

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DENNIS W. JACOBSON,

Plaintiff,

v.

COMMISSIONER OF INTERNAL REVENUE,

Defendant.

OPINION AND
ORDER

05-C-134-C

This is a civil action in which unrepresented plaintiff Dennis Jacobson contends that defendant Commissioner of Internal Revenue (1) filed a lien against plaintiff's property without first sending him deficiency notices for the years 1993, 1994, 1995 and 1996; (2) levied certain property without respecting plaintiff's right to abate or rescind notices of deficiency for the years 1997, 1998 and 2000; and (3) failed to provide plaintiff with a hearing at which to challenge his tax liabilities. Plaintiff seeks monetary and injunctive relief and has paid the filing fee.

Federal courts have an independent obligation to insure that they have subject matter jurisdiction over an issue. Fed. R. Civ. P. 12(h)(3). I undertake this review of the court's

jurisdiction pursuant to this duty. Of particular concern here is whether the United States has waived its sovereign immunity with respect to plaintiff's claims and if so, whether there are any limitations to the waiver that may apply. I conclude that the government has waived immunity with respect to plaintiff's first two claims but not as to his third claim. However, plaintiff's second claim is barred by the Anti-Injunction Act. Accordingly, I will dismiss both the second and third claims for lack of jurisdiction. Plaintiff will have 120 days in which to serve his complaint and copies of this order to defendant, the Attorney General of the United States and the Attorney for the Western District of Wisconsin.

OPINION

Before turning to the question of this court's jurisdiction, it is helpful to understand some basics about the assessment and notice requirements at issue here. Upon determining that a deficiency exists, the IRS first must send a notice of deficiency to the taxpayer. 26 U.S.C. § 6212. The taxpayer then has ninety days to file a petition in the Tax Court for a redetermination of the deficiency. § 6213. If the taxpayer files a timely petition for redetermination, the IRS is prohibited from taking any action to collect the debt until the Tax Court decision has become final. § 6213(a). If no petition is filed, the IRS may make an assessment of the deficiency. § 6203. Within sixty days, the IRS must send the taxpayer a notice stating the amount of the assessment and demanding payment thereof. § 6303. If

the deficiency is not paid, a lien arises in favor of the United States on all real and personal property of the taxpayer. § 6321. The lien is treated as arising on the date on which the assessment was made. If the taxpayer fails to pay the deficiency within ten days of delivery of the assessment notice, the IRS may levy upon such property after providing the taxpayer notice of its intention to do so. § 6331.

A. Sovereign Immunity

I. Source of waiver

28 U.S.C. § 1340 grants federal district courts jurisdiction over “any civil action arising under any Act of Congress providing for internal revenue” Because plaintiff’s claims arise under the federal tax code, § 1340 is applicable. Nonetheless, his claims may be barred under the doctrine of sovereign immunity, which prohibits suit against a sovereign, such as the United States, unless it has consented to suit. Macklin v. United States, 300 F.3d 814, 820 (7th Cir. 2002); see also United States v. Mitchell, 463 U.S. 206, 212 (1983) (waiver of sovereign immunity is prerequisite to federal court’s exercise of jurisdiction). (Although plaintiff has not named the United States as a defendant, he is suing the Commissioner of the Internal Revenue Service in his official rather than individual capacity. Official capacity suits are treated as suits against the government and are subject to the doctrine of sovereign immunity unless the plaintiff is seeking only prospective injunctive

relief. Kentucky v. Graham, 473 U.S. 159, 167, n.14 (1985); Blakely v. United States, 276 F.3d 853, 870 (6th Cir. 2002); see also Ex parte Young, 209 U.S. 123, 160 (1908); Marie O. v. Edgar, 131 F.3d 610, 615 (7th Cir. 1997).) Section 1340 is “a general grant of jurisdiction to district courts to entertain actions of a certain class . . . It is not a waiver of governmental immunity from suit or a consent to be sued.” Geurkink Farms, Inc. v. United States, 452 F.2d 643, 644 (7th Cir. 1971); see also S.E.C. v. Credit Bancorp., Ltd., 297 F.3d 127, 137 (2d Cir. 2002).

a. Quiet title action

One potential source of waiver is 28 U.S.C. § 2410(a)(1), which provides that “the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien.” Courts have recognized that this provision can be a source of waiver of sovereign immunity if a taxpayer is contesting the validity of a tax lien and sale on the ground that the government has failed to comply with statutory requirements. United States v. Harrell, 13 F.3d 232, 233-34 (7th Cir. 1993); Robinson v. United States, 920 F.2d 1157, 1161 (3d Cir. 1990) (taxpayer could challenge tax lien allegedly imposed without IRS sending notice of deficiency under § 2410); Pollack v. United States, 819 F.2d 144, 145 (6th Cir. 1987) (§ 2410 can be used to contest

procedural irregularity of tax lien); Viva Ltd. v. United States, 490 F. Supp. 1002, 1007 (D. Colo. 1980); Aqua Bar & Lounge, Inc. v. U. S. Dept. of Treasury Internal Revenue Service, 539 F.2d 935, 938 (3d Cir. 1976).

