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, and CHARLES RETTIG, in his official capacity as Commissioner of Internal Revenue, Defendants.	)	Case No. 3:20-cv-00455-G

BRIEF IN REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Plaintiff filed this suit asking the Court to order the IRS to return funds to her that it received pursuant to a levy. The levy was made to collect a joint federal income tax liability she incurred with her former husband. That levy was made on December 11, 2019. On December 20, 2019, she made a request for relief as an "innocent spouse" under Section 6015(e) of the Internal Revenue Code ("IRC") pertaining to the underlying assessed liability.

Section 6015(e)(1)(B)(i) prohibits the IRS from taking certain collection actions—including making a levy—after such a request is made. Section 6015(e)(1)(B)(ii) provides a narrow waiver of sovereign immunity allowing a court to enjoin the IRS from "beginning" levies or proceedings in court to collect an assessed liability of a person who has made an innocent spouse request. Plaintiff seeks to turn these provisions on their head by ascribing the action taken by another party—the bank— to the IRS and attempting to disguise her claim for compensatory, monetary damages as injunctive relief. *See Cent. States, Se. & Sw. Areas Health & Welfare Fund ex rel. Bunte v. Health Special Risk, Inc.*, 756 F.3d 356, 360 (5th Cir. 2014). Nevertheless, Plaintiff's Complaint (ECF No. 1) and Opposition to Motion to Dismiss (ECF No. 14) fail to

establish that the IRS took any prohibited action that could lead to such an injunction. Therefore, the Court lacks subject matter jurisdiction over her Complaint, and it should be dismissed.

Argument

"Federal courts are courts of limited jurisdiction . . . ." *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). "Absent a waiver of sovereign immunity, the federal government is immune from suit." *Wagstaff v. U.S. Dep't of Educ.*, 509 F.3d 661, 664 (5th Cir. 2007). In addition, the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a) prohibits suits (i.e., withdraws jurisdiction from the federal courts for this type of lawsuit) to restrain the assessment or collection of taxes, with several exceptions. *Smith v. Rich*, 667 F.2d 1228, 1230 (5th Cir. 1982). Plaintiff seeks to invoke a narrow exception to that prohibition found in Section 6015(e) of the Internal Revenue Code. (Compl. ¶ 1, Oppo. 4.) That section's extremely limited conditions that might authorize jurisdiction are not met here.

Under the statutory and regulatory scheme that governs levies, the IRS did not make a levy after Plaintiff sought relief under Section 6015. Nor did it "prosecute" a levy because levies are not "prosecuted" within the meaning of the statute or under the facts alleged by Plaintiff. Nor does the narrow, judicial exception to the AIA permit this suit to proceed because Plaintiff has not shown that the Government cannot prevail and her request for innocent spouse relief constitutes an adequate legal remedy.[1] Because her Complaint does not properly invoke any exception to the AIA, relief is not available under the Declaratory Judgments Act or Administrative Procedures Act. Finally, she fails to establish jurisdiction for mandamus relief because it is identical to the injunction she seeks, and she has a legal remedy.

[1]The argument here assumes, *arguendo*, that the relief Plaintiff seeks is injunctive in nature. That assumption appears unwarranted because Plaintiff actually seeks monetary relief. (Compl. ¶¶ 35, 37.) *See Cent. States*, 756 F.3d at 360.

1. The IRS Did Not Make a Levy in Violation of 6015(e)(1)(B)(i).

Plaintiff has failed to meet her burden to establish subject matter jurisdiction over this action under Section 6015(e)(1) of the IRC. *See Morris v. Thompson*, 852 F.3d 416, 419 (5th Cir. 2017) (Plaintiff "constantly bears the burden of proof that jurisdiction does in fact exist."). That section provides a very narrow waiver of sovereign immunity that allows a court to enjoin the "beginning of" a levy or court proceeding when a taxpayer has sought relief under Section 6015 as an innocent spouse. 26 U.S.C. § 6015(e)(1)(B)(ii). Plaintiff makes no colorable allegation that there was a "beginning of" any levy after Plaintiff sought relief from the IRS under Section 6015 on December 20, 2019. Thus, there is no applicable waiver of sovereign immunity and the Court lacks jurisdiction. Without citing any authority for doing so, Plaintiff attempts to avoid this result by blurring the line between the prohibition on collection action found in Section 6015(e)(1)(B)(i) and the waiver of sovereign immunity found in Section 6015(e)(1)(B)(ii).

Even if the proscriptions found in Section 6015(e)(1)(B)(i) are a component of the waiver of sovereign immunity found in 6015(e)(1)(B)(ii), the IRS did not violate them. Section 6015(e)(1)(B)(i) imposes a bar that "no levy or proceeding in court shall be made, begun, or prosecuted against" people who request innocent spouse relief under Section 6015 from the time they make that request until it is fully resolved. *Id.* § 6015(e)(1)(B)(i). Despite her protestations to the contrary, the IRS did not make a levy against Plaintiff after she filed her innocent spouse request. Whether the IRS has "made" a levy is controlled by the meaning of that term within the IRC and in the regulations that govern levies. Under those controlling authorities, it is beyond cavil that the levy at issue was made on December 11, 2019.

The regulation that governs the making of a levy specifies that "Levy may be *made by serving a notice of levy* on any person in possession of, or obligated with respect to, property or

rights to property subject to levy, including . . . bank accounts . . . .” 26 C.F.R. § 301.6331-1(a)(1) (emphasis added).[2] It further specifies that the manner of service may be by mail. *Id.* § 301.6331-1(c). When a notice of levy is mailed, “the date and time the notice *is delivered* to the person to be served is the date and time the levy *is made*.” *Id.* (emphasis added).[3] Here, the uncontradicted declaration of Revenue Officer Sandles and its exhibit establish that the notice of levy was sent by mail to Intouch Credit Union (“ICU”) on December 5, 2019 and that the bank received it on December 11. (ECF Nos. 12, 12-1.)[4] Thus, under that statutory and regulatory framework, the levy was “made” on December 11. Because Plaintiff made her innocent spouse request on December 20, 2019, the IRS could not have violated 6015(e)(1)(B)(i).

Despite this clear authority, Plaintiff contends that a levy is not “made” until 21 days after a bank receives a notice of levy. She does so based largely on a quote taken out of context from the preamble to a different, inapposite regulation applicable to § 6332, not § 6331:

> “*With respect to imposing liability under Section 6332(d) for refusal or failure to surrender property subject to levy*, the 21-day rule effectively changes the date of the making of a levy on bank deposits to the date of the expiration of the 21-day holding period or any extension of the period granted by the Internal Revenue Service.”

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[2]Throughout the Opposition, Plaintiff refers primarily to Section 6332 of the Code and its regulations. However, Section 6331 of the Code and the regulations applying that section govern this issue for purposes of innocent spouse requests. *See* 26 C.F.R. § 1.6015-7(c)(4) (“levy means an administrative levy . . . described by section 6331.”).

[3]That regulation also provides for a rebuttable presumption that the date of delivery is the date that “an officer or other person authorized to act on behalf of the person served signs and notes the date and time of receipt on the notice of levy . . . .” 26 C.F.R. § 301.6331-1(c).

[4]Plaintiff calls into question whether the person whose signature appears on the Notice of Levy for the bank was authorized to act on its behalf. (Oppo. 1 n.1.) This is beside the point and does not contradict that it was received by the bank on that date. Nor does it meet Plaintiff’s evidentiary burden to establish subject matter jurisdiction in the face of this factual attack. *See Superior MRI Servs., Inc. v. All. Healthcare Servs., Inc.*, 778 F.3d 502, 504 (5th Cir. 2015).

(continued...)

