

No. 04-1274 T

(Filed June 27, 2005)

**UNPUBLISHED**

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TROY C. BONIN and TERRI L.  
BONIN, \*

*Plaintiffs,* \*

v. \*

THE UNITED STATES, \*

*Defendant.* \*

\* \* \* \* \*

*Troy C. Bonin and Terri L. Bonin, pro se.*

*Benjamin C. King, Jr.*, United States Department of Justice, Washington, D.C., with whom were *Eileen J. O'Connor*, Assistant Attorney General, *Mildred L. Seidman*, Chief, Court of Claims Section, *David Gustafson*, Assistant Chief, for defendant.

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**OPINION**

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**BUSH**, *Judge*

This tax case is before the court on the government’s Motion to Dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC). Defendant contends that the claims asserted and relief sought by plaintiffs are not within the jurisdiction of this court, as conferred by the Tucker Act, 28 U.S.C. § 1491 (2000). For the reasons set forth herein, defendant’s Motion to Dismiss is granted.

## BACKGROUND

Plaintiffs, Dr. Troy C. Bonin and Mrs. Terri L. Bonin (the Bonins), are husband and wife. On August 10, 2004, the Bonins filed a complaint with the United States Court of Federal Claims. This complaint was followed by an amended complaint on August 31, 2004. One of the primary bases for the plaintiffs' lawsuit is that they are not obligated to file an income tax return because Title 26 of the Income Tax Code has not been published in the Federal Register.<sup>1</sup> As a result, the Bonins contend that their property has been illegally exacted, in violation of their due process rights. Specifically, plaintiffs seek: (1) to recover damages resulting from the tortious actions of Internal Revenue Service (IRS) agents; (2) to restrain or enjoin collection activity of the IRS; and (3) to recover for violations of their right to "administrative due process." Plaintiffs cite 26 U.S.C. § 7433 (2000) as establishing their right to recover damages from defendant.

In response to plaintiffs' allegations, defendant filed a motion to dismiss for lack of subject matter jurisdiction on October 12, 2004. The Bonins subsequently filed Plaintiff[s'] Motion [Opposition] to Defendant's Motion to Dismiss/Plaintiff[s'] Motion for Summary Judgment (Pls.' Resp.) on April 19, 2005.<sup>2</sup> The government then filed Defendant's Reply to Plaintiff[s'] Motion

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<sup>1/</sup> The court notes that other courts have repeatedly confirmed that all citizens are subject to a federal income tax and therefore must file an income tax return. *See Lovell v. United States*, 755 F.2d 517, 519 (7th Cir. 1984) (stating that all individuals are subject to federal income tax on their wages); *In re Morimoto*, 171 B.R. 85, 86 (B.A.P. 9th Cir. 1994) (stating that "an individual must file federal income tax returns regarding any earned wages"). "The tax laws, including their administration and enforcement by the Internal Revenue Service, a division of the Department of the Treasury, are probably the best publicized and indexed area of federal law, consisting of a separate title of the United States Code, Title 26, and the Code of Federal Regulations, Title 26 (spanning eighteen volumes), plus extensive commercial compilations and explanations." *Longsdale v. United States*, 919 F.2d 1441, 1447 (10th Cir. 1990) (holding publication arguments to be "utterly meritless"). As a result, taxpayers have, at the very least, actual notice of Form 1040 and similar forms. *Id.* Accordingly, taxpayers such as the Bonins are required to file a return.

<sup>2/</sup> In the court's order of November 3, 2004, plaintiffs' earlier submission on October 15, 2004 was returned unfiled, so that plaintiffs could respond to the government's motion to dismiss. As  
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[Opposition] to Defendant’s Motion to Dismiss on April 19, 2005. The court acknowledges that the Bonins are *pro se*, and are not expected to frame issues with the precision of a common law pleading. *Roche v. United States Postal Serv.*, 828 F.2d 1555, 1558 (Fed. Cir. 1987). However, despite the court’s liberal reading of plaintiffs’ complaint, defendant’s motion to dismiss must be granted.