In this case, plaintiff challenges the validity of the government's lien and levy on his property and expressly seeks to quiet title on his property. Although § 2410(a)(1) speaks expressly only of liens, liens and levies "have been treated as essentially interchangeable for purposes of finding an action covered by § 2410." Rodriguez v. United States, 629 F. Supp. 333, 341 (N.D. Ill. 1986). Because it is appropriate to treat a challenge that would remove a cloud from a title as an action to quiet title, I will construe plaintiff's first and second claims as an action to quiet title. See Aqua Bar, 539 F.2d at 937-38. However, I cannot construe as a quiet title action plaintiff's third claim, that he was denied a hearing to challenge his underlying tax liability.

Some limits might apply to the waiver of sovereign immunity found in § 2410. The first is that § 2410 cannot be used to challenge the validity of the underlying tax assessment. Koehler v. United States, 153 F.3d 263, 266 (5th Cir. 1998); Progressive Consumers Fed. Credit Union v. United States, 79 F.3d 1228, 1233 (1st Cir. 1996); Harrell, 13 F.3d at 235; Johnson v. United States, 990 F.2d 41, 42 (2d Cir. 1993); Guthrie v. Sawyer, 970 F.2d 733, 735 (10th Cir. 1992); Falik v. United States, 343 F.2d 38 (2d Cir. 1965). To the extent that plaintiff is attempting to challenge the validity of the underlying assessment, his claim

is barred by sovereign immunity.

Second, § 2410(a) does not apply if the government sold the property prior to the date on which the action was filed. Koehler, 153 F.3d at 266-67; Dahn v. United States, 127 F.3d 1249, 1251-52 n.1 (10th Cir.1997); Hughes v. United States, 953 F.2d 531, 538 (9th Cir.1992); Bleavins v. United States, 1990 WL 223025, at *2 (7th Cir. 1990). Although the complaint does not indicate that the property has been sold, it would be necessary to dismiss this case for lack of subject matter jurisdiction if in fact the government sold the property at issue before March 4, 2005, the date on which this complaint was filed.

Finally, the IRS satisfies its obligation to send a notice of deficiency by mailing the notice to the taxpayer's last known address, even if the taxpayer does not receive it. Guthrie, 970 F.2d at 737. Plaintiff's allegation that he did not receive notices for years 1993-1996 is sufficient to suggest that no notice was sent. However, plaintiff should be aware that his failure to receive deficiency notices is not conclusive. See also Lewin v. Commissioner of Internal Revenue, 569 F.2d 444 (7th Cir. 1978) (rejecting due process claim of taxpayer who had been sent but did not receive deficiency notice).

b. Taxpayer Bill of Rights

A second potential source of waiver is the "Taxpayer Bill of Rights," which provides in relevant part that "If, *in connection with any collection* of Federal tax with respect to a

taxpayer, any officer or employee of the Internal Revenue Service 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.” 26 U.S.C. § 7433 (emphasis added). This provision provides a waiver of sovereign immunity for plaintiff’s demand for monetary damages in conjunction with his first claim in which he claims that defendant filed a lien against his property without sending him certain deficiency notices in violation of 26 U.S.C. § 6213(a); section 6213(a) provides in relevant part that “no assessment of a tax . . . and no levy or proceeding in court for its collection shall be made, begun or prosecuted until such notice [of deficiency] has been mailed to the taxpayer.”

However, this provision does not mean that the government has waived its sovereign immunity as to plaintiff’s second and third claims. In the second claim, that defendant levied certain property without respecting plaintiff’s right to abate or rescind notices of deficiency for the years 1997, 1998 and 2000, plaintiff does not suggest that defendant disregarded any provision of the Internal Revenue Code or any regulation. The power to abate or rescind deficiency notices is held by the Secretary of the Internal Revenue Service, not by individual taxpayers. 26 U.S.C. §§ 6404 (Secretary authorized to abate tax assessment) and 6212(d) (Secretary authorized to rescind notice of deficiency). Plaintiff’s third claim, that defendant failed to provide him a hearing to challenge his tax liabilities,

relates to tax assessment rather than collection. By its terms, section 7433 is limited to actions taken “in connection with any *collection* of Federal tax”; thus, it does not permit damages claims for any injuries that may have been sustained during assessment of tax liability. Miller v. United States, 66 F.3d 220, 223 (9th Cir. 1995); Shaw v. United States, 20 F.3d 182, 184 (5th Cir. 1994); Gosalves v. Internal Revenue Service, 975 F.2d 13, 16 (1st Cir. 1992).

