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FILED

APR 19 2004

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FLETCHER H. HYLER,

Plaintiff,

No. C 03-2081 MHP

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM & ORDER
**Defendant's Motion for Summary
Judgment**

Plaintiff Fletcher H. Hyler filed this action in U.S. District Court on May 5, 2003, seeking to annul a tax penalty levied against him for the failures of a business he controlled to pay trust fund taxes. Specifically, plaintiff's action is postured as an appeal—on the grounds that plaintiff is not liable for the tax penalty in the first instance—from the Internal Revenue Service ("IRS") Appeals Office's decision to allow the IRS to proceed with a levy against plaintiff's property in order to fulfill this tax liability. Defendant has moved for summary judgment on the ground that this action is now moot: Plaintiff has now paid the tax penalty in full, and the IRS no longer seeks to levy against plaintiff's property. In the alternative, defendant claims that plaintiff may not now challenge his underlying tax liability because he had already raised the relevant issues in a prior administrative proceeding. Having considered the arguments presented and for the reasons stated below, the court enters the following memorandum and order.

BACKGROUND

On October 24, 2000, plaintiff received a letter from the IRS informing him that Logical Marketing Inc., a company for which he acted as president, owed in excess of \$290,000 in unpaid

1 trust fund taxes. Weill Dec. Exh. B, at 1. The letter stated that as the individual responsible for
2 collecting, accounting for, and paying these taxes, plaintiff would be charged with a personal tax
3 penalty equal to the amount of unpaid trust fund taxes. Id. Plaintiff was afforded the opportunity to
4 “appeal or protest this action,” and he did file a protest, within the appropriate time frame, on
5 December 22, 2000. Id. at 1; Weill Dec., Exh. C, at 1. In that protest, plaintiff based his claim of
6 immunity from tax penalty in part on the argument that “its assertion is barred by the applicable
7 statute of limitations.” Weill Dec., Exh. C., at 2.

8 A “settlement conference” took place before IRS Appeals Settlement Officer Richard
9 Stefanski on November 21, 2001. Simpson Dec., Exh. 4. On March 22, 2002, plaintiff received a
10 letter from the San Francisco Appeals Office memorializing the fact that “we were unable to reach
11 an agreement with you” and explaining that “[t]he Fresno Service Center will compute the amount of
12 tax as provided by law, and send you a bill for the amount due.” Weill Dec., Exh. D, at 1. In
13 addition, this letter stated that

14 Trust Fund Recovery Taxes may only be contested in the Federal District Court or the United
15 States Court of Federal Claims. However, in order to petition either court to hear your case,
you must first pay the tax due or at least the portion of the tax that the court may require.

16 Id. Plaintiff took no immediate action, and approximately three months later, on July 19, 2002, the
17 IRS served plaintiff with a “FINAL NOTICE” and “NOTICE OF INTENT TO LEVY AND
18 NOTICE OF YOUR RIGHT TO A HEARING,” which announced that plaintiff had only 30 days in
19 which to appeal the judgment of tax liability, after which the government would begin to seize his
20 property. Weill Dec., Exh. E, at 1. On July 17, 2002, within that 30-day window, plaintiff filed a
21 “Request for a Collection Due Process Hearing,” arguing again that the statute of limitations had run
22 on Logical Marketing Inc.’s unpaid taxes before the IRS assessed plaintiff with a tax penalty. Weill
23 Dec., Exh. F, at 1.

24 The IRS Appeals Office responded on December 6, 2002, with a “NOTICE OF
25 DETERMINATION” that referenced plaintiff’s “Collection Due Process Hearing.” Weill Dec., Exh.
26 A, at 1. The Notice indicated that plaintiff’s case had been considered at an “Appeals hearing,” and
27 that the IRS’s “proposed levy action” had been subsequently been “sustained.” Id. at 1-2.¹ The
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1 Appeals Office explained its ruling succinctly: “The taxpayer is trying to argue that the trust fund
2 recover penalties were assessed after the legal statute of limitations. However, *this argument has*
3 *previously been heard and rejected by Appeals.* No proposals for payment or alternatives thereof
4 have been presented.”² *Id.* at 3 (emphasis added). In the event that plaintiff did not agree with the
5 Appeals Office’s determination, the Notice outlined the procedure for further appeals:

6 If you want to dispute this determination in court, you have 30 days from the date of this
7 letter to file a complaint in the appropriate United States District Court for a redetermination.

8 The time limit for filing your complaint (30 days) is fixed by law. The courts cannot
9 consider your appeal if you file late. If the court determines that you made your complaint to
10 the wrong court, you will have 30 days after such determination to file with the correct court.

11 *Id.* at 1.

12 Rather than appeal directly to federal district court, at some point after receiving the Notice
13 of Determination plaintiff filed an appeal with the United States Tax Court. Compl. ¶ 3.³ The Tax
14 Court dismissed plaintiff’s appeal on April 23, 2003, explaining that it lacked jurisdiction to review
15 tax liabilities that “relate to unpaid employment taxes.” Compl. Exh. 1, at 1. The Tax Court’s order
16 of dismissal also contained a reminder to plaintiff “of the applicability of Internal Revenue Code
17 sections 6320(c) and 6330(d)(1) which provide a 30-day period for filing an appeal with the
18 appropriate Federal District Court.” *Id.*

19 On May 5, 2003, plaintiff filed the current action in this court, arguing that the IRS should
20 not be allowed to levy against him because the underlying tax liability had been incorrectly (and
21 unlawfully) assessed. *See* Compl. ¶¶ 4 & 9. Plaintiff’s complaint stated that this court held
22 jurisdiction over the matter under 26 U.S.C. section 6330(d)(1), which permits a person against
23 whose assets the IRS intends to levy to appeal the IRS’s determination that such a levy is proper “to
24 a district court of the United States.” 26 U.S.C. § 6330(d)(1)(B). Defendant subsequently answered
25 plaintiff’s complaint and filed for summary judgment on the grounds that the issue of plaintiff’s
26 underlying tax liability “was raised in a prior administrative proceeding” (presumably the November
27 21, 2001, hearing before Appeals Officer Stefanski) and therefore “cannot be raised again.” Def.
28 Mot., at 1. On February 6, 2004, this court ordered the parties to conduct further discovery (and, if
necessary, submit further briefing) related to whether the November 21, 2001, hearing had in fact

1 provided plaintiff with a full and fair opportunity to dispute his tax liability, and whether plaintiff
2 had indeed participated “meaningfully” in that hearing. See 26 U.S.C. §§ 6330(c)(2)(B) &
3 6330(c)(4).

4 Discovery and briefing, however, were apparently not the only significant case-related
5 activities that took place during the weeks after the court’s February 2004 order. On March 4, 2004,
6 in order to secure a home equity loan, plaintiff “paid all the tax liabilities at issue in this case.” Weill
7 Dec. ¶ 2; see also Hyler Dec. ¶¶ 6-8. By consequence, there is no longer any levy proceeding against
8 plaintiff, and the United States represents that “the IRS will not need need [sic] to levy on the assets
9 of plaintiff to collect any unpaid tax liabilities....” Weill Dec. ¶ 2. Defendant now contends that this
10 action is moot.

11
12 LEGAL STANDARD

13 “A claim is moot if it has lost its character as a present, live controversy.” American Rivers v.
14 National Marine Fisheries Service, 126 F.3d 1118, 1123 (9th Cir. 1997) (citing American Tunaboat
15 Ass’n v. Brown, 67 F.3d 1404, 1407 (9th Cir. 1995)). “In the context of declaratory and injunctive
16 relief, [a plaintiff] must demonstrate that she has suffered or is threatened with a concrete and
17 particularized legal harm, coupled with a sufficient likelihood that she will again be wronged in a
18 similar way.” Bird v. Lewis & Clark College, 303 F.3d 1015, 1019 (9th Cir. 2002) (internal
19 quotation marks and citation omitted), cert. denied, 538 U.S. 923. Where the activities sought to be
20 enjoined have already occurred, and the courts “cannot undo what has already been done, the action
21 is moot.” Friends of the Earth, Inc. v. Bergland, 576 F.2d 1377, 1379 (9th Cir. 1978). “The burden
22 of demonstrating mootness is a heavy one.” Northwest Environmental Defense Center v. Gordon,
23 849 F.2d 1241, 1243 (9th Cir. 1988).

1 DISCUSSION

2 This action is before the court as an appeal from the IRS Appeals Office’s determination that
3 that agency may levy against plaintiff’s assets in order to recoup unpaid taxes. Because plaintiff has
4 now paid his outstanding tax penalty, the IRS no longer seeks to levy against his property—there is
5 no longer any tax that remains to be paid. By consequence, this court could not now grant plaintiff
6 any meaningful relief on his complaint as filed.⁴ A ruling by this court that plaintiff had not received
7 a full and fair opportunity to dispute his tax liability in an administrative proceeding before the IRS
8 would result simply in a remand to the IRS with instructions to provide plaintiff with such an
9 opportunity; the IRS, however, is no longer attempting to levy against plaintiff, and thus no
10 administrative forum would remain to hear such challenges. Furthermore, this court originally took
11 jurisdiction over this action under 26 U.S.C. section 6330(d)(1), which gives the federal courts the
12 authority to entertain appeals from IRS determinations regarding tax levies. Since the IRS’s
13 determination that it may levy against plaintiff has now been mooted, any appeal from that
14 determination has been similarly mooted, and jurisdiction no longer lies under section 6330.

15 Plaintiff may—as he alleges—retain a viable claim that the IRS improperly and unlawfully
16 assessed a tax penalty against him, and thus that the taxes that he has already paid should be
17 refunded to him. However, plaintiff may not file suit seeking such a refund until he has first “filed a
18 claim for refund or credit” with the Secretary of the Treasury, an action that he has not yet taken. 26
19 U.S.C. § 7422(a).⁵ This court thus currently lacks jurisdiction over any suit brought by plaintiff to
20 recover the taxes he has already paid, and any attempt by plaintiff to recast the current action as a
21 suit for refund of the taxes he has remitted will ultimately be futile in the absence of a prior filing of
22 a claim for refund with the Secretary. Plaintiff has no remaining viable action before this court.

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CONCLUSION

For the reasons stated above, plaintiff's action is DISMISSED and the Clerk of Court shall close the file.

IT IS SO ORDERED.

Dated:

April 19, 2004



MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

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ENDNOTES

1. The Notice reads, in relevant part, “In Appeals, the taxpayer was granted a due process hearing by an appeals officer who had no prior involvement with respect to the tax for the tax periods covered by the hearing.” Weill Dec. Exh. A, at 3.

2. The Notice does not specify the occasion upon which the argument had “previously been heard and rejected.” The Appeals Office is presumably referring to the conference or hearing that took place pursuant to the protest action that plaintiff had previously filed, though it does not indicate so specifically.

3. The papers do not reveal the date upon which this appeal was filed. Nevertheless, it is reasonably safe to assume that the Tax Court appeal was filed within the allowed 30-day time window, since the Tax Court did not dismiss the appeal on the grounds that it had been filed after the appeals period had run. Compl. Exh. 1, at 1 (United States Tax Court, Hyler v. Commissioner of Internal Revenue, Docket No. 775-03L).

4. Plaintiff’s proposed amendment complaint is also postured as an appeal of the IRS’s decision to proceed with the levy against his property, and also invokes the jurisdictional grant in 26 U.S.C. section 6330(d)(1). For the purposes of this analysis, the question of whether plaintiff will be allowed to amend his complaint is irrelevant.

5. This section states:

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, 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.

26 U.S.C. § 7422(a).