In the United States Court of Federal Claims

No. 04-1663T
Filed June 6, 2005

TONY JIBILIAN,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

Tony Jibilian, *pro se*, plaintiff.

David R. House, Trial Attorney, David Gustafson, Assistant Chief, Mildred L. Seidman, Chief, Court of Federal Claims Section, Eileen J. O'Connor, Assistant Attorney General, United States Department of Justice, Washington, DC, for defendant.

OPINION AND ORDER

GEORGE W. MILLER, Judge.

This matter is before the Court on defendant's motion to dismiss for failure to state a claim upon which relief can be granted. For the following reasons, defendant's motion is GRANTED.

BACKGROUND

On November 9, 2004, plaintiff, appearing *pro se*, filed a complaint alleging that he is entitled to refunds of all income taxes he paid for the years 1999, 2000, and 2001. Plaintiff alleges that he filed his tax returns and timely paid all taxes due for each of the three years in question. Compl. ¶¶ 7-9. Apparently, plaintiff later came to believe that he was in fact entitled to a full refund of all income taxes paid with respect to those years. *Id.* ¶ 10. Plaintiff's principal theory appears to be that because Form 1040 and related instructions "make mention only of reporting foreign source income and not domestic," domestically earned income is not subject to income tax. *Id.* Based upon this and other theories described below, plaintiff filed Form 1040X amended returns for each of the three years. *Id.* Because he earned no foreign source income

during those years, plaintiff claimed that he was not liable for income tax in any of the years in question. *Id.* Following a significant amount of correspondence with the Internal Revenue Service ("IRS"), plaintiff deemed it prudent to re-file all three amended returns and declare himself to be "not liable" for income tax. *Id.* ¶ 23. The IRS disallowed plaintiff's claims for refunds. *Id.* ¶ 30. In this action, plaintiff seeks refunds totaling $900,828.00, plus associated interest, penalties, and costs. *Id.* ¶ 61.

On January 10, 2005, pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), defendant filed a motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. On February 28, 2005, plaintiff filed both an objection to defendant's motion to dismiss and a motion for summary judgment. On March 21, 2005, defendant filed a reply to plaintiff's objection to the motion to dismiss and a motion to refuse summary judgment. On March 25, 2005, the Court stayed briefing on plaintiff's motion for summary judgment pending resolution of defendant's motion to dismiss. On April 4, 2005, plaintiff filed an objection to defendant's reply to plaintiff's objection to defendant's motion to dismiss.

DISCUSSION

I. Jurisdiction Of The United States Court Of Federal Claims

Absent congressional consent to entertain a claim against the United States, the Court lacks authority to grant relief. *See United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Congressional consent to suit in the Court of Federal Claims, which thereby waives sovereign immunity, must be explicit and strictly construed. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Fid. Const. Co. v. United States*, 700 F.2d 1379, 1383 (Fed. Cir. 1983). A waiver of sovereign immunity cannot be implied, but must be unequivocally expressed. *Testan*, 424 U.S. at 399; *United States v. King*, 395 U.S. 1, 4 (1969).

Consent to suit in this Court for a refund of income tax paid is granted by the "Little Tucker Act," 28 U.S.C. § 1346(a)(1), which provides that the United States Court of Federal Claims has jurisdiction, concurrent with the district courts, over

> [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; . . .

28 U.S.C. § 1346(a)(1).

II. Standard Of Review

Dismissal under RCFC 12(b)(6) for failure to state a claim upon which relief can be granted is appropriate when the facts as alleged in the complaint do not entitle the plaintiff to a legal remedy. *New York Life Ins. Co. v. United States*, 190 F.3d 1372, 1377 (Fed. Cir. 1999). In reviewing a motion to dismiss, the court accepts all well-pleaded factual allegations as true, and draws all reasonable inferences in favor of the plaintiff. *Perez v. United States*, 156 F.3d 1366, 1370 (Fed. Cir. 1998). The case may be properly dismissed, however, if the plaintiff "can prove no set of facts in support of his claim that would entitle him to relief." *Southfork Sys., Inc. v. United States*, 141 F.3d 1124, 1131 (Fed. Cir. 1998); *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000).

A *pro se* plaintiff is held to a less stringent standard than one represented by counsel. *Bernard v. United States*, 59 Fed. Cl. 497, 500 (2004). Though a plaintiff's *pro se* status may excuse the ambiguities in a plaintiff's complaint, it does not excuse the failures, if such there be. *Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995). The court may strain its proper role in adversarial proceedings in searching the complaint for facts that might possibly be construed to state a cause of action. *Ruderer v. United States*, 188 Ct. Cl. 456, 468, 412 F.2d 1285, 1292 (1969). The court should interpret a *pro se* plaintiff's complaint liberally, but, nonetheless, a plaintiff must present some set of facts upon which a claim for relief can be based. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

III. Plaintiff Has Failed To State A Claim Upon Which Relief Can Be Granted

The Court begins its analysis by noting that plaintiff's argument that he is not liable for income tax on domestically earned income has been uniformly and conclusively rejected by every court that has examined the issue. *E.g.*, *United States v. Bell*, 238 F.Supp.2d 696, 700-01 (M.D. Pa. 2003); *Loofbourrow v. Commissioner*, 208 F.Supp.2d 698, 710 (S.D. Tex. 2002); *Williams v. Commissioner*, 114 T.C. 136, 138-39 (2000). Furthermore, plaintiff's argument has been repeatedly found to be without merit and frivolous. *E.g., Takaba v. Commissioner*, 119 T.C. 285, 293-94 (2002); *Bell,* 238 F.Supp.2d at 701; *Loofbourrow*, 208 F.Supp.2d at 710; *Williams*, 114 T.C. at 144.