## DISCUSSION

### I. Standard of Review

#### A. *Pro Se* Litigants

*Pro se* plaintiffs are entitled to a liberal construction of their pleadings. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (requiring that allegations contained in a *pro se* complaint be held to “less stringent standards than formal pleadings drafted by lawyers”). Accordingly, the court has read the complaint liberally and attempted to discern all of plaintiffs’ claims. However, “[t]here is no duty on the part of the trial court to create a claim which [the plaintiff] has not spelled out in his pleading.” *Scogin v. United States*, 33 Fed. Cl. 285, 293 (1995) (quoting *Clark v. Nat’l Travelers Life Ins. Co.*, 518 F.2d 1167, 1169 (6th Cir. 1994)).

#### B. Subject Matter Jurisdiction under RCFC 12(b)(1)

With respect to a motion to dismiss for lack of subject matter jurisdiction, the court should construe the allegations in the complaint in a manner most favorable to the pleader. See *Martinez v. United States*, 48 Fed. Cl. 851, 856 (2001) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)), *aff’d in part*, 281 F.3d 1376 (Fed. Cir. 2002). The plaintiff bears the burden of establishing subject matter jurisdiction and must do so by a preponderance of the evidence. See *Alder*

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<sup>2</sup>(...continued)

stated in that order, “[t]he court must first determine whether it possesses jurisdiction in this matter prior to any adjudication of the merits.” The Bonins’ subsequent submission on April 19, 2005 has thus been regarded by the court as plaintiffs’ response, and any cross-motion by plaintiffs that might be read to have been included in that filing has been rendered moot by the court’s disposition of defendant’s motion.

*Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). If a defendant challenges the facts upon which jurisdiction is premised, the plaintiff may lose the benefit of the foregoing presumption of truth. *McNutt*, 298 U.S. at 189. The court may then look beyond the pleadings to consider all available evidence when determining jurisdiction. *Martinez*, 48 Fed. Cl. at 857 (citing *Rocovich v. United States*, 993 F.2d 991, 993 (Fed. Cir. 1991)). Specifically, if the court has any doubts regarding jurisdiction, it may look at all the evidence presented to satisfy itself regarding the jurisdictional facts. *See RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461 (Fed. Cir. 1998). “Indeed, the court may, and often must, find facts on its own.” *Martinez*, 48 Fed. Cl. at 857.

The government argues that this court lacks subject matter jurisdiction over plaintiffs’ claims. This court’s jurisdiction is founded in the Tucker Act, 28 U.S.C. § 1491(a)(1). Pursuant to this statute, this court possesses jurisdiction to entertain any claim against the United States which is founded upon (1) the Constitution, (2) an act of Congress, (3) a regulation of an executive department, (4) any express or implied contract with the United States, or (5) for liquidated or unliquidated damages not sounding in tort. *Id.* The Tucker Act is a jurisdictional statute and does not grant a substantive right of action. *United States v. Testan*, 424 U.S. 392, 400 (1976). Accordingly, a substantive right must arise out of a specific source of law. *Id.* The United States Supreme Court has held, with limited exceptions, that this court may entertain a suit only if it is founded upon a claim for money allegedly due to the plaintiff from the government. *Id.* at 397-98. Thus, a jurisdictional inquiry must be decided in relation to whether plaintiffs have alleged a claim for money damages founded upon the Constitution, an act of Congress, a regulation of an executive department, or arising out of an express or implied-in-fact contract with the United States, or for damages not sounding in tort. 28 U.S.C. § 1491(a)(1).

## **II. Analysis**

Despite the Tucker Act grant of jurisdiction, “not every claim involving or invoking the Constitution, a federal statute, or a regulation . . . is cognizable here.” *Eastport S.S Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967). Rather, this court will only have jurisdiction over specific types of non-contractual claims.

*Id.* First of all, the claim must be for money. *Id.* Proper claims may then be broken down into two categories. *Id.*

The first category contains claims in which the plaintiff has paid money to the government. *Id.* In such a case, the plaintiff is asserting that this money was “improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation”, and therefore must be returned. *Id.* The second consists of assertions by a plaintiff that the government has done something for which he or she must be compensated. *Id.* In these cases, the plaintiff must cite a particular provision of law which commands the United States to pay the plaintiff money as a result of the government’s action. *Id.* at 1008. The Bonins’ claims fail to qualify for jurisdiction under either category.

