IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ARVIN W. KUNTZ,

Plaintiff,

OPINION AND ORDER

06-C-0043-C

v.

INTERNAL REVENUE SERVICE,
Washington, D.C.
IRS HOLTESVILLE, N.Y.,

Defendants.

- -

In 2003, plaintiff Arvin Kuntz paid defendant Internal Revenue Service approximately $12,600 in federal income tax, which he believed was all that he was required to pay for the year 2002. Defendant disagreed and assessed his tax at approximately $45,000. When plaintiff did not pay this amount, defendant placed a lien on plaintiff's property and began levying his bank accounts. In response, plaintiff filed this lawsuit pro se, seeking $1,000,000 in compensatory and punitive damages. (The court attempted to obtain counsel to represent plaintiff but was unable to find a volunteer. Dkt. #12.) Defendant has moved for summary judgment on the ground that the court lacks jurisdiction to hear the case. Because I agree that this court lacks jurisdiction to hear plaintiff's claim,

I will grant defendant's motion.

I have drawn the facts from defendant's proposed findings of fact and the record as a whole. Plaintiff did not submit his own proposed findings of fact, but he did submit a number of documents, most of which he says he received from defendant over the last few years. Plaintiff did not authenticate these documents with the affidavit of a person through whom the exhibits could be admitted into evidence, as required by Fed. R. Civ. P. 56(e). Scott v. Edinburg, 346 F.3d 752, 760 (7th Cir. 2003). However, it does not appear that defendant disputes the authenticity of these documents. Woods v. City of Chicago, 234 F.3d 979, 988 (7th Cir. 2000) (considering affidavit despite failure to properly authenticate when opposing party conceded authenticity). For this reason and because considering these documents will not change the outcome of this case, I have treated plaintiff's exhibits as if they were properly authenticated and admissible.

UNDISPUTED FACTS

Plaintiff Arvin Kuntz is a resident of Wausau, Wisconsin. Defendant Internal Revenue Service is a bureau of the United States Department of the Treasury, created under the authority of 26 U.S.C. § 7801. It administers and supervises the execution and application of the internal revenue laws. 26 U.S.C. § 7803.

In 2003, plaintiff and his wife filed a joint tax return for the year 2002. The tax

return showed an obligation of $44,942. Plaintiff sent defendant a check for $12,637. (The parties dispute when in 2003 plaintiff submitted his tax return and payment and whether his payment was timely.)

Defendant did not correct or audit plaintiff's return but accepted the return as filed. It assessed plaintiff's tax as the $44,942 he reported, adding a penalty of $1,797.68 for late payment and interest of $1,324.21. Because defendant accepted the amount plaintiff reported on his return, defendant did not issue a notice of deficiency.

Plaintiff wrote to defendant on February 6, 2004. (Neither party provides the contents of that letter.) In its response, defendant told plaintiff, "We haven't yet resolved this matter because we haven't completed all the research necessary for a complete response. We will contact you again within 30 days to let you know what action we are taking."

In June 2004, defendant sent plaintiff a letter that included the following heading: "CALL IMMEDIATELY TO PREVENT PROPERTY LOSS FINAL NOTICE OF INTENT TO LEVY AND NOTICE OF YOUR RIGHT TO A HEARING." The letter stated that defendant had tried to contact plaintiff before about overdue taxes, but plaintiff did not respond. (Defendant's records indicate that it sent plaintiff multiple notices before this one, but plaintiff denies that he received them.) It informed plaintiff: "we intend to levy on your property or your rights to property" unless plaintiff made arrangements to pay the tax or appealed the determination by requesting a due process hearing within 30 days of the date

on the letter. The letter listed the total amount due as $37,829.43. Plaintiff returned the notice to defendant, writing on it: "I hereby refuse and refute this presentment for cause and without dishonor. I do not owe this . . . Bill [was] settled . . . according to the new capital gain law."

On November 3, 2004, plaintiff filed with defendant a "claim for refund and request for abatement" on Form 843. Plaintiff challenged defendant's determinations that his payment was untimely and that he continued to owe tax. He wrote that he had received an extension to pay until January 15, 2004, and that he had

> paid the entire amount due according to the new capital gain tax. We were told because of the new capital gain tax, this would be a good time to sell the lake property so that we could get the money for the astronomical nursing home care for my wife. We paid according to the new capital gain tax because of the above information. I advised the IRS that the new law was ambiguous, and therefore we were able to use the new capital gain tax. It was the duty of the IRS to prove to me that the law wasn't ambiguous. However, I didn't hear from them for six months. However, there was also a s[t]ipulation which said that in the event they proved the law was otherwise, I would have to have the bank put up the money, and we could pay the people back, and redo the deal in 2004–at which time, we would have cleared up some d[i]scr[e]pancy on our property, and we can make the deal the way it should have been made in the first place. With this procedure, there would be no question in regards to the ambiguous tax law.

