In the United States Court of Federal Claims

No. 11-590T
(Filed: February 23, 2012)

MARIO BOERI,	)
Pro Se Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

OPINION GRANTING DEFENDANT'S MOTION TO DISMISS

FIRESTONE, *Judge*.

Pro se plaintiff Mario Boeri ("plaintiff") filed a complaint on September 14, 2011, seeking a refund of taxes that he asserts were improperly withheld by his employer. Pending before the court is defendant the United States' ("the government") motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"). The government argues that under the provisions of the Internal Revenue Code applicable to plaintiff's case, plaintiff's recovery is capped at zero dollars. Plaintiff responds that several provisions of the Internal Revenue Code, its

regulations, and case law overcome this barrier to relief. For the reasons discussed below, the government's motion to dismiss is **GRANTED**.

I. BACKGROUND

The following facts are taken from plaintiff's complaint.[1] Plaintiff, an Italian citizen, was previously employed by Verizon Communications, Inc. ("Verizon"), and its predecessor the General Telephone and Electronics Corporation ("GTE"). Compl. ¶¶ 6, 9, Ex. C. In connection with his employment, plaintiff worked in a variety of geographic regions, including Italy for 11 years, Brazil for five years, Argentina for five years, and the Dominican Republic for 15 years. Id. ¶¶ 9-10, Ex. C. At no time during his employment with GTE or Verizon did plaintiff work in the United States. Id. Ex. C.

In November 2003, after 36 years of employment, plaintiff opted to participate in Verizon's Management Voluntary Separation Plan. Id. ¶¶ 9-10, Ex. C. Under this plan, on March 1 and August 1, 2004, plaintiff was paid a gross amount totaling $247,177, from which Verizon withheld $70,559 in taxes. See Compl. Ex. D; Def.'s Mot., Ex. 1 at 2, Ex. 2 at 9-10. The taxes withheld by Verizon consisted of $61,794 in federal income taxes, $5,450 in Social Security taxes, and $3,315 in Medicare taxes. Compl. Ex. D, F; Def.'s Mot., Ex. 2 at 9-10.

[1] The government attaches plaintiff's Internal Revenue Service tax records as exhibits to its motion to dismiss, which provide further factual background to plaintiff's claim. For purposes of evaluating jurisdiction, the court may look beyond the pleadings and "inquire into jurisdictional facts" to determine whether jurisdiction exists. Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991). Therefore, the court also references here the government's exhibits that expand on the facts outlined in plaintiff's complaint and have allowed the court to determine that jurisdiction is proper in this case.

Plaintiff filed a nonresident alien income tax return, Form 1040NR for the 2004 tax year, on March 10, 2009, seeking a refund of all of the taxes withheld by Verizon in 2004. Compl. ¶ 11, Ex. D. The Internal Revenue Service ("IRS") received plaintiff's return on March 28, 2009. Def.'s Mot., Ex. 1 at 2. The IRS disallowed as untimely plaintiff's refund claim on September 14, 2009. Compl. ¶ 14, Ex. G. The IRS explained that plaintiff's claim for a refund for taxes withheld in 2004 was barred because to claim an "overpayment as a credit or to obtain a refund, you have to file your tax return within 3 years from its due date. Withheld tax and estimated tax are deemed to be paid on the last day prescribed (i.e., April 15) for filing your tax return." Id. As explained more fully below, under Internal Revenue Code ("I.R.C." or "the Code") § 6511(b)(2)(A), a taxpayer's claim for a refund is limited to taxes paid within three years of when the claim for a refund was filed. Thus, plaintiff could only recover for taxes paid between 2006 and 2009.

Plaintiff appealed this disallowance on October 14, 2009. Compl. ¶ 15. On July 20, 2011, the IRS Appeals Office of Miami, Florida, denied the appeal, and notified plaintiff that there was no basis on which to allow any part of his claim. Id. ¶ 16, Ex. H. On September 14, 2011, plaintiff filed suit in this court, seeking a refund of the $70,599 in taxes that Verizon withheld from the March and August 2004 payments, and an award of costs. Compl. at 3.

II. STANDARD OF REVIEW

The Tucker Act, 28 U.S.C. § 1491(a)(1) (2006), allows the Court of Federal Claims to hear federal tax-refund claims. See Ledford v. United States, 297 F.3d 1378,

1382 (Fed. Cir. 2002). However, the Court of Federal Claims' Tucker Act jurisdiction is limited by the Internal Revenue Code. Radioshack Corp. v. United States, 566 F.3d 1358, 1360 (Fed. Cir. 2009) (citing United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 8-9 (2008)). Section 7422(a) of the Code does not allow suit for the recovery of internal revenue tax until "a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

The provisions of law and regulations setting forth the requirements for a "duly filed" refund claim include § 6511 of the Code, which limits the court's ability to award relief. Clintwood, 553 U.S. at 7-8 (holding the limits in § 6511 apply to all claims for tax refunds in the Court of Federal Claims). Section 6511 contains two sets of provisions for determining the timeliness of a refund claim:

> [Section 6511] first establishes a filing deadline: The taxpayer must file a claim for a refund "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." [§ 6511(a)]. . . . It also defines two "look-back" periods: If the claim is filed []within 3 years from the time the return was filed,[] then the taxpayer is entitled to a refund of "the portion of the tax paid within [the 3 year] period, immediately preceding the filing of the claim." § 6511(b)(2)(A) (incorporating by reference § 6511(a)). If the claim is not filed within that 3-year period, then the taxpayer is entitled to a refund of only that "portion of the tax paid during the 2 years immediately preceding the filing of the claim." § 6511(b)(2)(B).

Commn'r v. Lundy, 516 U.S. 235, 239-40 (1996), superseded by statute on other grounds as recognized in Healer v. Commissioner, 115 T.C. 316, 320 (2000).

In other words, §§ 6511(a) and 6511(b)(1) require that a taxpayer bring a refund claim within three years of filing a return, or two years of paying the tax, regardless of

the tax return's actual due date. See VanCanangan v. United States, 231 F.3d 1349, 1351 (Fed. Cir. 2000). Here, plaintiff's 2004 return, filed in March 2009, was also plaintiff's refund claim. Plaintiff's claim as alleged is therefore timely under §§ 6511(a) and 6511(b)(1), because plaintiff's refund claim was filed within three years (in this case, on the same day) as the return.[2] See id. However, the "look-back" provisions of § 6511(b)(2)—the provisions of § 6511 at issue in this case—still limit the refund amount available to plaintiff to taxes paid within the applicable look-back period. Here, the applicable look-back period is the 3-year period immediately preceding the filing of plaintiff's March 2009 refund claim. See I.R.C. § 6511(b)(2)(A); VanCanangan, 231 F.3d at 1351-52; Minehan v. United States, 75 Fed. Cl. 249, 254 n.7 (2007).

To recover under the Tucker Act, plaintiff must adhere to the requirements of § 6511. See Clintwood, 553 U.S. at 7-8. However, the courts have been divided on the issue of whether failure to allege that any tax pertaining to the refund claim was paid during the applicable look-back period comprises a failure to state a claim under RCFC 12(b)(6) or lack of subject matter jurisdiction under RCFC 12(b)(1). Here, the government seeks dismissal based on either provision. See Def.'s Mot. at 6 n.2.

The Supreme Court has held that the filing requirements of § 6511(a), which set forth a filing deadline for a refund claim, present a jurisdictional bar. Murdock v. United States, No. 11-326T, 2012 WL 401594, at *3 (Fed. Cl. Feb. 9, 2012) (citing United States v. Brockamp, 519 U.S. 347, 348-49 (1997); United States v. Dalm, 494 U.S. 596, 602

[2] The government concedes for purposes of this motion that plaintiff's claim was properly filed under § 6511(a). See Def.'s Mot. at 7 n.3.

(1990)). In contrast, the Supreme Court has not squarely addressed whether the provisions of § 6511(b)(2)—at issue here—are jurisdictional in nature. Murdock, 2012 WL 401594, at *3. However, unlike the jurisdictional requirements of § 6511(a), § 6511(b)(2) does not preclude the court from hearing plaintiff's claim, but instead limits the amount of recovery the court may award. See I.R.C. § 6511(b)(2) (mandating a "[l]imit on amount of credit or refund"). Based on the reasoning in the recent decision in Murdock v. United States (attached to this opinion), the court finds that this limitation on relief is more properly considered under a motion to dismiss for failure to state a claim. See Murdock, 2012 WL 401594, at *3-4. Here, the government argues plaintiff is not entitled to any refund because no taxes were paid during the look-back period. For this reason, the court will evaluate this case under RCFC 12(b)(6).

To avoid dismissal for failure to state a claim upon which relief may be granted under RCFC 12(b)(6), the complaint must contain facts sufficient to "'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)). The plaintiff's factual allegations must "raise a right to relief above the speculative level" and cross "the line from conceivable to plausible." Bell Atl. Corp., 550 U.S. at 555, 570. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' . . . Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Iqbal, 129 S. Ct. at 1949 (quoting Bell Atl. Corp., 550 U.S. at 555, 557). In considering a motion under RCFC 12(b)(6), "the court must accept as true the complaint's undisputed factual allegations and should construe

them in a light most favorable to the plaintiff." Cambridge v. United States, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (citing Papasan v. Allain, 478 U.S. 265, 283 (1986); Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). In addition, when considering the dismissal of a pro se complaint, the court holds "the pleading 'to less stringent standards than formal pleadings drafted by lawyers.'" Johnson v. United States, 411 F. App'x 303, 305 (Fed. Cir. 2010) (quoting Haines v. Kerner, 404 U.S. 519, 520 (1972)).

III. DISCUSSION

To reiterate, the government bases its motion to dismiss on the "look-back" provision found in I.R.C. § 6511(b)(2)(A). As noted above, under that provision, plaintiff is only entitled to a refund of "the portion of the tax paid within the [3 year] period, immediately preceding the filing of" the refund claim. I.R.C. § 6511(b)(2)(A). In this case, the government argues, plaintiff is not entitled to a refund of the $70,559 in taxes that he seeks because those taxes were paid more than three years prior to the filing of plaintiff's refund claim, outside of the look-back window. Def.'s Mot. at 6-7.

Plaintiff filed his 2004 Form 1040NR on March 10, 2009, which constituted a timely refund claim under § 6511(a). Under § 6511(b)(2)(A), the look-back period applicable to plaintiff's claim extended from March 10, 2009 back to March 10, 2006. Therefore, plaintiff only has a claim for a refund of the taxes paid between March 10, 2006 and March 10, 2009.

The taxes in dispute in this case were withheld by Verizon in March and August 2004. Def.'s Mot., Ex. 2 at 9-10. Sections 6513(b)(1) and (c)(2) specify when advance

payments of income tax and social security and Medicare taxes are deemed paid. Under these provisions, the advanced payments paid by Verizon in 2004 for which plaintiff seeks a refund are deemed paid on April 15, 2005. I.R.C. § 6513(b)(1), (c)(2) (specifying time when advance payments of tax are considered as having been paid); see Def.'s Mot., Ex. 2 at 9-10 (Internal Revenue Report showing a $70,559 "Refundable Credit" dated April 15, 2005); Baral v. United States, 528 U.S. 431, 435 (2000) (discussing § 6513(b)(1)). The taxes withheld were therefore paid eleven months before the start of the look-back period on March 10, 2006. Given these facts, the court agrees with the government that, because none of the taxes for which plaintiff seeks a refund were paid during the three-year look-back period applicable to his claim, the plaintiff has not stated a claim for relief. Under § 6511(b)(2), the plaintiff's recovery is limited to zero dollars. See Baral, 528 U.S. at 436 (denying a taxpayer's refund claim where taxes withheld were deemed paid before the start of the look-back period).

Plaintiff presents several arguments to suggest that his claim should be exempted from the look-back period in § 6511(b)(2). First, in his complaint, plaintiff relies on the Tenth Circuit decision of Clark v. United States, 587 F.2d 465, 466 n.1 (10th Cir. 1978) and Revenue Ruling 61-11, 1961-1 C.B. 724 (cited both in Clark and in Revenue Ruling 68-172, attached to plaintiff's complaint) to argue that the limitations periods of § 6511 do not apply to him. See Compl. ¶ 19, Ex. K, L. However, these authorities do not overcome the limitations set in § 6511(b)(2). The court agrees with the government that the Clark decision and Revenue Ruling 61-11 addressed only "the narrow issue of whether certain payments made to a noncompetent, restricted member of a Native

American Indian Tribe with respect to specifically allotted Indian lands were subject to federal income taxes." Def.'s Mot. at 8.

