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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF WASHINGTON**

7 DONALD J. TAYLOR,)
8) CASE NO. 4:16-cv-05023-SMJ
9 Plaintiff,)
10 vs.) PLAINTIFF’S REPLY TO
COMMISSIONER OF) DEFENDANT’S MOTION
11 INTERNAL REVENUE,) TO DIMISS FOR LACK OF
12 Defendant.) SUBJECT MATTER
13) JURISDICTION
) With Oral Argument Before the
) Court: 7-28-16, at 1:30PM
)

14 Introduction

15 This reply addresses the only substantive issue raised in Defendant’s
16 Motion To Dismiss Plaintiff’s complaint. That issue is Defendant’s claim that
17 Plaintiff has failed to meet the jurisdictional prerequisites of 26 U.S.C § 6694
18 (c). The Defendant acknowledges that Plaintiff met the first two (2)
19 requirements:
20

1 1. Plaintiff timely paid 15% of the penalties at issue.

2 2. Plaintiff timely filed a claim for refund with the IRS (P-7, Line-8) of
3 Defendant's Dismissal Motion.

4 Defendant claims that Plaintiff failed to meet the so called third
5 requirement set out in § 6694 (c)(2). Defendant claims that the Plaintiff failed
6 to bring this action within the time specified in § 6694 (c)(2).

7 As discussed later, Defendant's "third requirement" has nothing to do with
8 the issue of the Court's Jurisdiction. It solely limits the IRS collection actions.
9 As the title of this section states: "Extension of period of collection where
10 preparer pays 15% of penalty".

11 In particular Defendant cites as follows:

12 The Plaintiff thus did not comply with the time for bringing a refund suit in
13 §6694 (c)(2). If a return preparer fails to bring a refund suit challenging a
14 penalty within a period specified in § 6694 (c)(2), the provisions of
15 §6694(c)(1) "shall cease to apply with respect to such penalty." 26 U.S.C. §
16 6694(c)(2). Because the provisions of § 6694 (c)(1) cease to apply, the 15%
17 payment exception to the *Flora* full pay requirement does not apply, and §
18 6694(c)(2) cannot provide jurisdiction over the refund suit (P-7 & 8, L-17
19 of Defendant's Motion to Dismiss).

18 Defendant also cites a number of cases supporting its position on this
19 issue. In particular, Defendant cites the 9th Circuit case of *Korobkin v.*
20 *United States*, 988 F.2d 975, 976 (9th cir. 1993) cited on P-8, L-22 of

1 Defendant's Motion To Dismiss.

2 The Plaintiff has all due respect for the analysis made by the *Korokbin*
3 *Court* and the other courts which have followed the same reasoning and which
4 are cited in P-8, Line-3, of Defendant's Motion To Dismiss.

5 The decision in the *Korokbin* case is four (4) paragraphs long. Of these four
6 paragraphs, only the first paragraph deals with the issue of Section 6694(c).
7 Even that paragraph is actually devoid of any substantive details or analysis.

8 However, the Plaintiff is of the opinion that the analysis of §6694(c) made
9 by the Defendant and its cited sources, is clearly erroneous. The basis for
10 Plaintiff's above opinion is set out in the following paragraphs.

11 Legal Argument

12 Both the Plaintiff and Defendant agree with the Supreme Court's holding in
13 *Flora v. United States*, 362 U.S. 145, 177 (1960) that a Plaintiff must generally
14 fully pay the challenged tax assessment prior to filing suit in Federal District
15 Court.
16

17 Where we differ is in the exception to the *Flora* rule which is set out in 26
18 UCS §6694 (c). We differ in both the meaning and interpretation of the above
19 statute section and in the holding of the *Korobkin v. United States*, 928 F. 2d
20

1 975, 976 (9th Cir. 1963) case and its progeny.

2 It is critical to read the entire code section 26 USC §6694(c)(2). This code
3 section must also be read along with the IRS regulations on this code section.
4 The IRS regulations flesh out certain vague and unclear wording in code
5 section 6694(c).

6 It is absolutely necessary to understand the nature and purpose of all three
7 (3) sections of §6694(c) and how they relate to each other.

