

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

ODREY R. RASMUSSEN,

Plaintiff,

v.

UNITED STATES OF AMERICA,**

Defendant.

OPINION AND ORDER

09-cv-573-wmc*

In this civil action, plaintiff Odrey Rasmussen proceeds pro se, seeking reversal of the Internal Revenue Service's decision to deny him a refund or credit based on a 2002 overpayment in the amount of \$6,254. In August of this year, defendant moved for summary judgment on the grounds that the statutory period had expired for requesting a refund or credit of a 2002 overpayment. Dkt. #10. For the reasons stated, that motion will now be granted.

PROCEDURAL POSTURE

In a pattern of neglect not unlike that before the IRS, Rasmussen's required response

*Along with many others, this case was reassigned to Judge Conley pursuant to the court's March 31, 2010 administrative order.

**Rasmussen originally purported to sue the Internal Revenue Service. The true party in interest, however, is the United States. ; 26 U.S.C. § 7422(f). See also *White v. I.R.S.*, 790 F. Supp. 1017, 1019 (D. Nev. 1990) ("to the extent that this action might possibly be interpreted to be a suit for refund, the United States is by statute the only property party").

to the government's motion for summary judgment is now almost 90 days past the court-imposed deadline for filing. Indeed, Rasmussen has failed to respond to defendant's motion for summary judgment in any manner, despite being warned that a failure to dispute a fact proposed on summary judgment would result in the court treating the fact as undisputed. "Procedure to be Followed on Motions for Summary Judgment" attached to the February 16, 2010, Preliminary Pretrial Conference Order (dkt. #5, at 16).

As important given the plaintiff's unrepresented status, Rasmussen has also refused to respond to the defendant's discovery requests, despite being formally ordered to do so by this court. (Dkt. #9). Accordingly the record on summary judgment is devoid of any contradictory evidence and the court accepts as undisputed defendant's Proposed Findings of Fact, though will view in the light most favorable to pro se plaintiff Rasmussen as the non-moving party.

UNDISPUTED FACTS

Despite receiving a four-month extension from the original filing date of April 15, plaintiff Odrey Rasmussen failed to file his federal income tax return for 2002 on or before its ultimate due date of August 15, 2003. Instead, the Internal Revenue Service finally received his 2002 income tax return almost four years later on June 13, 2007, at the earliest. This 2002 return reflected payment of \$6,254 in "2002 estimated tax payments & amt.

applied from 2001 return” against a tax liability for 2002 of zero. In his return, Rasmussen requested the claimed overpayment be applied as a credit to his estimated taxes for 2003.

There is no dispute that Rasmussen would have been entitled to a refund in this amount had he timely requested it. Unfortunately, by letter dated September 10, 2007, however, the Internal Revenue Service informed Rasmussen that the statutory period for issuing a refund had expired before he filed a claim. A week later, on September 18, 2007, the Internal Revenue Service mailed Rasmussen a letter formally denying his claim for a refund of \$6,254. That money was ultimately transferred to an Internal Revenue Service excess collection fund.

OPINION

Under Fed. R. Civ. P. 56, summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the court must view all facts and draw all inferences from those facts in the light most favorable to the non-moving party. *Schuster v. Lucent Tech., Inc.*, 327 F.3d 569, 573 (7th Cir. 2003). The court’s function in a summary judgment motion is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249; *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007). For the reasons stated, there are no disputed facts of any kind on this record; this case turns instead on a purely legal question:

whether Rasmussen's refund claim was timely. The timeliness of Rasmussen's request for a refund or credit on his 2003 income tax return is governed by 26 U.S.C. § 6511. Section 6511(a) provides as follows:

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such period expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

26 U.S.C. §6511(a). Section 6511(b)(2)(A) further provides that:

If the claim was filed within the 3 year period prescribed by subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.

To qualify as timely under § 6511 then, Rasmussen must demonstrate that: (a) his claim for refund or credit was filed within three years of the tax return; and (b) any refund or credit does not exceed the amount paid by the tax payer in the three-year period, plus the period of any extension of time for filing the return, immediately preceding the filing date of the claim. *See e.g., Curry v. United States*, 774 F. 2d 852, 855 (7th Cir. 1985). For reasons not fully explained, the government does not dispute that Rasmussen filed his request for a refund or credit at the same time he filed his 2002 tax return, nor that his return was timely filed

under 26 U.S.C. § 6511(a).¹ Instead, the government maintains that any refund or credit to which Rasmussen is entitled is limited by 26 U.S.C. § 6511(b)(2)(A) to the amount of taxes he actually paid in the three year period immediately preceding the filing of the claim, plus the four month extension granted for the filing of the return.

While Rasmussen alleges in his complaint that he filed his 2002 income tax return on April 15, 2006, he offers no evidence putting into dispute the records submitted by defendant showing that the IRS actually received his 2002 tax return on June 13, 2007. Therefore, the court finds that plaintiff's 2002 tax return was filed on June 13, 2007.² According to §6513(b)(2)(A), this means that Rasmussen is entitled only to a refund or credit of any overpayments made on or after February 13, 2004 -- three years and the four-months before June 13, 2007.

The undisputed facts also show that Rasmussen made no payments of income taxes

¹The government does not explain why it takes this position given Rasmussen's almost four-year delinquency in filing his 2002 return and the more than three-year gap from the time the tax was paid. Indeed, the government appears to embrace an interpretation of §6511(a) that allows a taxpayer to file a return decades late, apparently believing this court bound by *United States v. Szopa*, 210 F.3d 377, 2000 WL 250116, #1 (7th Cir. 2000) (unpublished). Consequently, the court assumes for purposes of the pending motion (without deciding) that Rasmussen's claim for credit was timely under § 6511(a).

²Rasmussen apparently had marked his 2002 tax return as a "File Copy" and contended that he had originally filed it on April 13, 2006, but Rasmussen did not file his return electronically or by registered or certified mail. (Dkt. #1, Ex. 1). Moreover, the Internal Revenue Service has no record of receiving Rasmussen's 2002 federal income tax return prior to June 13, 2007. This evidence alone would be enough to bar Rasmussen from disputing the June 13, 2007 filing date. 26 U.S.C. § 7502(c); *Miller v. U.S.*, 784 F. 2d 728, 730 (6th Cir. 1986)(only admissible evidence of proof of filing is registered or certified mail receipt). Even if this were not so, however, Rasmussen's complete failure to respond to the government's proposed finding of fact to this effect and refusal to cooperate in discovery, even after being ordered to do so by this court, compels the adoption of the June 2007 date as a matter of undisputed fact.

after February 13, 2004. Indeed, according to Rasmussen's late-filed 2002 tax return, the last payment of any kind was the overpayment of the \$6,254 "for estimated tax payments & amt applied from 2001 return." Payment of these estimated taxes was deemed made on April 15, 2003--the due date for Rasmussen's 2002 income tax return before extension. See 26 U.S.C. 6513(b)(2). Accordingly, Rasmussen would have had to file his claim for a refund or credit within three years and four months of that date--by August 15, 2006--for it to have been timely. Because he did not do so, his request for a credit is barred by statute.

Rasmussen's long, repeated delays in seeking a refund both before the IRS and this court keeps this result from being inequitable. Even if it were, however, any "hardship resulting from the application of a statute of limitations is a matter of policy for Congress, not for the courts." *United States v. Miller*, 315 F.2d 354, 359 (10th Cir. 1963). Thus, defendant's motion for summary judgment must be granted.

ORDER

IT IS ORDERED that:

- (1) Defendant Internal Revenue Service's motion for summary judgment, dkt. #10, is GRANTED.

- (2) The clerk of court is directed to enter judgment in favor of defendant Internal Revenue Service and close the case.

Entered this 30th day of December, 2010.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge