U.S. Department of Justice

Tax Division

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November 29, 2016

Mr. Robert A. McNeil
729 Grapevine Hwy.
#148
Hurst, TX 76054

Re: Robert A. McNeil v. IRS Commissioner, et al.
(D.C. Cir. – No. 16-5233)

Dear Mr. McNeil:

Enclosed is a reply to your opposition to our motion for summary affirmance and an opposition to your motion for judicial notice, which we filed via the D.C. Circuit's CM/ECF system today.

Sincerely yours,

CURTIS C. PETT
Attorney
Appellate Section

Enclosure

THIS CASE HAS NOT YET BEEN SCHEDULED FOR ARGUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT A. McNEIL,	)	
	)	
Plaintiff - Appellant	)	
	)	
v.	)	**No. 16-5233**
	)	
COMMISSIONER OF INTERNAL REVENUE and UNITED STATES ATTORNEY GENERAL,	)	
	)	
Defendants - Appellees	)	

REPLY IN SUPPORT OF APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE AND OPPOSITION TO APPELLANT'S MOTION FOR JUDICIAL NOTICE

McNeil brought this suit seeking to enjoin the IRS and the Department of Justice from determining, assessing, and collecting income taxes from individuals who refuse to file tax returns. The District Court dismissed the suit as barred by the Anti-Injunction Act, I.R.C. § 7421(a), which generally provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." The court held that "[a]ll of the actions of which Plaintiff complains and that are the bases for Plaintiff's request for relief are actions taken in the process

of assessment and collecting taxes" and that, "[i]n light of the relief requested, it is clear that this suit is barred by the Anti-Injunction Act in its entirety." (Doc. 13 at 8.)[1]

McNeil appealed the order of dismissal and filed a motion for summary reversal. The government filed an opposition to his motion, combined with a motion for summary affirmance. McNeil has filed an opposition to the government's motion for summary affirmance (hereinafter cited as "Opp."), combined with a motion to judicially notice certain documents attached to his opposition. For the reasons explained herein, the Court should grant the government's motion for summary affirmance and deny McNeil's motion for judicial notice.

1. The Anti-Injunction Act bars the relief McNeil seeks

McNeil argues at length that various IRS actions used to determine, assess, and collect income taxes owed by persons who refuse to file income tax returns are improper. (Opp. at 2-17.) McNeil fails, however, to show any error in the District Court's conclusion that his suit to enjoin those actions is barred by the Anti-Injunction Act.

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[1] "Doc." references are to the documents in the record on appeal as numbered by the Clerk of the District Court.

Moreover, McNeil does not attempt to show any error in the District Court's conclusion (Doc. 13 at 9) that there is no material difference between this suit and *Ellis v. Commissioner*, 67 F. Supp. 3d 325 (D.D.C. 2014), *aff'd*, 622 Fed. Appx. 2, 3 (D.C. Cir. 2015) ("Appellant has not shown that the district court erred in concluding that his claims are barred by the Anti-Injunction Act, the purpose of which is to allow the government to assess and collect taxes without judicial interference."). McNeil cannot show any error in that regard because the instant case is substantially identical to that case. *See also Ellis v. Jarvis*, 2016 WL 3072244 (D.D.C. No. 16-31 May 31, 2016), *aff'd*, No. 16-5219 (D.C. Cir. Nov. 7, 2016) ("The merits of the parties' positions are so clear as to warrant summary action. . . . The complaint effectively challenged the legality of income tax and the requirement to file returns, thereby falling within the clear ambit of the Anti-Injunction Act, 26 U.S.C. §7421(a).").

McNeil's argument that his suit does not seek to restrain the assessment or collection of any tax (Opp. at 11-14) is specious. McNeil asserts that he does not owe any income taxes (Opp. at 11, 14), and he seeks to enjoin the IRS from "falsifying" its records to show that he does

owe taxes (Doc. 1 at 12-13). The Anti-Injunction Act's "ban against judicial interference is applicable not only to the assessment or collection itself, but is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes." *United States v. Dema*, 544 F.2d 1373, 1376 (7th Cir. 1976). *Accord Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 405 (4th Cir. 2003); *Smith v. Rich*, 667 F.2d 1228, 1230 (5th Cir. 1982). Because McNeil "is seeking to stop the IRS from engaging in conduct that aids in the assessment and collection of taxes," his claims are barred. *Ellis*, 67 F. Supp. 3d at 332. *See also Tecchio v. United States*, 153 Fed. Appx. 841, 843 (3d Cir. 2005) (rejecting argument that Anti-Injunction Act did not apply because plaintiff "was not seeking relief based on the tax assessment but on the use of a substitute return that was created without authorization").

Also without merit is McNeil's argument (Opp. at 13-17) that his suit falls within the narrow exception to the Anti-Injunction Act established in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962). That exception applies only where the taxpayer establishes both (1) that under no circumstances could the Government

succeed on the merits of its claim and (2) that equity jurisdiction otherwise exists, *i.e.*, that he has no legal remedy and that he will be irreparably harmed absent an injunction. McNeil fails to satisfy either prong of the *Williams Packing* exception.