The claim did not include information regarding the tax period for which the claim was made, the amount to be refunded or abated or the type of tax at issue. Defendant determined that the claim could not be processed.

On November 22, 2004, defendant levied on approximately $20,000 in plaintiff's

bank account.

In February 2005, defendant wrote to plaintiff: "We are pleased to inform you that your request to remove the penalty charged for failure to pay has been granted. . . . You should receive a notice of a penalty adjustment in the next few weeks." (Neither party identifies the request to which defendant was responding, if any.)

In March 2005, defendant filed a notice of federal tax lien on plaintiff with the register of deeds in Wausau, Wisconsin. Also in March 2005, plaintiff filed a request for a due process hearing with defendant. Because the request was not signed or dated, defendant determined that the request was not valid and could not be processed. Plaintiff did not receive a hearing.

Plaintiff wrote defendant again on May 9, 2005. In its response dated May 18, 2005, defendant told plaintiff that it had "not resolved the matter" because it had not "completed all the processing necessary for a complete response," that it would contact him within 45 days and that he did not "need to do anything further now on this matter."

In June 2005, defendant received from plaintiff a second claim for refund and request for abatement, repeating and elaborating on the argument presented in the November 2004 claim. Plaintiff requested approximately $59,000. Defendant disallowed this claim in November 2005. Plaintiff filed a third claim on Form 843 in October 2005, requesting a refund of $46,454. He argued that defendant's levy was invalid because it had failed to

provide him with a deficiency notice and that defendant had acted fraudulently by deducting more money than was owed. Defendant determined that the claim was frivolous. (It is not clear whether defendant responded to any of the claims plaintiff filed.)

In a letter dated February 3, 2006, defendant wrote plaintiff: "The current amount you owe for the tax period Dec. 31, 2002, is $12,489.97, which includes tax and interest figured to Feb. 2006." (Plaintiff interprets the February letter as proof that his entire tax liability for 2002 is less than $12,500. However, the letter is clear that the amount in the letter is his *current* obligation, that is, the amount he still owes after his previous payments are credited.)

Defendant has collected almost $28,000 from plaintiff using levy procedures, bringing the total collected from plaintiff to more than $40,000. Defendant calculates that plaintiff still owes more than $12,000 for the year of 2002. Plaintiff has not filed an administrative claim with defendant under 26 C.F.R. §§ 301.7432-1(f) or 301.7433-1(e).

OPINION

The threshold issue is whether this court has jurisdiction to hear this case. I have already dismissed this case once for lack of subject matter jurisdiction. Order dated March 17, 2006, dkt. #4. I relied on Voelker v. Nolen, 365 F.3d 580, 581 (7th Cir. 2004), in

which the court held "a case involving income taxes . . . must be filed in the Tax Court, and the district court lacks jurisdiction." However, I reopened the case after I learned that plaintiff had tried earlier to present his claim to the Tax Court, but that court too had dismissed the case for lack of jurisdiction. The court had interpreted 26 U.S.C. §§ 6212 and 6213 as restricting its jurisdiction to instances in which defendant had issued a notice of deficiency, which defendant had not done in this case. Order dated April 13, 2006, dkt. #7. See also Murray v. Commissioner of Internal Revenue, 24 F.3d 901, 903 (7th Cir. 1994) ("the Tax Court has no jurisdiction to redetermine an alleged deficiency unless the IRS first issues a notice of deficiency").

In reopening the case, I relied on Flora v. United States, 362 U.S. 145 (1960), a case construing 28 U.S.C. § 1346(a)(1), which gives district courts original jurisdiction to hear actions against the federal government to recover a wrongfully collected internal revenue tax. In Flora, the Court interpreted §1346(a)(1) as providing a basis for jurisdiction *only* when the plaintiff has paid the full amount assessed to him.

