The pertinent regulation referred to by the statute states that “in the case of an overpayment of income taxes, a claim for credit or refund of such overpayment shall be made on the appropriate income tax return.” 26 C.F.R. § 301.6402-3(a)(1) (2011). This may take the form of an amended tax return, *id.* at § 301.6402-3(a)(2), (4), or a “properly executed individual . . . tax return or an amended return.” *Id.* at § 301.6402-3(a)(5). In lieu of such a formal claim, an informal claim “is permissible if it fairly apprises the IRS of the basis for the claim within the limitations period,” *Computervision Corp. v. United States*, 445 F.3d 1355, 1364 (Fed. Cir. 2006), and its “formal defects are later remedied by amendment of the claim.” *Pennoni v. United States*, 86 Fed. Cl. 351, 361 (2009) (citing *United States v. Kales*, 314 U.S. 186, 194 (1941)).

In short, before bringing tax refund suit here, a taxpayer must first file with the IRS a claim, whether formal or informal, for a credit or refund. This is “a jurisdictional prerequisite to a refund suit.” *Chi. Milwaukee Corp. v. United States*, 40 F.3d 373, 374 (Fed. Cir. 1994). Here, the government has presented evidence that Mr. Lau did not file any claim for a credit or refund and thus fails to satisfy this jurisdictional prerequisite. If this charge is correct, we have no choice but to dismiss the suit.

We have examined the various documents appended to the parties’ pleadings, including Mr. Lau’s tax returns for the 2007 and 2009 tax year, and can find no evidence of a claim for a refund. The amended 2007 return *increased* his tax liability for that year. As for the 2008 and 2009 tax years,

Mr. Lau provides no evidence of any filing, and the IRS' Certificate of Assessments and Payments show no return filed in either year. In addition, the Certification of Lack of Record further establishes that, as of January 13, 2011, the IRS searched fruitlessly for any record of Mr. Lau's 2008 and 2009 tax returns.

Even assuming *arguendo* that the unsigned 2009 return appended to Mr. Lau's complaint was submitted to the IRS on the date it was prepared, December 23, 2010, this filing would nonetheless have postdated Mr. Lau's suit by more than five months, thus failing to satisfy the jurisdictional prerequisite that the refund claim be filed *prior* to initiating suit. In any event, the 2009 tax return reports zero tax liability, zero return due, and zero overpayment, and thus cannot constitute a claim for a refund or credit.

Nor has Mr. Lau demonstrated that he made any informal claim with the IRS for a refund. Without supporting documentation, Mr. Lau's allegation that he submitted "form 208 and form 209" is insufficient to provide jurisdiction, particularly when countered by the IRS' certification of a lack of records. Similarly, without supporting evidence, we cannot conclude that Mr. Lau's telephone conversations with two unnamed IRS employees constitutes notice to the agency of his refund claim. Even assuming Mr. Lau's account of these conversations to be accurate, the IRS employee stated that he was eligible for a refund for the 2009 tax year. This is clearly inconsistent with the 2009 return appended to his amended complaint, which shows that he had zero tax liability, zero overpayment for that year, and zero refund due.

In sum, we conclude that Mr. Lau has failed to demonstrate that he filed a formal or informal claim for a refund or credit with the IRS as required by 26 U.S.C. § 7422(a) prior to initiating this lawsuit. Accordingly, we lack jurisdiction over his complaint.

CONCLUSION

For the reasons set forth above, we conclude that we lack jurisdiction over Mr. Lau's complaint. Accordingly, we grant defendant's motion to dismiss pursuant to RCFC 12(b)(1). The clerk is directed to dismiss the case. Judgment accordingly. No costs.

Eric G. Bruggink, Judge