Exhaustion of administrative remedies is a jurisdictional prerequisite for a claim arising under the Taxpayers Bill of Rights Act. 26 U.S.C. § 7433(d). This limitation may bar plaintiff’s claim for monetary damages. Although plaintiff has not alleged that he exhausted his administrative remedies, failure to exhaust under § 7433(d) is an affirmative defense. Morrell v. United States, 185 F.R.D. 116, 118 (D. Puerto Rico 1999). Therefore, defendant bears the burden of pleading and proving it. Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 1999). Accordingly, I will not dismiss this claim for plaintiff’s failure to plead exhaustion of administrative remedies. However, defendant may allege plaintiff’s lack of exhaustion as an affirmative defense and argue it on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

c. Federal Tort Claims Act

The Federal Tort Claims Act, 28 U.S.C. §§ 2671 - 2680, provides in part that the

United States “shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 2674. However, actions related to the assessment and collection of taxes are expressly excluded from the Act’s coverage. 28 U.S.C. § 2680(c). Therefore, the Tort Claims Act does not provide a source of waiver for plaintiff’s claims. Because plaintiff’s third claim does not fall into any waiver provision, I will dismiss it as barred by the doctrine of sovereign immunity.

2. Anti-Injunction Act

One final hurdle in finding jurisdiction is determining whether there are any statutory limitations to the waiver of sovereign immunity. One possible statutory limitation is the Anti-Injunction Act, which provides that “[e]xcept as provided in section[] . . . 6213(a), . . . no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.” 26 U.S.C. § 7421(a). Clearly, plaintiff’s suit is an attempt to restrain the collection of his tax debt. However, § 6213(a) specifically authorizes an injunction prohibiting an assessment or levy when the taxpayer has not received a notice of deficiency. Laing v. United States, 423 U.S. 161, 185 n.27 (1976); Guthrie, 970 F.2d at 735. It states in pertinent part, “Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such

prohibition is in force may be enjoined by a proceeding in the proper court.” 26 U.S.C. § 6213(a).

Plaintiff alleges that he did not receive deficiency notices for the years 1993, 1994, 1995 and 1996; thus, his claims relating to those years are encompassed by the Anti-Injunction Act’s § 6213(a) exception. However, plaintiff concedes that he received deficiency notices for the years 1997, 1998 and 2000. No other exception to § 7421(a)’s expansive reach appears to encompass plaintiff’s claims as they relate to these three years. Because plaintiff’s second claim relates exclusively to these years, I must conclude that to the extent that it could have been maintained as a quiet title action, it is barred by the Anti-Injunction Act. Thus, I will dismiss this claim for lack of jurisdiction.

B. Proper Defendant

Plaintiff has named the Commissioner of Internal Revenue as defendant. His claim should have been brought against the United States directly. People of California ex rel. Ervin v. District Director, 170 F. Supp. 2d 1040, 1045 (E.D. Cal. 2001); Ferrel v. Brown, 847 F. Supp. 1524, 1526 (W.D. Wash. 1993), aff’d, 40 F.3d 1049 (9th Cir. 1994). 28 U.S.C. § 2679(d)(1) provides that “[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon

such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.” Upon receipt of certification by the Attorney General, I will substitute the United States as defendant.

C. Service Procedure

It is plaintiff’s obligation to serve his complaint on the defendant. The rule governing service of process in civil actions brought against a federal official in his official capacity is Fed. R. Civ. P. 4(i). According to this rule, plaintiff must send this complaint and a copy of this order by certified mail to: 1) defendant; 2) the United States Attorney for the Western District of Wisconsin; and 3) the Attorney General in Washington, D.C. The address for defendant is: Commissioner Mark W. Everson, Internal Revenue Service, 1111 Constitution Ave. NW, Washington, DC 20224. The address for the United States Attorney in this district is: The Hon. Stephen Sinnott, Acting United States Attorney, 660 W. Washington Ave., Madison, WI 53703. The address for the Attorney General in Washington, D.C. is: The Hon. Alberto Gonzales, United States Attorney General, 950 Pennsylvania Ave., N.W., Rm. 5111, Washington, DC 20530. Enclosed to plaintiff with a copy of this order are three copies of his complaint, three copies of this order and three summons forms.

Under Fed. R. Civ. P. 4(m), a plaintiff has 120 days after filing a complaint in which

to serve the defendant. However, that is an outside limit with few exceptions. This court requires that a plaintiff act diligently in moving her case to resolution. If plaintiff acts promptly, he should be able to serve his complaint on the defendant well before the deadline for doing so established in Rule 4. Pursuant to Fed. R. Civ. P. 4(l), plaintiff is to submit proof to the court that he served his complaint by certified mail. A copy of the postmarked certified mail receipt for each of the individuals to whom the complaint was sent will constitute proof of service.

ORDER

IT IS ORDERED that

1. Plaintiff Dennis Jacobson's claims that defendant Commissioner of the Internal Revenue Service levied certain property without respecting plaintiff's right to abate or rescind notices of deficiency for the years 1997, 1998 and 2000 and failed to provide plaintiff with a hearing at which to challenge his tax liabilities are DISMISSED for lack of subject matter jurisdiction; and

2. Plaintiff is to serve his complaint and a copy of this opinion and order on 1) defendant; 2) the United States Attorney for the Western District of Wisconsin; and 3) the

Attorney General in Washington, D.C. and file proof of service as soon as service has been accomplished.

Entered this 16th day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge