IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CATHY LANDERS, Plaintiff, v. UNITED STATES OF AMERICA, THE INTERNAL REVENUE SERVICE, CHARLES RETTIG, IN HIS OFFICIAL, CAPACITY AS COMMISSIONER OF, and INTERNAL REVENUE, Defendants.	)	Case No. 3:20-cv-00455

UNITED STATES' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

1. BACKGROUND

On December 5, 2017, Plaintiff and her ex-husband, Wyndall S. Landers, filed a joint federal income tax return for 2016. *See* Dkt. 1 at ¶ 11. On January 8, 2018, the IRS made an assessment (*i.e.*, determined that they owed a balance) of $742,728 against Plaintiff and her ex-husband for 2016. *Id*.

On December 5, 2019, the IRS issued a Notice of Levy to InTouch Credit Union (ICU) to seize funds held in a bank account that is currently solely owned by Plaintiff. *See* Dkt. 1 at ¶ 13; Exhibit A attached to the Declaration of IRS Revenue Officer Vincent C. Sandles ("Sandles Decl."). ICU received the Notice of Levy on December 11, 2019. *See* Exhibit A, p. 2 attached to the Sandles Decl.

On December 20, 2019, 9 days after ICU received the levy from the IRS, Plaintiff filed a request to be designated an innocent spouse under 26 U.S.C. § 6015(f) with the IRS. Plaintiff

claims that the IRS, in response to her claim for innocent spouse relief, was required by 26 U.S.C. § 6015(e)(1)(B)(i) to release the levy received by ICU on December 11, 2019. *See* Docket Entry No. 1 at ¶ 22. As discussed in more detail below, Plaintiff's claim for innocent spouse relief only prevents the IRS from taking certain actions to collect the outstanding tax debt from her prospectively. The innocent spouse claim has no impact on a levy that was "made" prior to the filing of the innocent spouse claim.

2. ARGUMENT

a. Under the regulatory structure governing the IRS's ability to levy on a taxpayer's bank account to satisfy her outstanding tax liability, an IRS levy is considered "made" when the bank receives a notice of levy from the IRS.

The issue of when an IRS levy is considered to have been made is key to determining whether the IRS violated the injunction, provided in Section 6015(e)(1)(B)(i), that stops the IRS, until certain conditions are met, from taking certain affirmative action to collect a tax debt, including making levies, after a taxpayer files an innocent spouse claim. As will be discussed in more detail in the following section, the injunction, under Section 6015(e)(1)(B)(i), that is automatically implemented when a taxpayer files an innocent spouse claim does not impact levies that have been made prior to the filing of the innocent spouse claim. Before getting to that portion of the argument, the United States will establish in this section that an IRS levy is considered "made" when the bank receives a copy of the Notice of Levy from the IRS via U.S. Mail.

As an initial matter, pursuant to 26 U.S.C. § 6331(a), "[i]f any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person . . . ." To be clear, Plaintiff does not make any allegations that the IRS

failed to follow Section 6331(a). This is mentioned to inform the Court of the predicate the IRS is required to follow prior to issuing a levy to collect an outstanding federal income tax liability from a taxpayer's property and assets.

Once the IRS has fulfilled the requirements of Section 6331(a), it can levy on a taxpayer's property, including bank accounts, to try to satisfy any outstanding federal tax liability. A "[l]evy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or right to property subject to levy, including . . . bank accounts . . . ." 26 C.F.R. § 301.6331-1(a)(1). "A notice of levy may be served by mailing the notice to the person upon whom the service of a notice of levy is authorized under (a)(1) of this section [*e.g.*, bank accounts] . . . *the date and time the notice is delivered is the date and time the levy is made*." *Id*. at 301.6331-1(c) (emphasis added). In short, the levy is considered "made" on the date and time it is received by the bank. The key is that once the levy is made, the IRS need take no further action to collect the funds in the bank account.

