

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

DENNIS W. JACOBSON,

OPINION AND ORDER

Plaintiff,

05-C-134-C

v.

MARK W. EVERSON,

Defendant.

In this civil action for injunctive, declaratory and monetary relief, plaintiff Dennis W. Jacobson contends that defendant Mark W. Everson is attempting to collect income taxes from him in violation of Title 26 of the United States Code. Specifically, plaintiff contends that defendant (1) filed a lien against plaintiff's property without first sending him deficiency notices for the years 1993 through 1996; (2) levied upon certain property without respecting plaintiff's right to abate or rescind notices of deficiency for the years 1997, 1998 and 2000 and without first sending him deficiency notices for the years 1993 through 1996; and (3) failed to provide plaintiff with a hearing to challenge his tax liabilities.

This case is before the court on defendant's motion to dismiss pursuant to Fed. R.

Civ. P. 12(b)(1) and (6). Defendant asserts that (1) this court lacks subject matter jurisdiction over some of plaintiff's claims; (2) plaintiff failed to state a claim upon which relief may be granted; and (3) plaintiff did not properly plead an action to quiet title.

Jurisdiction is present. 28 U.S.C. § 1331. Defendant's motion to dismiss will be granted because this court lacks subject matter jurisdiction over plaintiff's first two claims and because plaintiff's third claim fails to state a claim upon which relief may be granted.

For the sole purpose of deciding this motion, I accept as true the allegations in the complaint.

ALLEGATIONS OF FACT

A. Parties

Plaintiff Dennis W. Jacobson is a resident of Wisconsin. Defendant Mark W. Everson is the Commissioner of the Internal Revenue Service.

B. Plaintiff's Correspondence with the Internal Revenue Service

On June 16, 2003, plaintiff sent a letter to the Internal Revenue Service office in Utah. He wrote that on May 22, 2003, he had received a letter from the IRS setting forth certain findings regarding his 1998 and 2000 tax returns. Plaintiff disputed those proposed findings in his June 16 letter but did not receive a response.

On October 17, 2003, the IRS office in Utah sent plaintiff a letter notifying him of a deficiency in his taxes for 1997. The letter was signed by IRS Commissioner Thomas B. Mathews. On that same day Mathews sent plaintiff identical letters regarding his taxes for 1998 and 2000. On November 4, 2003, plaintiff wrote to Mathews, requesting that the IRS rescind or abate the three deficiency notices from October 17, 2003. Plaintiff sent a second letter to the IRS office in Utah on November 4, 2003, asking that the October 17, 2003 notices be rescinded and asking for a response to his June 16, 2003, letter. Plaintiff did not receive a response to either of his November 4 letters.

On November 1, 2003, plaintiff sent a letter to the IRS office in Ohio, stating that he had received deficiency notices for 1991 and 1992 and disputing that he owed any amount for either of those years. He wrote also that he had never received deficiency notices for the years 1993-1996. On November 3, 2003, plaintiff sent another letter to the IRS office in Ohio reiterating what he wrote in his November 1 letter.

On July 15, 2004, plaintiff received a “Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320” from the IRS office in Chicago. The lien related to taxes allegedly owed for the years 1993 through 1998. It was signed by a C. Sherwood, director of payment compliance.

On August 12, 2004, plaintiff submitted a “Request for a Collection Due Process Hearing.”

On October 27, 2004, the IRS office in Wisconsin sent plaintiff a letter stating that the office had received his case for consideration. The letter was signed by appeals team manager Timothy I. Gukich.

On November 8, 2004, the IRS office in Wisconsin sent plaintiff a letter stating “we received your request for a collection due process hearing and we need to advise you on procedures.” It was signed by settlement officer Ursula K. Wastian. On November 29, 2004, plaintiff sent Wastian a letter setting forth facts to contest the alleged tax deficiencies. On December 2, 2004, Wastian wrote to plaintiff to notify him that he would receive a decision within one month.

Two months later, on February 2, 2005, the IRS office in Wisconsin sent plaintiff a Notice of Determination, signed by appeals team manager Gukich. The IRS found that the notice of intent to levy and the tax lien “were issued in accordance with established policy and procedures.”

On March 25, 2005, the IRS office in Wisconsin sent plaintiff a Notice of Decision stating that “Appeals sustains the proposed levy action.” It was signed by Gukich.

OPINION

_____ A motion to dismiss will be granted only if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations” of the complaint.

Cook v. Winfrey, 141 F. 3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73, (1984)).

_____Federal officials may be sued for constitutional injuries under 28 U.S.C. § 1331. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). In other words, the United States Constitution protects citizens from unconstitutional acts performed by individuals and entities who are acting under state or federal authority only. Plaintiff may sue defendant in his individual capacity because, as Commissioner of the Internal Revenue Service, defendant acts under federal authority. _____

_____Before I can consider whether plaintiff has stated a claim upon which relief may be granted, I must address the threshold question whether this court has subject matter jurisdiction over plaintiff's claims. This court lacks jurisdiction to hear taxpayers' claims involving their tax obligations, Voelker v. Nolen, 365 F.3d 580, 581 (7th Cir. 2004), except where the taxpayer has paid his entire tax due and is suing for a refund. Plaintiffs seeking a review of their liability for income taxes must file an action in the United States Tax Court. Id.

Plaintiff's first claim is that defendant filed a lien against his property without giving him an opportunity to "challenge the underlying tax liability claimed by defendants for years 1993, 1994, 1995, 1996." His second claim is that defendant threatened to levy upon his property without giving him an opportunity to abate or rescind the notices of deficiency for

years 1997, 1998, and 2000. The crux of these two claims is the underlying income tax deficiency. Plaintiff believes that he was cheated out of his right to challenge the commissioner's decision that plaintiff owed money to the IRS for unpaid taxes for the years 1993 through 1998 and 2000.

These are claims that plaintiff must file in the tax court. Accordingly, I will grant defendant's motion to dismiss plaintiff's first two claims because this court lacks subject matter jurisdiction over them. Plaintiff has thirty days from the date of this order in which to file an appeal with the United States Tax Court if he wishes to contest his tax liability.

Plaintiff's third claim is that he was not afforded a hearing in the appeals process even though he requested one. He seeks monetary damages from defendant. Subject matter jurisdiction over this claim is present.

Liability under Bivens must arise from the individual defendant's personal involvement in the deprivation of plaintiff's constitutional rights. Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994). It is not necessary that the defendant participate directly in the deprivation; the official is sufficiently involved "if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985).

Even if I were to find that the IRS's refusal to provide plaintiff with a hearing

amounts to a constitutional violation, plaintiff has not alleged any facts to suggest that defendant had any personal involvement in the deprivation of his alleged constitutional right.

In an order dated May 31, 2005, I noted that it was extremely improbable that the commissioner of the Internal Revenue Service had a personal hand in the incidents at issue. Plaintiff chose to proceed with the lawsuit against the commissioner anyway. In his amended complaint, plaintiff attributes all actions of the IRS to the commissioner. For example, plaintiff alleges that “by letters dated November 1, 2003, and November 3, 2003 . . . plaintiff’s brought to defendants’ attention that he had not sent him notices of deficiency . . .” and “by letter dated December 2, 2004, defendant shown an indifferent disregard to plaintiff and the tax laws” However, a close look at each piece of correspondence to which plaintiff refers in the complaint shows that the commissioner was neither the recipient nor the sender of any of those letters, or even a recipient of copies of any of the correspondence. Plaintiff’s exchanges were with the regional IRS offices in Utah, Ohio and Wisconsin. He did not adduce any facts to suggest that the commissioner was aware of the existence of his dispute with the IRS.

The facts that plaintiff alleges in the complaint do not suggest that the commissioner had any knowledge of or participation in the decision to deny plaintiff an appeals hearing. Therefore, plaintiff fails to state a claim upon which relief may be granted. I will grant

defendant's motion to dismiss plaintiff's third claim.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendant Mark W. Everson is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 19th day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge