

In the United States Court of Federal Claims

No. 10-165T

(Filed: June 28, 2010)

(NOT TO BE PUBLISHED)

RAY THOMAS KELLY, and,)
MAXINE BROWN KELLY)
Plaintiffs,)
)
v.)
)
THE UNITED STATES,)
)
Defendant.)

Ray Thomas Kelly and Maxine Brown Kelly, *pro se*, San Francisco, CA.

David R. House, Tax Division, United States Department of Justice, Washington, D.C., for defendant. With him on the briefs were John DiCicco, Assistant Attorney General, Tax Division, Steven I. Frahm, Chief, Court of Federal Claims Section, and G. Robson Stewart, Assistant Chief, Court of Federal Claims Section, Tax Division, United States Department of Justice, Washington, D.C.

OPINION AND ORDER

LETTOW, Judge.

Ray Thomas Kelly and Maxine Brown Kelly seek refunds, damages, and equitable relief relating to an assessment of taxes by the Internal Revenue Service (“IRS”) in 2008. The government has moved to dismiss plaintiffs’ complaint, asserting that this court lacks subject matter jurisdiction over plaintiffs’ claims seeking equitable or injunctive relief and that they have failed to state a claim upon which relief can be granted.

BACKGROUND¹

On March 26, 2009, plaintiffs submitted to the IRS a number of Forms 1099-A and Forms 1099-OID completed by them for the 2008 tax year, as well as Forms 1096 and 1040-V, also completed for that tax year, plus a “Notice by Special Visitation.” Compl. ¶¶ 16-17. Plaintiffs’ purpose in submitting these forms is not readily apparent, but their intent may be implied from the context of their claims. Form 1099-A is used to report the procurement of abandoned or missing property. On Form 1099-A, plaintiffs listed themselves as “lender” and “Wachovia Mortgage FKA World Savings” as “borrower.” Compl. Schedule 2. Form 1099-OID is used for listing the estimated amortized interest attributable to the purchase of a debt instrument at a discount. On Form 1099-OID, plaintiffs listed themselves as the “payer” and “Wachovia Mortgage FKA World Savings” as the “recipient.” *Id.* Form 1040-V is meant to accompany an individual’s payment of income tax by check or money order, to expedite the processing of that payment. Plaintiffs appear to have sent Form 1040-V without the attached payment, as no copies of checks or money orders were attached to the Forms 1040-V submitted by plaintiffs nor have such copies been provided by plaintiffs anywhere else in the record. *See id.* Form 1096 is a summary of the transactions and information returns filed during the year. Plaintiffs filled out that form stating that 20 Forms 1099-OID were filed and \$2,482,947.96 in taxes were withheld for the year 2008.

Plaintiffs also allege that they filed an amended return on Form 1040X, which states that plaintiffs’ original tax return for 2008 reflected \$71,600 in gross income. Compl. ¶¶ 20-21. Amendments purportedly attributable to the other forms plaintiffs submitted supposedly increased plaintiffs’ gross income for 2008 to \$2,610,585.80, increased their taxable income to \$2,559,724.80, and increased their total payments to \$2,543,524.80. Compl. Schedule 5 (Form 1040X). The Form 1040X listed their income tax due as zero. *Id.* By the Form 1040X, plaintiffs requested a refund of \$2,541,500.80. *Id.* Plaintiffs allege that the source of this payment could be found in the Forms 1099-OID. *See* Compl. ¶¶ 47-48. Contrastingly, Form 4130, Certificate of Assessments, states that, for the 2008 year, plaintiffs’ gross income amounted to \$71,600, they paid \$4,539 in taxes through withholding, and they received a refund of \$2,024. Def.’s Mem. in Support of Mot. to Dismiss (“Def.’s Mot.”), Ex. B (Certificate of Assessments, Payments, and Other Specified Matters) at 1.

In essence, plaintiffs claim that none of their purported \$2,559,724.80 in taxable income should be taxed, and consequently that the government owes them a refund of \$2,543,524.80 minus the \$2,024 refund they have already received. Compl. ¶¶ 46-53.

In its motion to dismiss, the government argues that plaintiffs have failed to state a claim upon which relief can be granted because plaintiffs’ claim does not surmount the plausibility bar required for pleadings in federal court. Def.’s Mot. at 5-7 (citing *Bell Atl. Corp. v. Twombly*, 550

¹The recitations that follow do not constitute findings of fact by the court. Rather, the recited factual elements are either undisputed or are alleged and assumed to be true because they are uncontested.

U.S. 544, 570 (2007)). The government contends that plaintiffs' claim for entitlement to a \$2,541,500.80 tax refund is based on a well known "tax defier theory." *Id.* at 6. The IRS has determined that claims based on this theory are considered frivolous and without merit. Rev. Rul. 2005-21, 2005 C.B. 822 ("straw man"). In this instance, the IRS explicitly warned plaintiffs that their claim was frivolous. *See* Compl. Schedule 3 (Letter from IRS to plaintiffs (Apr. 15, 2009)). The government additionally contends that the court lacks subject matter jurisdiction over plaintiffs' claims regarding requests for equitable or injunctive relief. Def.'s Mot. at 4-5.

Plaintiffs have not submitted a timely response to the government's motion to dismiss.

ANALYSIS

A. Failure to State a Claim

Plaintiffs have failed to submit any evidence that their gross income for the year 2008 totaled \$2,610,585.80. The documentary materials in the record indicate that plaintiffs' income for the year 2008 amounted to \$71,600, that this income was taxed, and that plaintiffs received a refund in the amount of \$2,024. Plaintiffs point to the Forms 1099-OID that they submitted to the IRS as proof that their gross income equaled \$2,610,585.80 for the year 2008 and that they paid \$2,543,524.80 in taxes. However, the mere reporting of a figure as one's gross income does not create such income out of nothing to qualify as an actual form of gross income as defined under 26 U.S.C. § 61(a). Defendant hypothesizes that "plaintiffs subscribe to a commonly employed (and rejected) tax defier theory that once the United States went off the gold standard in 1933, accounts were created for each citizen controlled by a 'straw man,' and linked to a birth certificate." Def.'s Mot. at 6.

While the factual allegations contained in plaintiffs' pleadings do not need to be detailed to be deemed adequate within the meaning of Rule 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"), they do need to "be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp.*, 550 U.S. at 570; *see also McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 n.4 (Fed. Cir. 2007). Plaintiffs' pleadings fail to meet this bar of plausibility due to the purely fictitious and frivolous nature of their claims. Thus, dismissal of these claims is appropriate under RCFC 12(b)(6).

B. Jurisdiction

By implication, plaintiffs also appear to raise equitable claims by alleging that they are "Sovereign[s]," Compl. ¶ 5, and that their property "is exempt from levy." Compl. ¶ 69. The court has no jurisdiction to entertain these claims, or others like them, and dismissal of these claims is accordingly appropriate under RCFC 12(b)(1).

CONCLUSION

The government's motion to dismiss is GRANTED. This case shall be dismissed for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction. The Clerk shall enter judgment accordingly. No costs.

It is so ORDERED.

Charles F. Lettow
Judge