#### **A. Plaintiffs’ Illegal Exaction Claim**

Plaintiffs claim that their property has been illegally exacted, in violation of their Fifth Amendment right to due process of law. An illegal exaction under the Due Process Clause exists only when money has been “improperly exacted or retained” by the government. *Testan*, 424 U.S. at 401. An exaction is considered improper when it has been made due to a “misinterpretation or misapplication of statutes, regulations, or forms.” *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1578 (Fed. Cir. 1996). In such cases, “Tucker Act claims can be made for recovery of monies that the government has required to be paid contrary to law.” *Id.* at 1572-73. In other words, jurisdiction is proper where “the Government has the citizen’s money in its pocket and the claim is to recover an illegal exaction made by officials of the Government, which exaction is based upon a power supposedly conferred by a statute.” *Eastport Steamship*, 372 F.2d at 1008 (citations omitted).

Plaintiffs claim that their property has been illegally exacted. However, nowhere in their pleadings have they claimed to have paid any of the taxes in dispute. Furthermore, they have not made any allegation that they have filed a claim for a refund. Outside of a refund claim for a tax fully paid, the Court of Federal Claims lacks jurisdiction to adjudicate claims for relief based on an alleged illegal exaction of property by the IRS. *Flora v. United States*, 362 U.S. 145, 150-51 (1960); *Brown v. United States*, 35 Fed. Cl. 258, 266 (1996) (*Brown I*), *aff’d*, 105 F.3d 621 (Fed. Cir. 1997) (*Brown II*); *see also* 26 U.S.C. § 7422(a) (2000). Therefore, plaintiffs have failed to meet the jurisdictional requirements of an illegal

exaction claim.

To the extent that plaintiffs argue that a lien or levy was illegally placed on their property, such a claim would also be improperly before this court. Such a claim would amount to a Fourth Amendment claim for illegal search and seizure. This court has held that “[a]lleged constitutional violations, other than a taking claim under the Fifth Amendment, do not state a cause of action for monetary relief against the United States in the [United States Court of Federal Claims].” *Frank’s Livestock & Poultry Farm, Inc. v. United States*, 17 Cl. Ct. 601, 607 (1989), *aff’d*, 905 F.2d 1515 (Fed. Cir. 1990). Therefore, because the Fourth Amendment does not mandate the payment of money for its violation, this court lacks jurisdiction over this claim. *Murray v. United States*, 817 F.2d 1580, 1582-83 (Fed. Cir. 1987).

Finally, even considering plaintiffs’ complaint as a Fifth Amendment takings claim, this court would still lack jurisdiction. When “a taxpayer disputes an IRS levy on his property, the appropriate course of action is a direct challenge of the levy, not the prosecution of a Fifth Amendment claim.” *Brown I*, 35 Fed. Cl. at 266 (citing *Castillo Morales v. United States*, 19 Cl. Ct. 342, 345 (1990)); *see also First Atlas Funding Corp. v. United States*, 23 Cl. Ct. 137, 141 (1991) (holding that “the filing of a notice of lien, standing alone, does not constitute a taking”). The court further observes that “[a] taking can only result from authorized acts of government officials.” *Brown I*, 35 Fed. Cl. at 266 (citing *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802-03 (Fed Cir. 1993); *Earnest v. United States*, 33 Fed. Cl. 341, 344 (1995)). This is because claims based on the unauthorized acts of government officials sound in tort. *Id.* Here, as in *Brown I*, plaintiffs assert that their property was taken unlawfully due to the unauthorized acts of government officials. Thus, their allegations sound in tort. As explained in Section II.B *infra*, this court lacks jurisdiction over tort claims.

Therefore, because plaintiffs have failed to demonstrate that they have paid any money over to the government, and because they have not cited any statutory provision that commands the United States to pay money to them, there is no jurisdiction over their illegal exaction claim.

## **B. No Jurisdiction For Tort Claims or Relief Sought**

### **1. Damages Arising from Alleged Wrongdoings of IRS Agents**

Plaintiffs also assert a variety of tort claims against agents of the federal government.<sup>3</sup> “It is well settled that the United States Court of Federal Claims lacks--and its predecessor the United States Claims Court lacked--jurisdiction to entertain tort claims.” *Shearin v. United States*, 992 F.2d 1195, 1197 (Fed. Cir. 1993). The court lacks jurisdiction because “the Tucker Act expressly provides that the ‘United States Court of Federal Claims shall have jurisdiction . . . in cases *not sounding in tort*’” *Id.* (citing 28 U.S.C. § 1491(a)(1)) (emphasis added).

As in *Ledford v. United States*, plaintiffs have made a claim for damages, alleging unlawful collection activities by agents of the IRS. 297 F.3d 1378, 1382 (Fed. Cir. 2002). Plaintiffs claim that these agents failed to follow proper administrative procedure, and illegally imposed a tax debt upon them in contravention of the laws and codes of the United States. Federal district courts possess exclusive jurisdiction over such claims. *Id.* (quoting 26 U.S.C. § 7433(a)). Additionally, plaintiffs have alleged fraud on the part of government agents. This claim is also improper because fraud, as a cause of action, lies in tort. *See Brown II*, 105 F.3d at 623 (stating that claims for “‘fraudulent assessments’ are grounded upon fraud, which is a tort.”); *Caravella v. United States*, 9 Cl. Ct. 280, 285 (1985), *aff’d*, 795 F.2d 1016 (Fed. Cir. 1986) (stating that plaintiff’s allegations of fraud and psychological stress occasioned by the government sound in tort).

The Bonins have alleged a variety of damages resulting from the unlawful acts of government officials. They seek \$1,600,000 in damages for pain, suffering, anxiety, fear of seizure of property rights, public humiliation, public defamation of character, encumbrance on plaintiffs’ freedom of movement, depression, and loss of consortium. Am. Compl. ¶ 38.<sup>4</sup> As in *Brown I*, plaintiffs’ “claims for monetary

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<sup>3/</sup> Although the Bonins deny that their claims sound in tort, the most cursory review of their allegations reflects otherwise. See discussion *infra*.

<sup>4/</sup> The court notes that there is a discrepancy between this total and the amount requested in the plaintiffs’ prayer for relief (\$1,739,000). Am. Compl. (Signature Page). Nevertheless, the court  
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damages, which arise out of alleged negligent and wrongful conduct of the defendant in the course of discharging official duties, are claims clearly sounding in tort.” 36 Fed. Cl. at 298 (citations omitted). Therefore, this court does not possess jurisdiction to grant such relief.<sup>5</sup>

Finally, to the extent that plaintiffs may assert tort claims against the federal government as a party, this court would still lack jurisdiction. This court does not possess authority to hear claims alleging tortious government misconduct. *See New Am. Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1079 (Fed. Cir. 1989) (confirming that when “government misconduct alleged is tortious, jurisdiction is not granted [to] the Claims Court”); *Carter v. United States*, 62 Fed. Cl. 66, 72 (2004) (stating that “[t]he language of the statutes which confer jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the government founded on torts”) (quoting *Gibbons v. United States*, 75 U.S. 269, 275 (1868)). Subsequent case law makes clear that “when no contractual duty exists, the negligent or careless performance of a duty by the government sounds in tort and fall[s] outside of this court[’s] jurisdiction.” *Lion Raisins, Inc. v. United States*, 54 Fed. Cl. 427, 434 (2002).

## 2. Restriction or Enjoinment of Collection Activities

Plaintiffs also seek to enjoin or restrain the collections actions taken by the IRS. As stated previously, this is a court of specific civil jurisdiction, defined by the Tucker Act, and a money-mandating provision is required to confirm jurisdiction. *Joshua v. United States*, 17 F.3d 378, 379 (Fed. Cir. 1994). Therefore, equitable relief may be granted only in conjunction with monetary relief under a money-mandating jurisdictional statute. *See Smith v. Sec’y of the Army*, 384 F.3d 1288, 1292 (2004) (stating that “the Tucker Act authorizes the Court of

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<sup>4</sup>(...continued)

lacks jurisdiction over all of plaintiffs’ claims and relief in any amount cannot be granted.

<sup>5</sup>/ The relief sought includes a request for \$50,217,000.00 in punitive damages. Pls.’ Am. Compl. (Signature Page). However, this request is also clearly beyond the jurisdiction of this court. *See e.g., Garner v. United States*, 230 Ct. Cl. 941, 943 (1982); *Vincin v. United States*, 468 F.2d 930, 932 (Ct. Cl. 1972). The United States has not waived sovereign immunity with regard to punitive damages, and therefore this court cannot grant such relief. 28 U.S.C. § 2674 (2000).

Federal Claims to grant ancillary equitable relief”). The Bonins have failed to identify such a statute. Furthermore, Congress has declared that claims resulting from the actions of IRS employees who disregard the Internal Revenue Code will be brought in the district courts.<sup>6</sup> 26 U.S.C. § 7433(a). The exception to this provision, Section 7432, which governs claims concerning failure to release a tax lien, also provides for jurisdiction in the district courts. *Id.* § 7432. As a result, this court must dismiss plaintiffs’ claims for injunctive and declaratory relief because such relief is beyond the scope of this court’s limited injunctive powers.

### **3. Recovery Based on Violations of Plaintiffs’ Due Process Rights**

Plaintiffs also seek recovery because agents of the IRS allegedly violated their constitutional rights. Specifically, these agents are alleged to have violated their right to “administrative due process.” Allegations concerning violation of the Due Process Clause of the Fifth Amendment do not provide a basis for jurisdiction because the Due Process Clause does not mandate the payment of money by the United States. *Brown I*, 35 Fed. Cl. at 258 (citing *Golder v. United States*, 15 Cl. Ct. 513, 517 (1988)). “Although the Fifth Amendment’s due process clause provides that no person shall be deprived of property without due process of law, no language in the clause itself requires the payment of money damages for its violation.” *Murray*, 817 F.2d at 1583. Moreover, this court’s jurisdiction comprises constitutional claims only against the United States, not federal officials in their individual capacities. *Frank’s Livestock*, 17 Cl. Ct. at 607 (citing 28 U.S.C. § 1491). Therefore, this court lacks jurisdiction over plaintiffs’ due process claim.

### **C. No Jurisdiction Under 26 U.S.C. § 7433**

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<sup>6/</sup> Section 7433(a) reads, in relevant part: “If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the [IRS] recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.” 26 U.S.C. § 7433(a).

Finally, the Bonins claim that 26 U.S.C. § 7433 grants jurisdiction. As explained earlier, the Tucker Act does not create a substantive right to recover money damages. *Testan*, 424 U.S. at 400. Instead, “[a] substantive right must be found in some other source of law, such as ‘the Constitution, or any Act of Congress, or any regulation of an executive department.’” *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (citing 28 U.S.C. § 1491(a)(1)). Plaintiffs cite 26 U.S.C. § 7433 as establishing their right to recover against the defendant.

Under this statute, a plaintiff “may bring a civil action for damages against the United States in a *district court* of the United States.” 26 U.S.C. § 7433(a) (emphasis added). This act authorizes civil actions for damages resulting from unauthorized collection actions by IRS personnel. *Id.* However, it explicitly states that such an action must be brought in a district court. The Court of Federal Claims is not a district court. Accordingly, a cause of action arising under 26 U.S.C. § 7433 may not be brought in this court. *See Brown v. United States*, 36 Fed. Cl. 290, 298 (1996) (stating that “claims for monetary damages alleging unauthorized collection activities are in the exclusive jurisdiction of the United States District Courts”). Therefore, this statute does not create a substantive right to recover money damages from the government in this court.

## CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that:

- (1) Defendant’s Motion To Dismiss, filed October 12, 2004, is **GRANTED**;
- (2) The Clerk’s office is directed to **ENTER** judgment for defendant, **DISMISSING** plaintiffs’ amended complaint, filed August 31, 2005, with prejudice; and
- (3) Each party shall bear its own costs.

Lynn J. Bush  
Judge