The IRS levy on a bank account only reaches the money in the bank account on the day the levy is made. When the IRS serves a levy on a bank, the bank "shall surrender . . . any deposits (including interest thereon) in such bank only after 21 days after service of levy." 26 U.S.C. § 6332(c). The levy only reaches property in possession of the bank at the time the levy is made plus any interest that accrues during the 21-day holding period. *See* Section 301.6311-1(a)(1). "[A] levy made on a bank with respect to the account of a delinquent taxpayer is satisfied if the bank surrenders the amount of the taxpayer's balance at the time the levy is made." *Id*. The IRS must issue the bank a new levy to reach any deposits made after the levy is made. *See id.*

b. The Court lacks subject matter jurisdiction over Plaintiff's claim because it is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

"Federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, lack the power to adjudicate claims." *Stockman v. FEC*, 138 F.3d 144, 151 (5th Cir. 1998); *see also Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 552 (2005). "They possess only that power authorized by Constitution and statute." *Exxon Mobil Corp.*, 545 U.S. at 552. "Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "[Courts] must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). Accordingly, the plaintiff "constantly bears the burden of proof that jurisdiction does in fact exist." *Morris v. Thompson*, 852 F.3d 416, 419 (5th Cir. 2017) (quoting *Ramming*, 281 F.3d 161). t 161.

"When ruling on the motion, the district court may rely on the complaint, undisputed facts on the record, and the court's resolution of disputed facts." *Id*. "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3)). Plaintiff's complaint contains an incomplete factual account of what happened before the IRS prior to the filing of this lawsuit. This necessitated submitting one piece of factual evidence (a copy of the levy and acknowledgment of receipt by the bank showing that the bank received the levy prior to Plaintiff filing her request for innocent spouse relief) by the United States to clarify the sequence of events that occurred prior to Plaintiff filing this lawsuit. Thus, this motion, depending on the Plaintiff's response, may require the Court to resolve a disputed fact.

i. Plaintiff's request that the Court cancel a levy that was made prior to her filing of her request for innocent spouse relief is barred by the Anti-Injunction Act (26 U.S.C. § 7421(a)).

The Anti-Injunction Act, 26 U.S.C. § 7421(a) prohibits suits (*i.e.*, withdraws jurisdiction from the federal courts for this type of lawsuit) restraining the assessment or collection of taxes, with several exceptions. *Jones v. United States*, 889 F.2d 1448, 1449-50 (5th Cir. 1989). Put simply, once a tax has been assessed, the taxpayer ordinarily has no power to prevent the IRS from collecting it; her only recourse is to pay the tax in full, and then sue for a refund. *Id.* Plaintiff argues that she is covered by the exception to the Anti-Injunction Act found in 26 U.S.C. § 6015(e)(1)(B)(ii) (allowing the Court to impose an injunction against the IRS preventing it from taking certain types of collection action after a taxpayer files an innocent spouse request). As discussed below, that exception only prevents the IRS from prospectively taking action to collect an assessment such as issuing new levies or beginning or prosecuting court proceedings to enforce an existing levy. For example, it does not require the IRS to cancel a levy that was already made when the request for innocent spouse relief was filed by the taxpayer with the IRS. Instead, it prevents the IRS from beginning or prosecuting a lawsuit to enforce the levy if the recipient does not voluntarily comply.

Under Section 6015(e)(1)(B)(i):

> [i]n the case of an individual . . . who requests equitable relief under . . . [6015](f) . . . no levy or proceeding in court shall be made, begun, or prosecuted against the individual . . . requesting equitable relief under subsection (f) for collection of any assessment to which such election relates until the close of the 90th day referred to in subparagraph (A)(ii), or, if a petition has been filed with the Tax Court under subparagraph (A) until the decision of the Tax Court has becoming final.

This limitation on the ability of the IRS to collect only applies after the taxpayer has filed a request for innocent spouse relief under Section 6015(f). As discussed above, the levy to ICU

was made prior to Plaintiff's filing of her request for innocent spouse relief with the IRS. Thus, because the IRS did not make the ICU levy after the Plaintiff filed her request for innocent spouse relief, the Court cannot enjoin the making of that levy under Section 6015(e)(1)(B)(ii).

Plaintiff argues that the IRS "was precluded from completing or prosecuting the levy until 90 days after the IRS properly mailed its notice of final determination regarding her request for relief to Ms. Landers." Dkt. Entry No. 1 at ¶ 22. As an initial matter, Section 6015(e)(1)(B)(i) does not contain any form of the word "complete." Hence, Plaintiff's argument about the IRS completing the levy has no basis in the regulatory language governing IRS levies and should be disregarded. As discussed in detail in the previous section, the key is when the levy is made.

