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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
MAR 13 2007
CLERK'S OFFICE
DETROIT

UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER ERIC HENDRICKSON and
DOREEN M. HENDRICKSON,
Defendants.

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Case No. 2:06-CV-11753
Judge Nancy G. Edmunds

MOTION FOR RELIEF FROM JUDGMENT

Now come the Defendants, Peter Eric and Doreen M. Hendrickson, and move this Court for an order granting them relief from the Judgment dated February 26, 2007. This motion is made pursuant to Rule 60(b)(4) and (6). Support for this motion is set forth in the Memorandum below.

MEMORANDUM

A. Introduction.

Civil Rule 60 (b) of the Federal Rules of Civil procedure (FRCP) provides that "On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order , or proceeding for the following reasons." Defendants believe they are entitled to relief pursuant to subsections "(4) the judgment is void;" and (6) any other reason justifying relief from the operation of the judgment." Defendants' belief is based on the fact that this Court had no jurisdiction to grant the relief the Plaintiff requested in its complaint.

The Plaintiff filed suit on April 11, 2006 seeking, among other things, the recovery of alleged “erroneous refunds” of federal taxes for the years 2002 and 2003. The basis for characterizing the refunds as “erroneous” is the allegation that the tax returns filed by the Hendricksons are “false and fraudulent”, and a subsequent assumption that the amount of the refund was erroneous. That assumption is illogical and erroneous, but in any event is not a matter properly within the jurisdiction of the District Court. Through filing its complaint and making the erroneous assumption that the amount of the refund, as alleged in the complaint, is an “erroneous refund” the Plaintiff is attempting to by-pass a clearly mandated responsibility which Congress explicitly delegated to the Secretary of the Treasury and to transfer that responsibility to the District Court. Congress gave the IRS specifically delineated collection authority, and the IRS must act within that authority. The Court has no jurisdiction and is powerless to do what Congress has clearly delegated to the Secretary of the Treasury.

B. Congressional Statutory Scheme.

1. Alternative methods of Collecting “Erroneous” Refunds.

When the IRS actually makes an “erroneous” refund it has the option of seeking recovery through two methods provided by Congress. It can initiate an “erroneous refund” suit under 26 U.S.C. §7405 for refunds of amounts assessed and paid in as tax under the specifications reflected in that code section; or it can go through the assessment process and eventual collection procedures under the Code, see *United States v. Frontone*, 383 F.3d 656, 661 (7th Cir. 2004) in other cases. But there are some limitations and qualifications for these procedures.

In order to understand why the District Court did not have jurisdiction to entertain this alleged "erroneous refund" suit, it is necessary to understand the nature of an "erroneous" refund and how it does not apply to the refunds given to the Hendricksons. But before this, a somewhat detailed examination of the statutory procedures given by Congress to the IRS to collect taxes is in order as they apply to the Hendricksons.

2. Assessment Process.

The process begins when a taxpayer files a return. The Hendricksons filed their returns timely within the first extension time limits. Under 26 U.S.C. §6151, when a person files a tax return on the date it is required, he is required to pay the tax shown on his return on the same date without the need of an agency assessment, as the person essentially self-assesses. The issue of payment with the filing did not apply to the Hendricksons because there was no tax shown as due on their returns. While no taxes were due, there had been certain funds withheld and deposited on the Hendricksons' behalf pending the determination of a tax liability. Accordingly, the withheld funds were either refunded to them or credited to other tax years.

The IRS claims that the returns filed by the Hendricksons were "false and fraudulent". When such a claim is validly and properly made the procedure the IRS is to follow is found in 26 U.S.C. §6020(b).

§6020(b) authorizes the Secretary to make a return from his own knowledge and from such information as he can obtain through testimony or otherwise, if any person "fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefore, or makes, willfully or otherwise, a false or fraudulent return." The status of such a return is stated in subsection (b)(2), i.e. "Any

return so made and subscribed by the Secretary shall be *prima facie* good and sufficient for all legal purposes.” The process under §6020(b) is how the Secretary makes a determination that a taxpayer may have a deficiency.

When there IS a fraudulent return, as claimed here, and the Secretary claims that taxes are owed, the assessment process under Chapter 63 of the Code is required to be followed, 26 U.S.C. §6201 *et seq.* Pursuant to this process the Secretary must first determine there is a deficiency, which is the amount determined by the Secretary through the procedures in §6020(b). A deficiency, in simple terminology, is defined in 26 U.S.C. §6211(a) as the amount of tax imposed by Title 26 which exceeds the sum of the amount shown on the taxpayers’ return, plus any previously assessed amounts, less any rebates. That the IRS is required to determine the deficiency is confirmed by the Supreme Court in *Spies v. United States*, 317 U.S. 492, 495 (1943). The Supreme Court used the language of §271 of the 1939 Code which defined a tax deficiency. §271 is the forerunner of the current §6211 representation of the statutory definition of a tax deficiency. The Court simply defined deficiencies as “additions to the tax upon determinations of fact made by an administrative agency.”

Once the Secretary (the IRS as an administrative agency) makes a determination that there is a tax deficiency he is then authorized under §6201 to make an assessment. 26 U.S.C. §6201 gives the assessment authority of the IRS as follows:

“The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

- (1) Taxes shown on return

The Secretary shall assess all taxes determined by the taxpayer or **by the Secretary** as to which returns or lists are made under this title.”

(Emphasis added)

§6201(e) gives further direction. Section 6201(e) states,

“(e) Deficiency proceedings

For special rules applicable to deficiencies of income, estate, gift, and certain excise taxes, see subchapter B.”