Fed. Reg. Vol. 58, No. 1, p. 16 (Jan. 4, 1993) (emphasis added). In both instances where Plaintiff quotes this sentence, she omits the first, italicized part. (Oppo. 1-2, 9.) That omitted phrase provides a vital clue to the actual import—and limitation—of the statement and establishes that it does not alter the date that a levy on a bank is *made by* the IRS from being when the notice of levy is *received* by the bank. By its plain language, this sentence applies only to the date on which interest will begin to run on a liability that might be imposed upon a bank that fails to honor a levy. *See* 26 U.S.C. § 6332(d)(1) (imposing liability on a party who fails or refuses to surrender property subject to levy and imposing interest from the date of the levy).[5]

The actual language of the regulation pertaining to the 21-day period for a bank to hold and then turn over funds subject to a levy also makes clear that a levy is made by the IRS when notice of levy is received by a bank and not at the end of the 21-day period. "When a levy is made on deposits held by a bank, the bank shall surrender such deposits . . . only after 21 calendar days after the date the levy is made." 26 C.F.R. § 301.6332-3(c). Thus, Plaintiff is simply mistaken that the IRS could have "made" the levy at issue here after December 11.

2. The IRS Did Not "Prosecute" the Levy.

Plaintiff is also mistaken that the IRS violated section 6015(e)(1)(B)(i) by prosecuting its levy against Plaintiff. (Oppo. 13-16.) Under the appropriate canons of construction, the term "prosecuted" in the phrase "no levy or proceeding in court shall be made, begun, or prosecuted . . . " in Section 6015(e)(1)(B)(i) does not apply to the noun, "levy" in that section, and only to a "proceeding in court." And, the facts alleged here could not fall within the meaning of "prosecuted" in any event because action taken by the bank in turning over funds *to* the IRS

[5]A typo in the Motion to Dismiss (ECF No. 11) refers to prosecuting a recipient of a levy that fails to honor it under Section 6331(e). (Motn 7.) It should refer to this Section 6332(d).

would not be an action *by* the IRS.

Properly understood within the applicable canons of construction, levies by the IRS are not "prosecuted" within the meaning of Section 6015(e)(1)(B)(i) any more than court proceedings are "made." To the extent Section 6015(e)(1)(B)(i) is part of the waiver of sovereign immunity found in Section 6015(e)(1)(B)(ii) at all, it must be narrowly construed. *See Lane v. Pena*, 518 U.S. 187, 195 (1996) ("waivers of sovereign immunity [construed] narrowly in favor of the sovereign.") Thus, the Court should reject Plaintiff's appeal to read the term "prosecuted" as broadly as possible and in her favor. (Oppo. 14.) Instead, the Court should give that term its narrowest meaning, which applies only to proceedings in court, as reflected in the first two definitions provided in Exhibit C to Plaintiff's Opposition. (ECF No. 14-3.)

Furthermore, this result is also dictated by the canon that requires statutory terms be understood within their overall statutory context. To determine the meaning of words in a statute, courts look to the "language itself, the specific context in which that language is used, and the broader context of the statute as a whole" *Asadi v. G.E. Energy U.S., L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013) (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Plaintiff agrees this is the properly applicable canon for understanding. (Oppo. 14.) Despite this, Plaintiff points to no authority which actually describes a levy as being "prosecuted" or explains how one could be "prosecuted" within the statutory framework. Instead, the case cited by Plaintiff as an "interpretation" by the Tax Court on this point sheds no light whatsoever. (Oppo. 18 n.71.) In that opinion, the Tax Court offers no interpretation of Section 6015, but merely quotes it after noting that the innocent spouse issue there was "moot." *See Freeman v. Comm'r,* T.C.M. 2007-28 at *7 (T.C. 2007). Further, she misconstrues the overall statutory scheme in which the key phrase in 6015(e)(1)(B)(i) occurs.

