

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Valdy Olender,)
)
Plaintiff,)
)
v.) Civil No. 8:07-cv-00930-EAK-EAJ
)
UNITED STATES OF AMERICA,)
)
Defendant.)

UNITED STATES OF AMERICA’S MOTION TO DISMISS

Plaintiff Valdy Olender brings this action for damages pursuant to 26 U.S.C. 7433, which authorizes damages against the United States if any officer or employee of the Internal Revenue Service “recklessly or intentionally, or by reason of negligence, disregards” any law or regulation in connection of the collection of any tax liability of the taxpayer. The statute, however, imposes several limitations on the collection of damages, and, hence, the United States’ waiver of its sovereign immunity. Section 7433 only authorizes certain types of damages, and it requires that taxpayer first file an administrative claim for damages with the Internal Revenue Service before a district court has jurisdiction to hear the damage claim. *Id.* Moreover, by the express language of the statute, it is “the exclusive remedy for recovering damages.” *Id.* Thus, Plaintiff cannot recover any damages that are not expressly permitted by the statute.

Plaintiff’s damage claims fall into three categories, all of which the Court lacks jurisdiction to grant. First, Plaintiff requests the return of \$5,387.11 that he alleges was wrongfully levied by the Internal Revenue Service. The Internal Revenue Service will return this amount, and therefore the Court should dismiss the claim as moot. Second, Plaintiff seeks

statutory damages of \$100,000. However, 26 U.S.C. 7433 does not authorize statutory damages of any amount, and therefore, the United States has not waived sovereign immunity with respect to such a damage claim. Third, Plaintiff makes vague allegations to additional damages and relief. However, this Court lacks subject matter jurisdiction over these claims, because Plaintiff did not satisfy the jurisdictional prerequisite of first filing an administrative claim for these damages with the Internal Revenue Service. Therefore, any claims that Plaintiff attempts to seek – whether through a liberal construction of this *pro se* pleading or through an amendment to his complaint – must be dismissed for lack of subject matter jurisdiction.

I. Procedural History

Plaintiff has failed to pay his income taxes for the 1999 tax year. In an attempt to collect these unpaid taxes, the Internal Revenue Service began levying Plaintiff's wages in June 2005. On October 1, 2005, Plaintiff filed an action in the U.S. District Court for the Middle District of Florida seeking an injunction prohibiting the Internal Revenue Service from further levying his wages and a return of any amounts the Internal Revenue Service had already levied. See Case No. 8:05-cv-2019-JDW-MAP (M.D. Fla.). After reviewing the complaint, the Internal Revenue Service voluntarily suspended the levy and agreed to provide Plaintiff with a CDP hearing prior to any further levies. Accordingly, the Court denied Plaintiff's motion for an injunction as moot. As to Plaintiff's request for a return of the amounts that had already been levied, the Court dismissed that claim for lack of subject matter jurisdiction, because Plaintiff had not met the statutory prerequisite of first filing an administrative claim for a refund of that amount with the Internal Revenue Service.

Following the dismissal of Plaintiff's first case, the Internal Revenue Service held a CDP hearing on the levy of Plaintiff's wages. At that hearing, Plaintiff failed to raise any legitimate issues that would prevent a levy, and hearing officer ultimately issued a Notice of Determination that upheld the Internal Revenue Service's ability to levy on Plaintiff's wages. Also following the dismissal of Plaintiff's first case, Plaintiff filed a claim for damages with the Internal Revenue Service. (Complaint, Ex. B.) Plaintiff's claim sought the return of the \$5,387.11 that was previously levied by the Internal Revenue Service, statutory damages of \$100,000, and court costs that appear to be associated with Plaintiff's first case. Plaintiff ultimately received a letter denying his claim for damages. (Complaint, Ex. C.)

Following the Internal Revenue Service's denial of his administrative claim, Plaintiff now brings this action. Plaintiff's complaint contains an extensive description of his version of the facts that precede the filing of this case. Although Plaintiff's complaint contains numerous inaccuracies, the Court does not need to resolve any disputed facts in order to grant the United States' motion to dismiss. Therefore, the United States has not provided an exhaustive recitation of the facts surrounding Plaintiff's claim nor has it attempted to point out all the inaccuracies in Plaintiff's Complaint. A more complete history of the assessments, tax court proceeding and collection activities surrounding Plaintiff's claim is found in the United States' opposition to Plaintiff's motion for an injunction that was filed in Case No. 8:05-cv-2019-JDW-MAP (M.D. Fla.).

