

In the United States Court of Federal Claims

No. 10-856T

(Filed: June 28, 2011)

(Not for Publication)

LARRY EUGENE BAILEY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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ORDER OF DISMISSAL

WILLIAMS, Judge.

This matter comes before the Court on Defendant’s motion to dismiss the complaint of Plaintiff pro se, Larry Eugene Bailey, for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (“RCFC”). Because Plaintiff failed to comply with the statutory prerequisites for filing a tax refund suit, the Court lacks subject-matter jurisdiction, and Defendant’s motion to dismiss is granted.

Background¹

After serving in the United States Army for approximately 12 years, Plaintiff was honorably discharged on December 20, 1993, and simultaneously awarded special separation pay of \$33,611.25. Plaintiff received a check for less than this amount -- about \$25,000. Plaintiff claims that the Government erroneously withheld 28 percent of his separation pay in taxes. As such, Plaintiff filed this suit on December 13, 2010, seeking a tax refund in the amount of \$9,411.15.

Plaintiff attached the following documents to his complaint: (i) a “Military Leave and Earning Statement” dated December 31, 1993; (ii) a DD Form 214, “Certificate of Release or Discharge from Active Duty,” which documents his service, discharge, and separation pay; and

¹ This background is derived from the complaint and exhibits to the motion papers.

(iii) a copy of 10 U.S.C. § 1174a, which discusses the applicable special separation benefit program. None of these documents indicate that \$9,411.15 was in fact withheld from Plaintiff's separation pay. See Pl.'s Opp. at V(e) (conceding that the earnings statement does not reflect a withholding of \$9,411.15). Although Plaintiff did not attach a tax return to his complaint, he alleges "[i]t is my belief that [a] federal income tax return for Plaintiff's 1993 taxable year was timely filed on or about April 15, 1994." Compl. ¶ 5(b).

Plaintiff included several additional documents in his response to the Government's motion to dismiss. Plaintiff submitted two letters from the Defense Finance and Accounting Service ("DFAS"). The first, dated July 22, 2008, stated that DFAS no longer had Plaintiff's W-2 Form for tax year 1993 on file because such records were not retained after five years. The second letter stated that DFAS was unable to provide Plaintiff's requested records because the agency was unable to retrieve the W-2.

In addition, Plaintiff attached an affidavit signed on February 19, 2011, in support of his opposition to Defendant's motion to dismiss. The affidavit stated that Plaintiff "made every effort possible" to resolve the matter through correspondence with the "United States Military Pay and Fiance [sic] Center" and with IRS Centers located in Alabama, Texas, and Georgia. Pl.'s Aff. ¶¶ 7-8, 10. In his opposition papers and this affidavit, Plaintiff requested that the Court appoint counsel because he was indigent, incarcerated, and unfamiliar with tax law. Pl.'s Opp. at VI(a)-(c); Pl.'s Aff. ¶¶ 15-17. Plaintiff also attached a March 9, 2010 affidavit addressed to the IRS that outlined the basis for his request for a refund. Neither of these documents included a 1993 tax return.

Discussion

Plaintiff bears the burden of establishing subject-matter jurisdiction before the Court proceeds to the merits of the action. Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988); Naskar v. United States, 82 Fed. Cl. 319, 320 (2008); Fullard v. United States, 78 Fed. Cl. 294, 299 (2007). When deciding a motion to dismiss based on lack of subject-matter jurisdiction, the Court must accept as true all undisputed allegations of fact made by the plaintiff and draw all reasonable inferences from those facts in the plaintiff's favor. Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995); Naskar, 82 Fed. Cl. at 320. "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." RCFC 12(h)(3).

"[C]omplaints drafted by pro se litigants are held to 'less stringent standards than formal pleadings drafted by lawyers.'" Naskar, 82 Fed. Cl. at 320 (citation omitted). Nevertheless, a plaintiff's pro se status does not excuse him or her from meeting this Court's jurisdictional requirements. Tindle v. United States, 56 Fed. Cl. 337, 341 (2003). Pro se litigants still bear the burden of establishing the Court's subject-matter jurisdiction. Id. Furthermore, "the court has no duty to create a claim where a pro se plaintiff's complaint is so vague or confusing that one cannot be determined." Fullard, 78 Fed. Cl. at 299.

This Court has jurisdiction to entertain tax refund suits against the Government. 28 U.S.C. § 1346(a). However, the Internal Revenue Code provides that "[n]o suit or proceeding

shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously . . . collected . . . until a claim for refund or credit has been duly filed with the Secretary.” 26 U.S.C. § 7422(a); see also Buser v. United States, 85 Fed. Cl. 248, 260 (2009) (“[T]he taxpayer must, in addition to paying a tax liability in full, file a claim for refund with the IRS prior to commencing a suit challenging an IRS assessment of additional taxes.”). The Code and the Treasury Regulations provide that an administrative claim for refund may be made on a properly executed individual income tax return such as Form 1040 or an amended return, Form 1040X. I.R.C. § 6402; Treas. Reg. § 301.6402-3(a)(2), (5). A taxpayer’s refund claim must be filed with the Service by the later of “3 years from the time the return was filed or 2 years from the time the tax was paid.” I.R.C. § 6511(a).

Rule 9(m) requires a party who is pleading a tax refund claim to provide:

- (1) a copy of the claim for refund [filed with the Secretary], and
- (2) a statement identifying:
 - (A) the tax year(s) for which a refund is sought;
 - (B) the amount, date, and place of each payment to be refunded;
 - (C) the date and place the return was filed, if any;
 - (D) the name, address, and identification number (under seal) of the taxpayer(s) appearing on the return;
 - (E) the date and place the claim for refund was filed; and
 - (F) the identification number (under seal) of each plaintiff, if different from the identification number of the taxpayer.

RCFC 9(m); see also Buser, 85 Fed. Cl. at 260. The requirements of Rule 9(m) serve “as a screening mechanism to forestall jurisdictionally unsupported and inappropriate tax litigation in this court,” and thus, better guarantee that each plaintiff has satisfied this Court’s jurisdictional requirements for a tax refund suit. Artuso v. United States, 80 Fed. Cl. 336, 338-39 (2008).

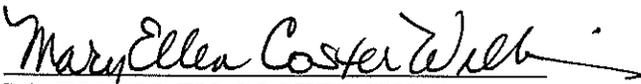
Here, Plaintiff has not met his burden to establish that this Court has jurisdiction over his action because he failed to allege that he timely filed an administrative refund claim for his 1993 tax year prior to commencing suit as § 7422 requires. His complaint does not allege that he filed a refund claim with the IRS for the 1993 tax year, and he did not attach a refund claim to his complaint. However, Defendant submitted the IRS’s Certification of Lack of Record which indicates that no tax return or other records pertaining to Plaintiff’s tax return for tax year 1993 were found after a diligent search.

Plaintiff’s claim stems from tax year 1993; the taxes are deemed paid as of April 15, 1994. Plaintiff also claims to have filed a 1993 income tax return on or about April 15, 1994. According to § 6511, a refund claim must “be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.” As such, Plaintiff’s time to file a refund claim expired on April 15, 1997, assuming he filed a tax return, or on April 15, 1996, if, as the Government contends, he filed no return. To the extent Plaintiff alleges that the March 9, 2010 affidavit constitutes an informal refund claim, such claim

was not timely filed and as such, fails to vest the Court with jurisdiction.² Because Plaintiff failed to establish that he filed a refund claim prior to April, 1997, he cannot maintain an action in this court.

Conclusion

Defendant's motion to dismiss is **GRANTED**. Plaintiff's request for Court-appointed counsel is denied.


MARY ELLEN COSTER WILLIAMS
Judge

² In response to Defendant's assertion that he had not exhausted his administrative remedies, Plaintiff proffered the March 9, 2010 affidavit to show that "this matter has been ongoing for several years and correspondence had been sent to United States Government Military Pay Processing Branch; and Internal Revenue Service Centers." Pl.'s Opp. at III(b). This Court need not resolve the issue of whether the March 9, 2010 affidavit constituted an informal refund claim.