There is some dispute between the parties regarding the amount that *plaintiff* identified as the amount he was obligated to pay when he filed his 2002 tax return. Plaintiff concedes that his tax return reports an obligation of almost $45,000, but he says in his response to defendant's proposed findings of fact that the return was "accompanied with

information about the changes in [capital] gains and I reported a tax obligation of $12,637." Dkt. #25, at ¶9. Although plaintiff submitted his tax return with his summary judgment materials, he neither submitted a document showing that his obligation was $12,637 nor made this averment in an affidavit. I may not consider unsworn allegations made in response to a proposed finding of fact. Collins v. Seeman, 462 F.3d 757, 760 n.1 (7th Cir. 2006).

In any event, it is ultimately beside the point whether plaintiff believes he has paid the full owed amount, at least for the purpose of determining the existence of jurisdiction. Under Flora, the question is not whether the plaintiff paid the amount he should have owed, it is simply whether he paid the amount *assessed* by the government. If a tax payer believes that the government has assessed his tax incorrectly, he must pay the amount assessed before he can seek a refund under § 1346(a)(1). It is undisputed that defendant assessed plaintiff's tax at approximately $45,000 (an amount that has increased significantly as defendant has added penalties and interest as a result of nonpayment). It is also undisputed that plaintiff has not paid that amount, either voluntarily or involuntarily.

The court of appeals has held that the requirement of full payment applies even when the plaintiff is barred from bringing his claim in Tax Court. Curry v. United States, 774 F.2d 852, 854-55 (7th Cir. 1985). Under Curry, I am not free to carve out a "hardship"

exception to the jurisdictional limitations of § 1346(a)(1). Accordingly, I conclude § 1346(a)(1) does not provide a basis for exercising jurisdiction over this case.

This does not necessarily end the matter. The unavailability of § 1346 as a jurisdictional hook does not preclude the possibility that other grounds for jurisdiction might exist; section 1346 does not purport to be the exclusive means by which subject matter jurisdiction may be established in tax cases. Cf. Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 643-44 (2002) (general grant of jurisdiction for federal questions is always available unless more specific grant of jurisdiction is exclusive). Although Voelker suggests on its face that district courts do not have jurisdiction over any tax cases, the context of Voelker makes clear that its holding applies only when the Tax Court has jurisdiction over the case. See also Murray, 24 F.3d at 903-04 (considering merits of plaintiff's tax claim after concluding that Tax Court did not have jurisdiction).

In his complaint, plaintiff suggests several other statutes that he believes provide a basis for his claim, but each of these runs into other barriers. One of the statutes he cites, 26 U.S.C. § 7421, is not a basis for jurisdiction but is an express *prohibition* on suits seeking to enjoin the government from assessing or collecting a tax. Jones v. United States, 889 F.2d 1448, 1449-50 (5th Cir. 1989) ("The Act insures that once a tax has been assessed, the taxpayer ordinarily has no power to prevent the IRS from collecting it; his only recourse is

to pay the tax in full, and then sue for a refund."). There is a statute that prohibits "wrongful" levies, but an action under this statute may be brought only by a person "other than the person against whom is assessed the tax out of which such levy arose." 26 U.S.C. § 7426(a)(1). It appears that the purpose of this statute is to protect persons whose property is mistakenly seized to satisfy someone else's tax liability, not to provide a mechanism for challenging an incorrect assessment. Rosenblum v. United States, 549 F.2d 1140 (8th Cir. 1977).

Throughout his submissions, plaintiff alleges that defendant is liable for fraud. It is highly unlikely that plaintiff has stated a claim under that theory, particularly when one considers the heightened pleading requirement for fraud under Fed. R. Civ. P. 9(b). DiLeo v. Ernst & Young, 901 F.2d 624, 626 (7th Cir. 1990) ("Fed. R. Civ. P. 9(b) requires the plaintiff to state 'with particularity' any 'circumstances constituting fraud'. Although states of mind may be pleaded generally, the 'circumstances' must be pleaded in detail. This means the who, what, when, where, and how.") At most, plaintiff's allegations suggest that defendant made a mistake, not that it made any knowing misrepresentations to him. In any event, no matter how well pleaded his allegations of fraud were, he could not assert them against a federal agency. The Federal Tort Claims Act is the only statute under which plaintiff could assert a common law tort claim against the government, but that law expressly

excludes any claim "arising in respect of the assessment or collection of any tax." 28 U.S.C. § 2680(c).

One statute identified by plaintiff, 26 U.S.C. § 7214, authorizes a cause of action against individuals, not the United States or one of its agencies, and two statutes, 18 U.S.C. § 341 and 18 U.S.C. § 342 are criminal laws that are prosecuted *by* the government not *against* it. Maine v. Taylor, 477 U.S. 131, 136 (1986). Thus, none of these statutes provides a basis for jurisdiction.

This leaves plaintiff's claim that defendant failed to provide him with adequate notice, in violation of the due process clause, 26 U.S.C. § 6212(a) and 26 U.S.C. § 6330. Each of these federal laws would likely fall within the jurisdictional reach of 28 U.S.C. § 1331, which extends to all cases and controversies "arising under the Constitution, laws, or treaties of the United States." However, there are multiple problems preventing plaintiff from proceeding on this claim. As an initial matter, the claim is barred by sovereign immunity. Although the rule may seem unfair to many, an individual may not sue the United States or one of its agencies unless the government has given its consent to be sued. Library of Congress v. Shaw, 478 U.S. 310, 318 (1986). This rule applies to claims for damages as well as injunctive and declaratory relief. E.g., Small v. Chao, 398 F.3d 894, 897 (7th Cir. 2005). See also FDIC v. Meyer, 510 U.S. 471 (1994) (individual may not bring action for violation of constitutional rights against federal government agency; only individuals may be sued).

Generally, sovereign immunity is waived by statute. In re Rivera Torres, 432 F.3d

20, 23 (1st Cir. 2005) (sovereign immunity cannot be waived through litigation). Plaintiff points to no statute that waives defendant's immunity from suit in a case involving alleged violations of the due process clause, under 26 U.S.C. § 6212(a) or 26 U.S.C. § 6330 and my own research reveals none.

It is true that the Administrative Procedure Act includes a waiver of sovereign immunity for equitable relief against a federal agency. 5 U.S.C. § 702. But this general waiver must give way to the more specific language in 26 U.S.C. § 7421, which prohibits all injunctive relief that would prevent the collection or assessment of taxes, except in a few enumerated situations that do not apply in this case. United States v. Trident Seafoods Corp., 92 F.3d 855, 865 (9th Cir. 1995) (more limited waiver trumps general waiver).

Further, because § 7421 would apply regardless who plaintiff named as a defendant, allowing plaintiff to amend his complaint to add the commissioner or another individual would not help plaintiff. Whether his claim is against the agency or an individual, if plaintiff prevailed on his claim that he was entitled to more process before defendant could levy his bank accounts, this would necessarily require enjoining defendant from further collection until the appropriate process was provided. Linn v. Chivatero, 714 F.2d 1278, 1282 (5th Cir.1983) (recognizing that § 7421 applies not only to assessment and collection of actual tax, but to activities relating to assessment or collection of taxes). Because § 7421 prohibits

seeking such an injunction, any claim seeking additional process must fail.

Plaintiff might argue that an action for *damages* against an individual defendant would not conflict with the letter of § 7421. Even if I were to agree with this proposition in the abstract, it would not apply in this case. All of the wrongdoing plaintiff alleges was conducted by individuals acting in their official capacity. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985) (suit against IRS employees in their official capacity is essentially suit against United States and is barred by sovereign immunity). It is defendant that assessed plaintiff's taxes and defendant that denied plaintiff a hearing. There is no suggestion in any of plaintiff's submissions to the court that any employee acting in her individual capacity violated plaintiff's rights (including Carol Pinnavaia, who plaintiff originally named as a defendant but had to be dismissed when plaintiff failed to submit proof that she was properly served, dkt. #21).

In its brief in support of its motion for summary judgment, defendant identifies two additional potential causes of action that plaintiff has not expressly raised but may have intended: failure to release a lien (26 U.S.C. § 7432) and collecting a tax with reckless disregard of the law (26 U.S.C. § 7433). Sovereign immunity is waived under these statutes, so it would not be a bar to relief. Gandy Nursery, Inc. v. United States, 318 F.3d 631 (5th Cir. 2003); Allied/Royal Parking L.P. v. United States, 166 F.3d 1000, 1003 (9th Cir.