8 The heading for §6694(c) is as follows: “Extension of period of collection
9 where preparer pays 15% of penalty” (emphasis added). The clear and
10 unambiguous meaning of these words is that this section applies to two issues:

- 11 1. To avoid the “Full Pay” rule in *Flora*, the preparer is allowed to pay 15%
12 of the penalty and then file suit in Federal District Court.
- 13 2. It sets limits on the time frame in which the IRS is prohibited from
14 pursuing collection action of the penalties at issue.

15 Section 6694(c) in no way limits the District Court’s jurisdiction in this
16 matter.

17 This is more clearly fleshed out in the IRS’ Regulations on section 6694(c).
18 Section 1.6694-4 of the IRS regulations states in pertinent part as follows:

19 **(5) If the tax return preparer pays an amount and files a claim for**
20 **refund under paragraph (a)(4)(ii) of this section, the IRS may not**
make, begin, or prosecute a levy or proceeding in court for collection of
the unpaid remainder of the amount assessed until the later of – (i) A

1 date which is more than 30 days after the earlier of- (A) The day on which
2 the tax return preparer's claim for refund is denied; or(B) The expiration of
3 6 months after the day on which the tax return preparer filed the claim for
4 refund; and (ii) Final resolution of any proceeding begun as provided in
5 paragraph (b) of this section.

6 Paragraphs (b) and (c) of this section states as follows:

7 **(b) Preparer must bring suit in district court to determine liability for**
8 **penalty.** – The IRS may proceed with collection of the amount of the
9 penalty not paid under paragraph (a)(4)(ii) of this section within 30 days
10 after the earlier of- (1) The day on which the preparer's claim for refund
11 filed under paragraph (a)(4)(ii) of this section is denied; or (2) The
12 expiration of 6 months after the day on which the preparer filed the claim
13 for refund, (emphasis added).

14 **(c) Suspension of running of period of limitations on collection.** – The
15 running of the period of limitations provided in section 6502 on the
16 collection by levy or by a proceeding in court of the unpaid amount of a
17 penalty or penalties described in section 6694(a) or section 6694(b) is
18 suspended for the period during which the IRS, under paragraph (a)(5) of
19 this section, may not collect the unpaid amount of the penalty or penalties
20 by levy or a proceeding in court, (emphasis added).

The above §6694(c) explanation in the IRS regulations clearly shows that
the section at issue only relates to the IRS' levy and collection restrictions and
has nothing to do with the Court's Jurisdiction.

§6694(c) is Congress' answer to the fact that most preparers can not
comply with the *Flora* "full pay" rule and thus are prohibited from any ability
to seek redress in Federal District Court.

1 The 15% payment provision in §6694(c) is Congress' way of providing
2 relief from the *Flora* "full pay rule."

3 The other provision in §6694(c) is a balancing act to assist the IRS in its
4 collection activities. If a preparer pays at least 15% of the penalty amount and
5 timely files a claim for refund, the IRS is prohibited collection action in
6 §6694(c)(2) by setting out the two (2) requirements, one of which the preparer
7 must meet, to avoid IRS collection actions while the issue is before the court.

8 These two provisions differ from one another, but have similar requirements:

9
10 **(2) Preparer must bring suit in District Court to determine his liability**
11 **for penalty** – If within 30 days after the day on which his claim for refund
12 of any partial payment of any penalty under subsection (a) or (b) is denied
13 (or, if earlier, within 30 days after the expiration of 6 months after the day
14 on which he filed the claim for refund), the tax return preparer fails to begin
15 a proceeding in the appropriate United States district court for the
16 determinate of his liability for such penalty, paragraph (1) shall cease to
17 apply with respect to such penalty, effective on the day following the close
18 of applicable 30-day period referred to in this paragraph.

14 These balancing provisions lead to the following benefits:

- 15 1. The preparer can pay only 15% before filing suit in Federal Court.
- 16 2. If the preparer meets to either one of the above two (2) requirements set
17 out in the preceding paragraph, IRS is prohibited from pursuing any
18 collection action until the matter is resolved in court.
- 19 3. If the preparer fails to meet either of the proceeding requirements, the
20 IRS is free to pursue collection actions where this matter is being litigated.