Plaintiff highlights a footnote in Clark that cites Revenue Ruling 61-11 and indicates that the limitations period in § 6511(a) does not apply to certain cases dealing with tax-exempt income derived from allotted and restricted Indian lands. See Compl. Ex. K, L. Plaintiff alleges that these authorities demonstrate that "tax-exempt income" is excluded from the "tax statute of limitations." Id. ¶ 19. However, the authorities plaintiff relies on do not state such a broad rule. Instead, Clark and Revenue Ruling 61-11 narrowly hold that the statute of limitations regarding claims for refunds does not apply to cases where the tax was paid by an Indian superintendent or other officer of the United States on behalf of a restricted Indian on tax-exempt income directly derived from allotted and restricted Indian lands. Compl. Ex. L; Clark, 587 F.2d at 466 n.1. The special exception to the statute of limitations for Native American Indian allotted land is based on the government's "obligations as conservator and guardian of such Indian taxpayers." Revenue Ruling 61-11, 1961-1 C.B. 724. Therefore, the court agrees with the government that the unique set of circumstances addressed in Clark and Revenue Ruling 61-11 are not applicable to this case.

Plaintiff further argues in his response that the § 6511 limitations periods should not be applied against him because he is a nonresident alien whose income was derived from sources outside of the United States.[3] Pl.'s Resp. at 6-7. Plaintiff contends that

[3] Plaintiff also cites Treasury Regulation 31.3406(d)-5 and IRS Publication 1281 in support of the argument that the government was required to issue the plaintiff a notice of erroneous

because he was a nonresident alien whose income was derived from sources outside of the United States, he was not required to file a tax return, and is therefore not subject to the limitations of § 6511. Id. Plaintiff also argues that because no tax account was established for plaintiff until he filed a claim for a refund in 2009, the wrongfully withheld taxes cannot have been "deemed paid" in 2005. Id. at 7-8. Plaintiff argues that the withheld taxes should be deemed paid as of the date that he filed his return and refund claim, in 2009. Id. at 7.

Plaintiff's arguments fail for the following reasons. In order to claim a refund for overpaid or overwithheld tax, a nonresident alien is required to file a return. 26 C.F.R. § 1.6012-1(b)(2)(i) (stating that the regulation excepting a nonresident alien not engaged in trade or business with United States from filing a return does not apply "to a nonresident alien making a claim . . . for the refund of an overpayment of tax for the taxable year."). As such, plaintiff's refund claim is subject to the requirements of §§ 6511(a) and 6511(b)(2)(A), which outline when a claim for a refund must be filed and place limits on the amount of refund that may be awarded by establishing a look-back period. Plaintiff's refund claim is also subject to §§ 6513(b)(1) and (c)(2), the provisions of the Code outlining when advanced payment of taxes are "deemed paid" for purposes of § 6511. In addition, while some statutorily-created exceptions exist to the limitations found in §

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withholding. Pl.'s Resp. at 8. However, the court agrees with the government that the authorities plaintiff cites do not apply to plaintiff's case; rather, these authorities apply to whether and when a "payor" that withholds taxes must begin backup holding after receiving notice that a taxpayer identification number is incorrect. These authorities also do not provide for an exception to the limitations found in § 6511.

6511, plaintiff's status as a nonresident alien does not fall within any of these exceptions. See I.R.C. §§ 6511(c)-(h) (listing exceptions).[4] Therefore, the fact that plaintiff is a nonresident alien whose income was derived from sources outside of the United States does not exempt plaintiff's refund claim from the limitations established in § 6511(b)(2).[5]

Plaintiff presents no other arguments as to why he is exempt from the requirements of § 6511. Plaintiff is therefore bound by the three-year look-back period of § 6511(b)(2)(A). Because the entire refund plaintiff seeks is for taxes paid before the start of the look-back period, plaintiff has not stated a claim for a refund, and his claim must be dismissed.

IV. CONCLUSION

For the foregoing reasons, the plaintiff's claim falls outside the look-back period of § 6511(b)(2)(A), and government's motion to dismiss for failure to state a claim under RCFC 12(b)(6) is **GRANTED**.

[4] The exceptions include extension of the limitations period by agreement, special rules applicable to certain income taxes, including bad debts and worthless securities, net operating loss or capital loss carrybacks, taxes paid to foreign countries, certain credit carrybacks, self-employment taxes, amounts included in recaptured income, certain disability payments, taxes on prohibited transactions, taxes imposed on partnership items, and situations where the taxpayer is unable to manage its financial affairs due to disability. See I.R.C. §§ 6511(c)-(h).

[5] Although the United States has tax treaties with a number of foreign countries that allow residents of foreign countries to be taxed at a reduced rate or grant exemptions from U.S. taxes on certain items of income they receive from sources within the United States, the materials accompanying plaintiff's tax documents indicate that plaintiff's claim does not fall under a tax treaty with the United States, nor does plaintiff argue such. See Def.'s Mot., Ex. 2 at 12.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge