

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Donald D Bailey, Plaintiff, v. United States of America, Defendant.

No. CV-14-02471-TUC-RCC

December 6, 2016, Filed December 5, 2016, Decided

Donald D Bailey, Plaintiff, Pro se, Tucson, AZ.

For United States of America, Defendant: Amy Talburt Matchison, LEAD ATTORNEY, US Dept of Justice, Washington, DC.

For United States of America, Counter Claimant: Amy Talburt Matchison, LEAD ATTORNEY, US Dept of Justice, Tax Division, Washington, DC.

Raner C. Collins, Chief United States District Judge.

Raner C. Collins

**ORDER**

Pending before the Court is Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 52). The Court has received and reviewed Plaintiff's Response (Doc. 58) and Defendant's Reply thereto (Doc. 59). For the following reasons, Defendant's motion is granted, and this matter is dismissed without prejudice.

**26 U.S.C. § 6694(b)** provides that the Internal Revenue Service ("IRS") may, under certain circumstances, assess a penalty against tax return preparers who have prepared returns that understate the taxpayers' liability. By and through this action Plaintiff challenges such tax preparer penalties assessed against him on or about March 3, 2014 for tax preparation services rendered for tax years 2008, 2009 and 2010. Doc. 12; see also, Doc. 25, Ex. 4 at 1.

**FACTS**

The following facts are not in dispute. On March 28, 2014, Plaintiff filed a refund claim and request for penalty adjustment with the IRS and paid an amount equal to 15 percent of the penalties assessed in furtherance of this challenge. Doc. 52 at 3:15-16; Doc. 58 at 1-2 (citing Doc. 25 at 4). **26 U.S.C. § 6694(c)(2)**. Plaintiff commenced the instant action on November 12, 2014. Doc. 1. On November 17, 2014 the IRS issued the Plaintiff a letter denying his refund claim and request for penalty adjustment. Doc. 25, Ex. 5; Doc. 52 at 3.

**LEGAL STANDARD**

A motion to dismiss pursuant to **Federal Rules of Civil Procedure 12(b)(1) or 12(h)(3)** challenges the court's subject matter jurisdiction. Federal district courts are courts of limited jurisdiction that "may not grant relief absent a constitutional or valid statutory grant of jurisdiction," and "[a] federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *A—Z Int'l v. Phillips*, **323 F.3d 1141**, **1145** (9th Cir.2003) (citations and quotation marks omitted); see also **Fed.R.Civ.P. 12(h)(3)** ("If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action."). When ruling on a motion to dismiss for lack of subject matter jurisdiction, the court takes the allegations in the complaint as true. *Wolfe v. Strankman*, **392 F.3d 358**, **362** (9th Cir.2004). However, the court is not restricted to the face of the pleadings and "may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, **850 F.2d 558**, **560** (9th Cir.1988). "When subject matter jurisdiction is challenged under **Federal Rule of Procedure 12(b) (1)**, the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v. Communities for a Better Env't.*, **236 F.3d 495**, **499** (9th Cir.2001) (per curiam), abrogated on other grounds by *Hertz Corp. v. Friend*, **559 U.S. 77**, **130 S. Ct. 1181**, **175 L. Ed. 2d 1029** (2010).

To confer subject matter [\*2] jurisdiction in an action against a sovereign, there must exist (1)

"statutory authority vesting a district court with subject matter jurisdiction," and (2) "a waiver of sovereign immunity." *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008 , 1016 (9th Cir.2007). Because the United States is a sovereign, it is immune from suit unless it has expressly waived its immunity and consented to be sued. See *Dunn & Black, P.S. v. United States*, 492 F.3d 1084 , 1087-88 (9th Cir.2007). The United States Supreme Court has "frequently held ... that a waiver of sovereign immunity is to be strictly construed, in terms of scope, in favor of the sovereign." *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255 , 261 , 119 S.Ct. 687 , 142 L.Ed.2d 718 (1999). Moreover, the waiver cannot be implied, but must be "unequivocally expressed" in the statutory text. *Id.*; accord *Harger v. Dep't of Labor*, 569 F.3d 898 , 903 (9th Cir.2009). The party asserting a waiver of sovereign immunity bears "the burden of establishing that its action falls within an unequivocally expressed waiver of sovereign immunity by Congress..." *Dunn & Black, P.S.*, 492 F.3d at 1088 .

## DISCUSSION

Defendant argues that this Court lacks subject matter jurisdiction over this action because Plaintiff did not satisfy the statutory prerequisite(s) to filing such a suit. Doc. 52 at 2. Specifically, Defendant argues that Plaintiff did not bring the instant matter within 30 days after the expiration of 6 months after the day on which he filed his refund claim. *Id.* at 5-6. Defendant further argues that Plaintiff did not, alternatively, pay the full dollar amount of the tax penalty in dispute. *Id.* at 6. Defendant's arguments are well-taken.

The general rule—often referred to as the "full pay rule"—is that district courts lack subject matter jurisdiction over a claim for refund of tax penalties not fully paid. See, *Flora v. U.S.*, 362 U.S. 145 , 177 (1960). However, under 26 U.S.C. § 6694(c) a tax preparer can pay 15 percent of the penalty file a refund claim with the IRS, and file suit in district court within the earlier of (1) 30 days after the IRS denies his claim for refund or (2) 30 days of the expiration of 6 months after the day on which he filed the claim for refund.<sup>1</sup>

Plaintiff filed his claim for refund on March 28, 2014 together with the dollar equivalent of 15 percent of the penalties he was assessed. Thirty days after the expiration of 6 months (and a day) from that date was October 29, 2014. The IRS did not issue a denial of Plaintiff's refund claim until after that date. Accordingly, in order to capitalize on 6694(c)'s 15 percent exception to the full pay rule Plaintiff was obliged to file suit in district court no later than October 29, 2014. Plaintiff did not do so, waiting instead to file on November 12, 2014. As Plaintiff has not paid the full amount of the penalties in dispute, and no exception under 6694(c) applies, this Court lacks subject matter jurisdiction over this suit under *Flora*. See, *Taylor v. Washington*, 118 A.F.T.R.2d 2016-5531 (E.D. Wash. August 1, 2016)(finding lack of jurisdiction where Plaintiff did not pay the full penalty owed and did not timely file suit pursuant to 26 U.S.C. 6694(c) ). Accordingly,

## IT IS HEREBY ORDERED

(1) Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (**Doc. 52**) is **GRANTED**.

(2) All other outstanding motions pending in this matter (**Doc. 51**) are **[\*3] DENIED AS MOOT**.

(3) Plaintiff's case is **DISMISSED WITHOUT PREJUDICE**.

(4) The Clerk of the Court is directed to close its file in this matter.

Dated this 5th day of December, 2016 Copy with Citation

/s/ Raner C. Collins

**Raner C. Collins**

**Chief United States District Judge**

<sup>fn 1</sup>

The Ninth Circuit has not explicitly concluded that 26 U.S.C. § 6694(c) is an exception to the full pay rule, but it has so found when considering the identically worded 26 U.S.C. § 6703(c) . See *Thomas v. United States*, 755 F.2d 728 , 729-30 (9th Cir. 1985) (" 26 U.S.C. § 6703(c) provides an exception to the "full payment rule" of *Flora*").