20 Again, in no way does §6694(c) limit the jurisdiction of the Federal District

1
2 Court.

3 Plaintiff's position is further supported by Commerce Clearing House's
4 (CCH) summary of section 6694(c):

5 If the return preparer takes the 15 percent option, the IRS may not proceed
6 to collect the remainder of the penalty until the later of a date that is more
7 than 30 days after the earlier of: (1) The day the refund claim is denied or
8 six months after the day the preparer filed the claim for refund, or (2) Final
9 resolution of a district court proceeding brought by the preparer (Reg.
10 §1.6694-4(a)(5)) (emphasis added).

11 If the IRS does not act on the refund claim within six months after the date
12 on which the claim was filed, the return preparer may commence a suit in
13 the appropriate district court within 30 days after the end of the six-month
14 period. If the preparer does not initiate a refund action within the 30-day
15 period, the IRS may collect the remaining 85 percent of the penalty.

16 If the IRS denies the claim, the return preparer may bring suit within 30
17 days after denial of the refund (Reg. §1.6694-4(b)). The IRS may
18 counterclaim for the balance of the penalty where the preparer bring suit
19 after making partial payment of the penalty (Code Sec. 6694(c)(1)).

20 [CCH Vol. 17- Standard Federal Tax Reports §39,960 (2015)]

The above CCH analysis is the review of Section 6694(c).

In addition, if the 9th Circuit analysis is correct, then limiting portions of
§6694(c)(2) is in direct conflict with the Administrative Procedures Act
(5 U.S.C. §551). The APA basically requires a party to exhaust all
administrative avenues of resolution before filing suit in Federal District Court.

Summary

The Defendant and the courts have interpreted the preceding clause in

1 Section 6694(c)(2) as a restriction on a preparer's access to the District Court.

2 This clause states that, if a preparer fails to timely begin a proceeding in the
3 appropriate U.S. District Court for the determination of his liability for such
4 penalty, paragraph (1) shall cease to apply with respect to such penalty,
5 effective on the day following the close of the applicable 30-day period referred
6 to in the paragraph.

7 This section clearly applies to the IRS' ability to levy on a preparer. It has no
8 application whatsoever to the issue of the court's jurisdiction.

9 A reading of the entire §6694(c) section clearly indicates that no purpose is
10 served in limiting a preparer's right to access to court after making a 15%
11 deposit. The time limits set out in §6694(c)(2) do serve the purpose of limiting
12 the time period in which the IRS is prohibited from pursuing its collection
13 activities. It can pursue levy actions if the preparer fails to comply until after
14 the 30-day time frame after a claim denial or a timely filing of a complaint.
15

16 Code Section 6694(c) provides both an avenue of relief for the preparer
17 and a limit on the restriction of IRS collection activities.

18 Conclusion

19 26 USC 6694(c) is a remedial exception to the harsh ruling in by the US
20

1 Supreme Court in *Flora*. While the section provides a great benefit to preparers
2 it also provides the IRS with substantial benefits by limiting the time frame in
3 which it is limited in pursuing its collection activities. It in no way limits on
4 affects the District Courts jurisdiction in this matter.

5 If the *Korokbin* Court and the Defendant are correct, then the Plaintiff
6 would be in violation of the Administrative Procedures Act if they file a
7 complaint in Federal Court prior to the IRS' claim denial. Of course, 6694(c)(2)
8 does not apply to the Court's jurisdiction, it only applies to the IRS' Collection
9 activities.

10 Therefore, it is respectfully submitted that the court deny Defendant's
11 Motion to Dismiss Petitioner's claim for lack of subject matter jurisdiction.

12
13 DATED this 30th day of June, 2016.

14
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6 **CERTIFICATE OF SERVICE**

7 I, Charles Hammer, the undersigned, hereby certify that on June 30, 2016 I
8 electronically filed the foregoing Reply to Defendant’s Motion to Dismiss for Lack
9 of Subject Matter Jurisdiction with the Clerk of the Court using the CM/ECF
10 System, which will send notification of such filing to the following: Charles J.
11 Butler, Attorney for Defendant.
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