II. Because the United States will return the amount allegedly wrongfully levied and pay Plaintiff's court costs, his claim for damages is moot and should be dismissed

Plaintiff seeks the return of \$5,387.11 that he claims was illegally levied by the Internal Revenue Service. (Complaint, ¶1). Upon continued review of this case, the Internal Revenue Service has agreed to return the \$5,387.11 that it previously levied from Plaintiff, and it has already begun processing the return of this amount, which should be paid to Plaintiff shortly. Thus, Plaintiff's claim for a return of this amount is moot and should be dismissed.

In his complaint, Plaintiff additionally refers to a claim for "fees and costs," "fees" and "out of pocket costs" for the allegedly illegal levy. (Complaint, ¶1 and Conclusion). However, Plaintiff does not specify the nature of the fees and costs, nor does Plaintiff provide any specific amounts of these fees and costs. Notwithstanding this failure to itemize his alleged fees and costs, the statute only authorizes the recovery of Plaintiff's "costs of the action." 26 U.S.C. 7433(b)(2). Thus, the most Plaintiff could recover are his costs of the action, which at this stage in the case is only the \$350 filing fee.^{1/} The Internal Revenue Service will reimburse Plaintiff for this amount. Therefore, Plaintiff's claim for costs should be dismissed as moot.

III. 26 U.S.C. §7433 does not authorize statutory damages, and therefore this claims should be dismissed

^{1/} Plaintiff's administrative claim includes court costs in the amounts of \$250 (filing fee), \$40 (cost of mailing summonses) and \$50 (transportation costs). (Complaint, Ex. B). As Plaintiff's administrative claim was made before the suit was filed, these court costs appear to stem from his prior suit in this district – Case No. 8:05-cv-2019-JDW-MAP. Because the court in that case denied Plaintiff's claim for an injunction and damages, it did not award Plaintiff his costs. Plaintiff cannot seek them again in this case and, in any event, cannot recover those costs because the statute only authorizes recovery of the costs of this suit. Finally, to the extent that Plaintiff's complaint vaguely refers to any other costs, the Court lacks subject matter jurisdiction to hear that claim, because the only "costs" included in his administrative claim were those from his prior suit.

In addition to the return of the \$5,387.11 that was levied by the Internal Revenue Service, Plaintiff also seeks statutory damages of \$100,000.00. (Complaint, ¶1.) Contrary to Plaintiff's claim, the statute does not authorize statutory damages. 26 U.S.C. 7433(b). Rather, the statute sets a \$100,000.00 cap for damages. *Id.* ("the defendant shall be liable to the plaintiff in an amount equal to the lesser of \$1,000,000 (\$100,000, in the case of negligence) or the sum of ... actual, direct economic damages ... and ... the costs of the action.")^{2/}

Therefore, Plaintiff's claim for statutory damages must be dismissed, because the statute does not authorize statutory damages.

IV. This Court is without jurisdiction to rule on any additional claims for damages that Plaintiff might attempt to assert

In order to bring an action for damages in district court, a taxpayer is statutorily required to first exhaust his administrative remedies. I.R.C. § 7433(d)(1) ("A judgment for damages shall not be awarded under subsection (b) [of § 7433] unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service."). If a taxpayer fails to exhaust his administrative remedies prior to filing a complaint in the district court, the district court is without subject matter jurisdiction. *Venen v. United States*, 38 F.3d 100, 103 (3d Cir. 1994); *Babington v. Commissioner*, 2005 WL 2001165 at *2, 96 A.F.T.R.2d 2005-5381 (M.D. Fla. 2005) ("In this case, it does not appear that Plaintiffs have pursued, much less exhausted, the administrative remedies available under Section 7433. There is no allegation to that effect. Therefore, the Court is without jurisdiction to entertain Plaintiff's

^{2/} The only actual, direct economic damages mentioned in the complaint is the \$5,387.11 that Plaintiff alleges was wrongfully levied. Thus, §7433(b) limits damages to that amount. As explained, *supra*, the Internal Revenue Service is already returning that amount.

claim”).

In this case, Plaintiff filed an administrative claim that requested only the following items:

- \$5,387.11 (the amount allegedly wrongfully levied);
- \$100,000 (statutory damages);
- \$250 (filing fee), \$40 (cost of mailing summonses) and \$50 (transportation costs) in court costs – apparently related to his prior case

(Complaint, Ex. B.)

Because Plaintiff only requested these items in his claim for a refund, the Court does not have subject matter jurisdiction to consider any additional claims that Plaintiff might attempt to bring – whether through a liberal construction of this *pro se* complaint or through an amended complaint – because Plaintiff has not exhausted his administrative remedies for those claims.

V. Conclusion

Therefore, this Court should dismiss Plaintiff’s complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing UNITED STATES OF AMERICA'S MOTION TO DISMISS was filed with the EM/ECF system on July 26, 2007, and that a copy was also mailed to:

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/s/ Brian R. Harris
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