Section 6015(e)(1)(B)(i) does, however, contain the word prosecute. The issue is whether the word prosecute in Section 6015(e)(1)(B)(i) refers to a levy or just to a proceeding in court. The law supports a reading that the word prosecute only applies to proceedings in court and not to the initial process of serving the IRS levy on the bank (*a.k.a.*, making the levy).

First, the term "prosecute" does not appear in the regulations governing the IRS's ability to levy on a taxpayer's bank account. *See, e.g.*, 26 C.F.R. § 301.6331-1. By contrast, the term "made" appears multiple times in the regulations governing the IRS's ability to issue a levy to collect money from a taxpayer's bank account or other types of property. *See id.*

Second, similar language can be found in 26 U.S.C. § 6213(a) which provides in relevant part that "no levy or proceeding shall be made, begun, or prosecuted until . . . ." The Tax Court read that language as follows: "Section 6213(a) generally restricts when the Commissioner may assess a deficiency, make a levy determination, and begin or prosecute a collection action in a court proceeding." *Hoover v. Comm'r*, T.C. Memo 2006-82, 2006 Tax Ct. Memo LEXIS 85, *47 (Apr. 24, 2006). The Tax Court associated the term "make" with a levy, and the term "prosecute"

with starting a collection action in a court proceeding. Unfortunately, the Tax Court did not provide a detailed discussion of why it associated "make" with levy, and "begin" and "prosecute" with collection action or court proceeding. However, as discussed below, when considered in association with the levy process, the Tax Court's formulation is logical and, if applied to Section 6015(e)(1)(B)(i), would prevent the IRS from making any make new levies or beginning or prosecuting any court proceedings to collect on an assessment.

The IRS has various tools when it comes to a levy, not all of which are used in every situation. First, as discussed in the previous section, the IRS makes a levy by serving it on the entity or individual that has property belonging to the taxpayer. If the recipient turns over the property (at the end of any required waiting period), then the IRS does not need to take any further action and the levy is complete. If a recipient fails to turn over the property (again, at the end of any required waiting period), the United States can sue (*i.e.*, prosecute) the recipient of the levy in federal court for failure to honor a levy under 26 U.S.C. § 6331(e). In essence, the IRS only affirmatively acts at certain points in the levy process. Section 6015(e)(1)(B)(i) is meant to stop the IRS from taking any affirmative action like making a new levy or prosecuting an existing levy in court after the filing of an innocent spouse claim.

Here, the IRS had already made the levy on ICU when Plaintiff filed her request for innocent spouse relief. In compliance with Section 6015(e)(1)(B)(i), the IRS did not make any new levies, nor did it begin or prosecute any proceedings in court to collect on the assessment once Plaintiff filed her request for innocent spouse relief. ICU voluntarily complied with the levy once the 21-day period provided by Section 6332(c) expired. Because the IRS did not make a levy or begin or prosecute a lawsuit to collect on the assessment after she filed her request for innocent spouse relief, the IRS did not violate the applicable collection restrictions under Section

6015(e)(1)(B)(i). Thus, the IRS did not violate Section 6015(e)(1)(B)(i), and the relief requested by Plaintiff is barred by the Anti-Injunction Act.

c. Plaintiff's request that the Court provide declaratory relief with respect to her federal tax liability is barred by the Declaratory Judgment Act, 28 U.S.C. § 2201.

Plaintiff requests that the Court enter a declaratory judgment in her favor under the Declaratory Judgment Act. It is unclear what exactly Plaintiff wants the Court to declare. *See* Dkt. 1 at ¶ 26. At its heart, Plaintiff is disputing whether she is liable to pay the outstanding joint federal income tax liability with her ex-husband. The Declaratory Judgement Act (28 U.S.C. § 2201) specifically exempts from its coverage cases "with respect to Federal taxes." Thus, to the extent Plaintiff seeks a declaratory judgment about her federal tax liability, her complaint must be dismissed for lack of subject-matter jurisdiction under Rule 12(b)(1). *See Taylor v. United States*, 292 F. App'x 383, 388 (5th Cir. 2008).

d. Plaintiff's reliance on 5 U.S.C. § 702 is misplaced as it does not obviate the prohibitions contained in the Anti-Injunction Act.

Plaintiff also seeks some unspecified relief under 5 U.S.C. § 702. *See* Dkt. 1 at 6. Section 702 is part of the Administrative Procedure Act (APA). Section 701 of the APA provides that it "applies, according to the provisions thereof, except to the extent that statutes [*e.g.*, the Anti-Injunction or Declaratory Judgment Act] preclude judicial review." 5 U.S.C. § 701(a)(1). Thus, this explicitly provides that it does not override jurisdictional limitations in other statutes.

There is also case law that specifically states that Section 702 does not override the Anti-Injunction Act or the Declaratory Judgment Act. "Section 702 waives sovereign immunity in actions seeking non-monetary relief with respect to agency action." *Caldwell v. Smith*, 1995 U.S. Dist. LEXIS 9516, *6 (D. Ore. June 22, 1995) (citations omitted). The "limited waiver of sovereign immunity [in Section 702] does not override the limitations of the Anti-Injunction Act

or the Declaratory Judgment Act." *Id*. (citing *Hughes v. United States*, 953 F.2d 531, 537 (9th Cir. 1992); *see Fostvedt v. United States*, 978 F.2d 1201, 1203–04 (10th Cir.1992) (finding that "[section] 702 of the APA does not override the limitations of the Anti–Injunction Act and the Declaratory Judgment); *Cypress v. United States*, 646 F. App'x 748, 754–55 (11th Cir. 2016) ("Because the AIA [Anti-Injunction Act], 26 U.S.C. § 7421(a), and the DJA [Declaratory Judgment Act] . . . precluded the district court from exercising jurisdiction over the . . . [Plaintiffs'] suit, the APA [Section 702] cannot provide a cause of action in this case.) In sum, Plaintiff cannot get relief under the APA unless she can demonstrate that her situation falls into an exception to the Anti-Injunction Act or the Declaratory Judgment Act.

e. The Court does not have the authority to issue a mandamus under that Mandamus Act that conflicts with the Anti-Injunction Act.

Plaintiff asks the Court to use the Mandamus Act, 28 U.S.C. § 1361, to order the IRS to follow Section 6015(e)(1)(B). *See* Dkt. 1 at pp. 6-7. "It is broadly recognized that a request for relief in the nature of a mandamus is no different than a request for a mandatory injunction." *Ross v. United States*, 460 F. Supp. 2d 139, 150 (D.D.C. 2006) (citing *Swan v. Clinton*, 100 F.3d 973, 976 (D.C. Cir. 1996). "[C]ourts have held that the Anti-Injunction Act . . . precludes relief in the nature of a mandamus where plaintiffs have simply cloaked an action for an injunction against the collection of taxes as a mandamus action." *Id*. (citing *Simmar v. U.S. Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005); *Souther v. Milbachler*, 701 F.2d 131, 132 (10th Cir. 1983); *Dickens v. United States*, 671 F.2d 969, 972 (6th Cir. 1982)). In short, the Mandamus Act does not cancel out the Anti-Injunction Act. The Court can only issue a mandamus if Plaintiff's situation falls into one of the exceptions to the Anti-Injunction Act. Here, as discussed above, the relief sought by Plaintiff is barred by the Anti-Injunction Act. Thus, the Court is unable to provide the requested relief under the Mandamus Act.

3. CONCLUSION

The IRS complied with Section 6015(e)(1)(B)(i) as it has not made any levies or initiated a court proceeding to enforce an existing levy since Plaintiff filed her request for innocent spouse relief with the IRS. Plaintiff has failed to show that her claim falls into the exception to the Anti-Injunction Act contained in Section 6015(e)(1)(B)(i) and (ii). As a result, the Court must dismiss Plaintiff's complaint for lack of subject matter jurisdiction because it seeks relief barred by the Anti-Injunction Act. This Anti-Injunction Act also precludes Plaintiff's claims under 5 U.S.C. § 702 and the Mandamus Act.

Furthermore, Plaintiff has not shown how the United States waived its sovereign immunity for this lawsuit under the Declaratory Judgment Act. Thus, Plaintiff's claim under the Declaratory Judgment Act must also be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 22, 2020, opposing counsel was served with the following documents at his email address of Jason@FreemanLaw.com: (1) Motion to Dismiss, (2) Declaration of IRS Revenue Officer Vincent C. Sandles, and (3) Proposed Order.

/s/ Goud P. Maragani
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