1999). However, both statutes contain requirements to exhaust administrative remedies before bringing a lawsuit. 26 U.S.C. § 7432(d)(1); 26 U.S.C. § 7433(d)(1). In his response to defendant's proposed findings of fact, plaintiff argues that he did exhaust by filing several claims on Form 843 and by attempting to request a due process hearing. Unfortunately for plaintiff, he does not satisfy the exhaustion requirements simply by making *some* attempt to resolve the problem before bringing the claim to court. Rather, he must follow the procedures outlined in the regulations. Amwest Surety Insurance Co. v. United States, 28 F.3d 690 (7th Cir. 1994). A claim under both statutes must be filed first with the district director, Venen v. United States, 38 F.3d 100, 103 (3d Cir. 1994), which plaintiff has not done. (The regulations at issue, 26 C.F.R. §§ 301.7432-1(f) and 301.7433-1(e), include numerous other requirements as well, most of which plaintiff has not satisfied. If plaintiff intends to file claims under these laws, he should study the procedural requirements carefully before doing so.) Thus, even if plaintiff intended to pursue claims under §§7432 and 7433, he would be barred from doing so by his failure to exhaust his administrative remedies.

Finally, I note that even if plaintiff did not face jurisdictional problems, it appears that his claim for failing to giver proper notice could not succeed. As defendant points out, it did not violate any laws by failing to provide plaintiff with a notice of deficiency. Defendant is required to provide a notice of deficiency only when there *is* a "deficiency"

within the meaning of the internal revenue code. 26 U.S.C. § 6212(a). Under 26 U.S.C. § 6211(a) there is a "deficiency" when defendant determines that the tax actually owed is greater than "the amount shown as the tax by the taxpayer upon his return." As noted above, however, the only admissible evidence submitted on this issue shows that plaintiff reported an obligation of $44,962 in federal income tax. Because defendant did not determine plaintiff's tax return to be deficient, there was no notice of deficiency.

The facts show also that defendant complied with the notice requirements of 26 U.S.C. §§ 6330 and 6331. Under § 6330(a)(1)-(3), defendant is required to send a notice at least 30 days before a levy that includes the following information: (a) the amount of unpaid tax; (2) the right to request a hearing; and (3) the proposed action of the government. Similarly, under § 6331(d), defendant is required to give written notice at least 30 days before the levy. Defendant's notice to plaintiff includes all of this information. With respect to plaintiff's constitutional claim, the notice procedures provided in these statutes comply with the requirements of due process. Baddour, Inc. v. United States, 802 F.2d 801 (5th Cir. 1986); Ginter v. Southern, 611 F.2d 1226 (8th Cir. 1979); United States v. Heck. 499 F.2d 778 (9th Cir. 1974).

It is certainly unfortunate that plaintiff did not receive a hearing before his property was levied. However, the Constitution requires only that a person be given an *opportunity*

to be heard before a deprivation. Jones v. Flowers, 126 S. Ct. 1708, 1712 (2006). In this case, plaintiff was informed in the June 2004 notice that he had 30 days to request a hearing, but for reasons he does not explain, he waited more than nine months before attempting to make this request. When he finally did ask for a hearing, he failed to sign the form and his request was rejected. Although plaintiff is understandably frustrated, defendant was entitled to enforce its own rules on the manner in which plaintiff could seek to be heard. Soo Kim v. Commissioner of Internal Revenue, 89 T.C.M. (CCH) 1123, 2005 WL 1022943 (U.S. Tax Ct. 2005) ("because petitioners did not timely request a section 6330 hearing, petitioners were not entitled to such a hearing and were not offered one"). Cf. Woodford v. Ngo, 126 S. Ct. 2378, 2385 (2006) (requiring "proper exhaustion of administrative remedies, which means using all the steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits)") (internal quotations omitted).

It is clear that plaintiff has endured much hardship in recent years, both financial and personal. I know that, in plaintiff's eyes, defendant has contributed to his difficulties by giving him seemingly contradictory information and failing to address the substance of his objections. It may be that defendant was not as sensitive to plaintiff's situation as it could have been or as helpful in resolving the dispute. It would likely be beneficial to both parties

if plaintiff were given a chance by defendant to be fully heard on his concerns so that defendant could determine the claim on its merits.

However, a federal court is not empowered to order anything that it believes might be a good idea; it is constrained by what the legislature has empowered it to do. For better or worse, Congress has determined that the federal government will not be able to carry out its functions effectively if it is subject to suit by the many taxpayers who object to the tax the government has determined they should pay. Thus, at this time, plaintiff's legal remedies are limited to filing an administrative claim with defendant or waiting to file an action in federal court until after he has paid the full amount assessed by defendant.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant Internal Revenue Service is GRANTED and this case is DISMISSED for lack of subject matter jurisdiction.

Entered this 20th day of February, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge