

**ORIGINAL**

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 17-1000 T  
(Chief Judge Susan G. Braden)

JEFFREY T. MAEHR,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

**FILED**

**JAN - 8 2018**

**U.S. COURT OF  
FEDERAL CLAIMS**

**DEFENDANT’S REPLY TO PLAINTIFF’S RESPONSE TO  
DEFENDANT’S MOTION TO DISMISS AND TO  
PLAINTIFF’S MOTION FOR SUMMONS OF GRAND JURY**

In the brief supporting our motion to dismiss the complaint, we demonstrated that (1) the Court lacks subject-matter jurisdiction and thus the complaint must be dismissed pursuant to RCFC 12(b)(1); and (2) alternatively, that the complaint must be dismissed for failure to state a claim pursuant to RCFC 12(b)(6), because plaintiff’s tax liabilities for the years in suit have already been conclusively determined by the Tax Court and the Court of Appeals for the Tenth Circuit. Plaintiff’s responses to defendant’s motion to dismiss (hereinafter, collectively, “plaintiff’s brief”)<sup>1</sup> simply reiterate the same theories and contentions, asserted in the complaint and the attached exhibits, that those courts (and others) have already determined to be frivolous. For that reason, we will not repeat the points made in our opening brief. Rather, this Reply briefly supplements those points, as follows:

<sup>1</sup> All references to Plaintiff’s Motion for Summons of Grand Jury and Response to Defendant’s Motion to Dismiss, E.C.F. Nos. 10 and 11, are hereinafter abbreviated “Pl.’s Br.”

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1. Plaintiff admits that he has not met the prerequisites for filing a tax refund suit.

As discussed in our opening brief (at 6), one of the prerequisites for this Court's jurisdiction over tax refund suits is that the plaintiff have fully paid the taxes assessed for the tax year(s) at issue. *Fry v. United States*, 72 Fed. Cl. 500, 510 (2006).<sup>2</sup> Plaintiff admits that he has not met this prerequisite:

Plaintiff could not and would not attempt to “me[e]t the prerequisites for filing a tax refund suit . . . for to do so would have been tacit prima facie admission that he believed he ‘owed’ federal income taxes and was filing to obtain a ‘refund’ of same.

Pl.'s Br. at 8.<sup>3</sup>

2. To the extent plaintiff requests declaratory relief, this Court lacks jurisdiction.

In his brief, plaintiff requests that the Court order defendant to “answer Supreme Court case law” on the definition of income, whether levy upon his assets was lawful, and to provide proof of his tax liabilities. Pl.'s Br. at 37. This Court has already made clear that “[a] tax refund claim, with very few exceptions, is the only type of tax dispute over which this court has jurisdiction.” *Artuso v. United States*, 80 Fed. Cl. 336, 338 (2008). The Court explained (*ibid.* n.1):

In this court, the exceptions to this jurisdictional limitation to hearing only refund suits consist principally of cases filed under 28 U.S.C. § 1507 (grant of jurisdiction to hear declaratory judgment actions under 26 U.S.C. § 7428, which concerns classification of entities pursuant to 26 U.S.C. § 501(c)(3) and related provisions of the Internal Revenue Code); and under 28 U.S.C. § 1508 (grant of jurisdiction over certain partnership

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<sup>2</sup> A full discussion of jurisdiction is included in defendant's Motion to Dismiss, pages 5-10.

<sup>3</sup> Plaintiff also complains that “[m]erely the requirement to satisfy the full payment rule by paying the alleged debt would be an impossibility few Americans could ever do,” and violates due process. Pl.'s Br. at 15. While this contention is meritless, we note that plaintiff received notices of deficiency for tax years 2003, 2004, 2005, and 2006, and filed a petition with the Tax Court disputing the deficiencies for those years. He therefore did not have to satisfy the full prepayment rule, and utilized another available avenue to contest his tax deficiencies. *See* Def.'s Br. at 7-9.

proceedings under 26 U.S.C. §§ 6226 and 6228(a). *See also Brown & Williamson, Ltd. v. United States*, 231 Ct. Cl. 413, 688 F.2d 747 (1982) (jurisdiction to allow interest on a tax refund pursuant to tax treaty that created right to retroactive refund of taxes).

None of these exceptions applies here.

3. The Court of Federal Claims lacks jurisdiction over claims for criminal misconduct.

Plaintiff asks the Court to summon “one or more independent Citizens Grand Juries . . . under FRCP Rule 6 to investigate the obstruction of justice . . . conspiracy, collusion and treason” between factions of the government.” Pl.’s Mot. at 1-2.

Tort and criminal actions are expressly outside the Court of Federal Claims' jurisdiction. *Gump v. United States*, 482 Fed. App'x 588, 590 (Fed. Cir. 2012). *See also Brown v. United States*, 88 Fed. Cl. 322, 328 (2009) (holding that the Court of Federal Claims lacks jurisdiction to adjudicate criminal claims, including criminal behavior on the part of federal employees); *Joshua v. United States*, 17 F.3d 378, 379 (Fed. Cir. 1994) (“The court has no jurisdiction to adjudicate any claims whatsoever under the federal criminal code....”).

4. The Court of Federal Claims lacks jurisdiction over “due process” claims.

Plaintiff’s response also asserts that the Tax Court failed to provide him due process of law. Such claims are also outside the Court’s jurisdiction.

It is well established that due process claims are not money-mandating. *Carroll v. United States*, 120 Fed. Cl. 267, 269 (2015). *See also Smith v. United States*, 709 F.3d 1114, 1116 (Fed. Cir. 2013) (“The law is well settled that the Due Process clauses of both the Fifth and Fourteenth Amendments do not mandate the payment of money and thus do not provide a cause of action under the Tucker Act.”).

5. The Court of Federal Claims lacks jurisdiction to consider plaintiff's claims under the Administrative Procedure Act, 5 U.S.C. § 702 ("APA").

Plaintiff also requests review under the APA. Pl.s' Br. at 18. The APA provides for judicial review of agency actions. 5 U.S.C. § 702 (2000). However, the Court of Federal Claims "lacks the general federal question jurisdiction of the district courts, which would allow it to review the agency's actions and grant relief pursuant to the Administrative Procedure Act." *McNeil v. United States*, 78 Fed. Cl. 211, 224 (2007), *aff'd*, 293 Fed. App'x 758 (Fed. Cir. 2008).

6. Plaintiff's request for transfer must be denied.

Lastly, plaintiff requests that the Court "transfer . . . the issues that cannot be adjudicated herein, to the proper court." Pl.s' Br. at 37-38.

The Federal Circuit considered whether a taxpayer that had brought suit in the Tax Court can have his Court of Federal Claims case transferred to another court with respect to the same tax years:

Here, it was not an abuse of discretion for the Court of Federal Claims to deny Mr. Smith's transfer request because sovereign immunity and § 6512(a) would bar Mr. Smith's suit in any court. In some circumstances, a court may transfer a case . . . But that assumes plaintiff's claim could otherwise stand if the statute of limitations had not run. Transfer of Mr. Smith's claim would not remove the [§ 6512(a)] jurisdictional bar.

*Smith v. United States*, 495 Fed. App'x 44, 50 (Fed. Cir. 2012) (emphasis added).

As demonstrated in our opening brief (at 2-4), plaintiff received notices of deficiency for tax years 2003, 2004, 2005, and 2006, and filed a petition with the Tax Court disputing the deficiencies for those years. (Def.'s Ex. 1, Notices of Deficiency); (Def.'s Ex. 2, Tax Court Petition at ¶¶ 1, 3). The petition was dismissed for failure to state a claim, and that decision was affirmed by the Tenth Circuit. Thereafter, plaintiff filed a complaint in this Court attempting to allege a tax refund claim for the same years. Compl. at 5 (identifying tax years 2003, 2004, 2005

and 2006); Compl. ¶ 3, Notice of Directly Related Cases (citing plaintiff's prior actions regarding the same tax years).

Pursuant to I.R.C. § 6512, plaintiff's claims with respect to the 2003 through 2006 tax years are barred in any other court, and transfer to another court would not remove that jurisdictional bar. *See* I.R.C. § 6512 (emphasis added) (“If the Secretary has mailed to the taxpayer a notice of deficiency . . . and if the taxpayer files a petition with the Tax Court . . . no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court”).

Moreover, even if plaintiff's APA theory could be viewed as a stand-alone claim (it cannot) over which a district court might arguably have jurisdiction, transfer would not be proper. The transfer statute (28 U.S.C. § 1631) imposes three conditions, all of which must be met in order for this Court to be authorized to transfer a complaint to another court.<sup>4</sup>

*Zhuckkahosee v. United States*, 2016 WL 6747971 (Fed. Cl. Nov. 15, 2016) at \*6. Although the requirement that this Court lack jurisdiction has been met, the requirement that the transferee court would have jurisdiction has not. “The APA, by its terms, provides a right to judicial review of all ‘final agency action for which there is no other adequate remedy in a court,’ § 704, and applies universally ‘except to the extent that—(1) statutes preclude judicial review’ or (2) agency action is committed to agency discretion by law,’ § 701(a).” *Bennett v. Spear*, 520 U.S. 154, 175 (1997). That plaintiff had an “adequate remedy in a court” is evident from his litigation

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<sup>4</sup> Title 28 § 1631 provides:

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

history (recounted in our opening brief at 2-5). Furthermore, any transfer of this case would not meet the requirement that the transfer be “in the interest of justice.” None of plaintiff’s frivolous theories or contentions would survive a motion to dismiss for failure to state a claim in a transferee court, and transfer would thus be futile. *See Zhuckkahosee*, 2016 WL 6747971 at \*6.

### CONCLUSION

For all of the reasons set forth above and in defendant’s Motion to Dismiss and supporting brief, defendant requests that the Court enter an order dismissing the complaint for lack of subject matter jurisdiction under Rule 12(b)(1), and, alternatively, for failure to state a claim under Rule 12(b)(6).

Respectfully submitted,

January 8, 2018

  
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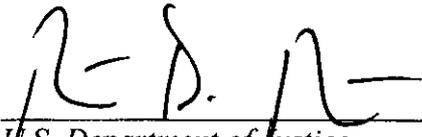
January 8, 2018

  
Of Counsel

CERTIFICATE OF SERVICE

I certify that service of the foregoing Brief in Support of Motion to Dismiss, has this 8<sup>th</sup> day of January 2018, been made on plaintiff by mailing the original thereof, in a postage prepaid envelope, to the following address:

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