Subchapter B begins with section 6211 and sets forth the procedures the Secretary must follow after there is a determination of a deficiency. Those procedures are set forth in Subchapter B of Chapter 63, i.e. section 6211 through 6225.

After the Secretary has determined there is a deficiency by means of the subscribed return created under 26 U.S.C. §6020(b) due to the allegedly fraudulent nature of the original return filed, the Secretary is then authorized to issue and send a Notice of Deficiency to the alleged debtor. The Notice of Deficiency is also called a ‘90 day letter,’ because once a valid Notice of Deficiency is issued 26 U.S.C. §6213 mandates that when someone is sent a Notice of Deficiency he has 90 days, or 150 if outside the United States, to file a petition with the Tax Court for a redetermination of the alleged deficiency.

Through this process Congress intended that a valid Notice of Deficiency must be issued and served before the Tax Court has jurisdiction to rule on the IRS alleged deficiencies. Only the Tax Court has this jurisdiction when the tax has not been paid. Pursuant to 26 U.S.C. §6212(a) the IRS must issue a valid notice of deficiency before the Tax Court can gain jurisdiction. See *Hempel v. United States*, 14 F.3d 522 (11th Cir. 1994) (holding that the Notice of Deficiency is the jurisdictional ticket to Tax Court). See also *Sealy Power v. Commissioner*, 46 F.3d 382 (5th Cir, 1995) (“Tax Court only has

jurisdiction when the Commissioner issues a valid notice and the taxpayer files a petition for redetermination").

Thus, Congress created the United States Tax Court "to provide taxpayers with a means of challenging deficiencies made by the Commissioner without first having to pay the alleged deficiency. Without such a forum, taxpayers would have to pay the asserted deficiency and then initiate a suit in federal district court for a refund." *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 979 (2nd Cir. 1991). As an Article I court, the Tax Court is a court of "strictly limited jurisdiction." *Kelley v. Commissioner*, 45 F.3d 348, 351 (9th Cir. 1995). A notice of deficiency issued by the IRS pursuant to §6212 is the jurisdictional "ticket to the Tax Court." *Bokum v. Commissioner*, 992 F.2d 1136, 1139 (11th Cir. 1993) (quoting *Stoecklin v. Commissioner*, 865 F.2d 1221, 1224 (11th Cir. 1989)); *Spector v. Commissioner*, 790 F.2d 51, 52 (8th Cir. 1986) (citing *Laing v. United States*, 423 U.S. 161, 165 n.4 (1976)), and holding that "the determination of a deficiency and the issue of a notice of deficiency is an absolute precondition to tax court jurisdiction").

An assessment will eventually result, either because the recipient of the Notice of Deficiency fails to petition the Tax Court, or as a result of the Tax Court's resolution of the matter. In either event, pursuant to §6155, the Secretary is then required to send a Notice and Demand for any tax due. In other words, any tax properly determined to be owing is not due until the Notice and Demand is sent. In this case, since the Hendricksons determined that no tax is owing, no tax is due unless and until a statutorily valid alternative assessment process-- which results in a proper and valid determination of a

different amount of tax owed-- is undertaken and completed, and the Notice and Demand is sent.

In a nutshell, the statutory authority for the Tax Court to have jurisdiction to adjudicate the validity of a tax deficiency determined by the IRS requires a valid Notice of Deficiency being issued pursuant to statutory guidelines. Without a valid Notice of Deficiency the Tax Court lacks jurisdiction.

C. Application to The Instant Case.

The Hendricksons determined that no tax was due on their return. The Plaintiff has not determined that a tax is due. Pursuant to the IR Code, until the administrative deficiency process has been completed and a Notice and Demand has been sent to the Hendricksons after a valid assessment has been made, no tax is owed. Thus, the Hendricksons have no tax liability.

Furthermore, it is entirely possible, even assuming *arguendo* the Hendricksons DID file fraudulent returns, that the refund may STILL not necessarily be erroneous. Had the Secretary followed the proper deficiency procedures, due to various deductions and exemptions, the refund may have been entirely proper or only partially correct. In any event, until an administrative agency determination has been made as to what part, if any, of the refund is an erroneous refund of a tax liability there is no possible method by which a District Court can exercise jurisdiction to determine a deficiency and assess a tax liability which Congress has reserved as a responsibility of the Secretary.

D. Conclusion.

The allegations of erroneous refunds made by the Plaintiff in the complaint are nothing more that rhetoric based on assumptions of a tax liability. The tax liability of the

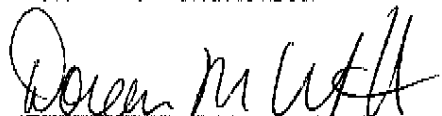
Hendricksons has never been determined, except through their own self-assessment. There has been no administrative determination that the Hendricksons DO have a tax liability due and owing through the deficiency and assessment procedures delineated in the IR Code and delegated to the Secretary, and this Court has no jurisdiction to assume the administrative functions of the IRS. Accordingly, Defendants respectfully request the Court dismiss this case for lack of jurisdiction and grant relief from the judgment pursuant to Civil Rule 60(b)(4) and (6).

Dated this 12th Day of March, 2007.

Respectfully submitted



Peter Eric Hendrickson

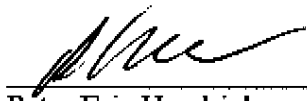


Doreen M. Hendrickson
232 Oriole Rd.
Commerce Twp, Michigan 48382
(248) 366-6858

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2007 a true and correct copy of the above and foregoing document was served on the Plaintiff as listed below by First Class Mail to:

Robert D. Metcalfe
Trial Attorney Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044



Peter Eric Hendrickson