The IRS has also notified taxpayers that the argument advanced by plaintiff is without merit and frivolous. Notice 2001-40, 2001-1 C.B. 1355 (informing taxpayers that if they file returns based upon the theory that only foreign-source income is taxable, they may be subject to penalties under I.R.C. §§ 6651, 6662, 6663, 6702 and applicable criminal statutes).[1] Finally, plaintiff's argument has been held to be so devoid of merit that it is unnecessary to "painstakingly address [the argument] with somber reasoning and copious citation of precedent; to do so might suggest that [plaintiff's argument] has some colorable merit." *Williams*, 114 T.C. at 139 (citation omitted). Because the weight of authority is overwhelmingly against plaintiff's argument that

[1] All references to "I.R.C." are to the Internal Revenue Code of 1986.

only foreign source income is subject to income tax, plaintiff has failed based on that theory to state a claim upon which relief can be granted.

Plaintiff also appears to argue that there is no law that makes him liable for income tax. However, I.R.C. § 1(a) imposes an income tax upon the income of United States citizens and resident aliens. "Gross income" is defined in I.R.C. § 61 as "all income from whatever source derived," and "taxable income" is defined in I.R.C. § 63 as being "gross income minus" allowable deductions. Pursuant to § 1(a), Treas. Reg. § 1.1-1(b) states that "all citizens of the United States . . . are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States." Finally, the Code requires that taxes shown to be due on the return be paid with the filing of the return. I.R.C. § 6151(a). In *United States v. Drefke*, the court, while discussing § 6151, stated that "when a tax return is required to be filed, the person so required shall pay such taxes to the internal revenue officer with whom the return is filed at the fixed time and place. The sections of the Internal Revenue Code *imposed a duty* on [the taxpayer] to file tax returns and pay the . . . tax." 707 F.2d 978, 981 (8th Cir. 1983) (emphasis in original).

Congress has expressed its intent that plaintiff be liable for income tax by asserting that "[u]nder the Federal individual income tax system, an individual who is a citizen or a resident of the United States generally is subject to tax on worldwide taxable income." H.Conf. Rep. No. 108-126, at 26 (2003), *reprinted in* 2003 U.S.C.C.A.N., 108th Cong., 1st Sess., Vol. 2, at 736. The courts are also in agreement that "all individuals, natural or unnatural, must pay federal income tax . . . ." *Lovel v. United States*, 755 F.2d 517, 519 (7th Cir. 1984). Plaintiff, as a citizen of the United States, is subject to tax upon his worldwide income, and has therefore failed to state a claim on the theory that no law makes him liable for income tax.

______The Court strains to interpret an argument apparently asserted by plaintiff that because there is no regulation requiring the use of the Form 1040 for filing an income tax return, plaintiff cannot be liable for income tax. Plaintiff's argument is without merit. It is the tax code, not the regulations that imposes a duty upon persons such as plaintiff to file tax returns. *United States v. Hicks*, 947 F.2d 1356, 1360 (9th Cir. 1991) (citing *United States v. Bowers*, 920 F.2d 220, 222 (4th Cir. 1990)). Plaintiff has therefore failed to state a claim based on his Form 1040 argument.

IV. Plaintiff's Additional Arguments Are Barred By The Doctrine Of Variance

______A taxpayer must file a timely claim for refund as a condition precedent to filing a tax refund suit. I.R.C. § 7422(a). A claim for refund to the IRS "must set forth in detail each ground upon which . . . [the] refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." Treas. Reg. § 301.6402-2(b)(1) (1990). A court cannot consider "[a]ny ground for refund not expressly or impliedly contained in the application for refund." *Burlington Northern Inc. v. United States*, 231 Ct. Cl. 222, 225, 684 F.2d 866, 868 (1982).

This requirement is jurisdictional. *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272 (1931); *Sun Chemical Corp. v. United States*, 698 F.2d 1203, 1206 (Fed. Cir.), *cert.*

denied, 464 U.S. 819 (1983); *Neptune Mut. Assen, Ltd., of Bermuda v. United States*, 13 Cl. Ct. 309, 321 (1987), *aff'd in part and vacated in part on other grounds*, 862 F.2d 1546 (Fed. Cir.1988) (citations omitted). RCFC 12(h)(3) provides that "whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Any claims asserted by plaintiff not expressly or impliedly set forth in his claims for refund must be dismissed by the Court pursuant to RCFC 12(h)(3).

Because he stated on his Amended Form1040X returns that he is "not liable" for income tax, plaintiff claims that he has properly set forth enough details and facts to permit the Court to hear *any argument* supporting his claims for refund. Object. to Def's Reply to Pl's Object. to Def's Mot. to Dismiss at 7. A general statement that plaintiff is "not liable" could not have apprised the Commissioner of every possible basis for a claim for refund. The Court is therefore without jurisdiction to consider the other arguments relied upon by plaintiff in support of his refund claims, *e.g.*, that plaintiff is not an individual.

CONCLUSION

For the reasons set forth above, defendant's motion to dismiss is GRANTED. The Clerk is directed to enter judgment dismissing plaintiff's complaint.

IT IS SO ORDERED.

GEORGE W. MILLER
Judge