Instead, the overall statutory and regulatory context demonstrates that levies are "made" and court proceedings are, generally, "begun" or "prosecuted." *See, e.g.*, 26 U.S.C. §§ 6502(a) ("such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun . . . ."); 6512(a)(3) ("making of levy or beginning a proceeding in court for collection').[6] The IRC and the regulations set forth above generally, if not uniformly, refer to levies being "made." *See, e.g.*, 26 U.S.C. §§ 6331(a), (c)-(e), 6332(d)-(e),6333(a), 6342(a)(3), 6343(a)(1), 6502(a), 7426(a)(1), 7429(a)(1). There is no instance in the IRC where the words "levy" and "prosecute" even occur in the same sentence except for when they are found in the nearly identical phrase used in Section 6015(e)(1)(B)(i) in which "proceeding in court" also appears. *See* 26 U.S.C. §§ 4961(c)(1), 6232(b), 6213(a), 6213(b)(2), 6672(c)(1), 6694(c)(1), 6703(c)(1). The Tax Court has understood that phrase to distinguish between making a levy and prosecuting a proceeding in court to collect a tax. *See Hoover v. Comm'r*, T.C.M. 2006-82 at *14 [91 T.C.M. (CCH) 1053] (T.C. 2006) (discussing "no levy or proceeding shall be made, begun, or prosecuted" in Section 6213(a).) *Hoover* involved the propriety of a jeopardy levy made to collect a tax liability with respect to the bar on collection action found in Section 6213. *Id.* Thus, the Tax Court was addressing the meaning of that phrase within the overall scheme provided by the IRC for assessment and collection, including a prohibition on collection actions similar to that found in Section 6015(e). Consequently, that case supports the interpretation that levies are

[6]This general principle is not negated by the exceptional use of the participial phrase "beginning of such levy" in Section 6015(e)(1)(B)(ii) and similar phrases in Sections 63301(e)(1), 6694(c)(1), 6703(c)(1) of the IRC. Nor is there any suggestion in this case that the IRS made any "beginning of" a levy against Plaintiff after she requested innocent spouse relief. And, the use of that term in those sections in no way informs the interpretation of the word "prosecuted" in an entirely different setting or alter the common understanding of that term as applying only to court proceedings.

"made," and court proceedings are "prosecuted."

The cases cited by Plaintiff in support of her contention that a levy is a "process" which the IRS could "prosecute" to completion are inapposite. (Oppo. 10-13.) Two of those cases are primarily concerned with what property is within a bankruptcy estate, make no mention of a levy being prosecuted, and shed little or no light on when a levy is made. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983) (involving seizure, not levy); *In re Quality Health Care*, 215 B.R. 543 (Bankr. N.D. Ind. 1997).[7] Another case cited by Plaintiff is similarly unhelpful because it is about whether the IRS could demand the cash surrender value of the delinquent taxpayer's unmatured insurance policy. *U.S. v. Sullivan*, 332 F.2d 100, 116 (3d Cir. 1964).

Plaintiff's references to the Internal Revenue Manual ("IRM") are similarly irrelevant. (Oppo. 11-12.) Those quotations make no mention of any levy being "prosecuted" and do not illuminate when a levy has been "made." Moreover, even if the cited provisions were apposite, the IRM is not controlling and could not contradict the plain meaning of the statutory and regulatory framework set forth above. "Procedures or rules adopted by the IRS are not law." *Keado v. United States*, 853 F.2d 1209, 1214 (5th Cir. 1988) (referring to IRM provisions).

Finally, even if the term "prosecuted" in Section 6015(e)(1)(B)(i) applied to levies, the facts alleged here could not establish that any prosecution occurred. The IRS took no action on the levy after it was made on December 11. To the extent that ICU turned over funds subject to the levy that had been made, that involves no affirmative action being taken by the IRS, and the statute only prohibits the IRS from taking action. *See* 26 U.S.C. § 6015(e)(1)(B)(i); *see also Quality Health Care*, 215 B.R. at 580 (IRS did not violate automatic stay when taking no action).

[7] *Quality Health Care* addresses the analogous setting of the automatic stay imposed in bankruptcy. 215 B.R. at 579-80. That court concluded that the IRS's refusal to relinquish funds turned over post-petition on a levy served prepetition did not violate the stay. *See id.*

3. No Other Basis of Jurisdiction Claimed by Plaintiff Is Available.

For largely the same reasons, there is no other basis for the Court to exercise jurisdiction over this case. Plaintiff fails to establish that the narrow, judicial exception to the AIA applies since she has failed to show that the United States could not prevail and she has a legal remedy. Because the Anti-Injunction Act bars her claims, the Court lacks jurisdiction under the Declaratory Judgment Act and Administrative Procedures Act. Finally, mandamus is unavailable because she has a remedy and what she seeks by mandamus is the same as the injunction.

As an alternative to Section 6015(e)'s exception to the AIA, Plaintiff seeks to invoke the Court's jurisdiction under a very narrow, judicially-created exception to that act. (Oppo. 20-21.) Under that exception, "[t]he taxpayer bears the burden of pleading and proving facts to show that the government cannot ultimately prevail." *Elias v. Connett*, 908 F.2d 521, 525 (9th Cir. 1990). Or, as the Supreme Court enunciated the standard in its seminal case, "[o]nly if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). Plaintiff has failed to meet this burden here because, as explained above, the levy was "made" when ICU received it, and the IRS cannot be said to have "prosecuted" it. Furthermore, Plaintiff would also have to show that she is entitled to the relief she seeks by her innocent spouse request, which is not properly before this Court. *See Chandler v. United States*, 338 F. Supp. 3d 592, 602 (N.D. Tex. 2018). Finally, the "government need only have a good faith basis for its claim in order to obtain a dismissal." *Elias*, 908 F.2d at 525. Good faith exists here in that the levy was made after a tax assessment against Plaintiff and before she made her request under Section 6015(e).

The judicial exception to the Anti-Injunction Act also requires that the taxpayer have no adequate legal remedy. *See Kemlon Prod. & Dev. Co. v. United States*, 638 F.2d 1315, 1321 (5th Cir.), *modified*, 646 F.2d 223 (5th Cir. 1981). Here, Plaintiff's remedy lies in her innocent spouse request, on which she is entitled to consideration by the IRS, and, if she disagrees with their ultimate determination, she will be entitled to challenge that determination in Tax Court. *See* 26 U.S.C. § 6015(e)(1)(A). That her remedy may require time or lead to financial hardship does not make it inadequate or her injury irreparable. *See Lucia v. United States*, 474 F.2d 565, 577 (5th Cir. 1973) ("hardship alone" insufficient for injunctive relief against tax collection).

Plaintiff's failure to invoke jurisdiction under the exceptions to the AIA also precludes the Court exercising jurisdiction under the Declaratory Judgment Act and Administrative Procedures Act. On this score, it is irrelevant whether the Declaratory Judgment Act in 28 US.C. § 2201 is "coterminous" with the AIA. (Oppo. 20-21.) If so, jurisdiction under the Declaratory Judgment Act is no more available than under the AIA for all of the reasons given above. Similarly, the Administrative Procedures Act cannot give rise to jurisdiction when another statute—especially the AIA—precludes judicial review. *See* 5 U.S.C. § 701(a)(1)*; McCarty v. United States*, 929 F.2d 1085, 1088 (5th Cir. 1991) (per curiam).

Finally, Mandamus is not available. The relief Plaintiff couches as mandamus is identical to the injunction she seeks, and it is well-established that mandamus is not available in such circumstances. *Family Rehab., Inc. v. Azar*, 886 F.3d 496, 506 (5th Cir. 2018). Furthermore, Plaintiff's Complaint fails to meet at least two of the elements required for mandamus under 28 U.S.C. § 1361: (1) she has no clear right to relief, as making such a determination would require deciding the merits of her innocent spouse request, and (2) she has an adequate remedy available in her innocent spouse request. *See Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980).

Conclusion

For all of the reasons set forth above, the Court lacks jurisdiction over this case. Therefore, it should grant the United States' motion and dismiss this case.

Dated: June 26, 2020

Respectfully submitted,

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Certificate of Service

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