McNeil's argument that under no circumstances could the Government succeed on the merits (Opp. at 16-17) rests on several fallacious assumptions. His assertion that, where a taxpayer does not file an income tax return, the IRS cannot assess the taxpayer's income tax liability (Opp. at 4) is wrong. Where a taxpayer does file an income tax return, the IRS can assess the tax reported on the return. I.R.C. § 6201(a)(1); *see Murray v. Commissioner*, 24 F.3d 901, 903 (7th Cir. 1994); *Meyer v. Commissioner*, 97 T.C. 555, 559 (1991). But a taxpayer's "fail[ure] to file a return will not insulate him from a determination by the Commissioner that a tax is due and owing." *Hartman v. Commissioner*, 65 T.C. 542, 546 (1975). *Accord Roat v. Commissioner*, 847 F.2d 1379, 1382 (9th Cir. 1988). Where a taxpayer does not file a return and the IRS determines that the taxpayer has an income tax liability, the IRS ordinarily must send a notice of deficiency to the taxpayer prior to assessing the tax. I.R.C. §§ 6212(a), 6213(a);

see Edwards v. Commissioner, 791 F.3d 1, 3-4 (D.C. Cir. 2015); *Gardner v. United States*, 211 F.3d 1305, 1311 (D.C. Cir. 2000); *Roat*, 847 F.2d at 1381. The taxpayer can petition the Tax Court for review of the IRS's deficiency determination, and the IRS cannot assess the tax deficiency until either the ninety-day period for filing a Tax Court petition has run or, if the taxpayer has filed a petition, the Tax Court has rendered a final decision. I.R.C. § 6213(a); *see Edwards*, 791 F.3d at 4.

McNeil's contention that I.R.C. § 6020(b), which gives the IRS authority to create a substitute for return where the taxpayer fails to file a return, "does not extend to income tax matters" (Opp. at 3; *see id.* at 8) is nonsense. The language of Section 6020(b) contains no such limitation, and the courts have rejected, as frivolous, the argument that the IRS lacks authority to create a substitute for return where the taxpayer fails to file an income tax return. *E.g., Douglas v. United States*, 324 Fed. Appx. 320, 321 (5th Cir. 2009); *Taliaferro v. Commissioner*, 272 Fed. Appx. 831, 833 (11th Cir. 2008).

McNeil asserts that the "IRS invariably falsifies tax records to fabricate the appearance of 'deficiencies' when dealing with 'non-filers,'" (Opp. 17) and he repeatedly asserts that this case involves a "record

falsification program" (*e.g.*, Opp. at 1, 3, 7, 11, 15, 18). But these assertions are based on his fallacious argument that the IRS lacks authority to create a substitute for return in an income tax case. At all events, because the IRS is not *required* to create a substitute for return before asserting a deficiency against a taxpayer who fails to file an income tax return (*see Roat*, 847 F.2d at 1381-82; *Geiselman v. United States*, 961 F.2d 1, 5 (1st Cir. 1992); *Schiff v. United States*, 919 F.2d 830, 832-33 (2d Cir. 1990)), McNeil's allegations concerning how or whether the IRS creates substitutes for return are beside the point.

With respect to the second prong of the *Williams Packing* exception, McNeil acknowledges that he has other remedies for disputing his tax liabilities (Opp. at 15-16), but argues that those remedies are inadequate because he does not owe any tax (Opp. at 16). McNeil's argument makes no sense. He can pursue those other remedies if his wishes to argue that he owes no tax. His aversion to those remedies does not make them inadequate. *See Alexander v. 'Americans United' Inc.*, 416 U.S. 752, 762 n.13 (1974) ("A taxpayer cannot render an available review procedure an inadequate remedy at law by voluntarily forgoing it.").

2. McNeil's request for judicial notice should be denied

McNeil asks the Court (Opp. at 18) to take judicial notice of four items attached to his opposition. Three of the items (Exs. A, B, and C; *see* Opp. at 2-3 & n.3, *id.* at 14 & n.14) are filings in a suit brought by another taxpayer seeking injunctive relief similar to that sought by McNeil here. McNeil does not rely on the existence of the filings in the other suit but, rather, he relies on assertions made in those filings, and also relies on "evidence" attached to those filings. But "[a] court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388-89 (2d Cir. 1992) (citation and quotation marks omitted). *See Rickett v. Jones*, 901 F.2d 1058, 1062 n.5 (11th Cir. 1990) ("we ought to take no notice of evidence in other cases to supply facts essential to support an outcome in the present case"); *M/V American Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) ("a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to

support a contention in a cause then before it"); *see also Kemlon Prods. & Dev. Co. v. United States*, 646 F.2d 223, 224 (5th Cir. 1981) (refusing to take judicial notice of items in record in related, pending litigation between the same parties). Judicial notice of these three items, therefore, is not available here.

Judicial notice also is unavailable with respect to the fourth item (Ex. D; *see* Opp. at 4 & n.5), which purports to be an internal IRS memorandum discussing the topic of "Disclaimer Returns." It is unclear what fact in the memorandum McNeil wishes to judicially notice. *Cf. Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 12 n.5 (D.C. Cir. 1980) (Fed. R. Evid. 201(b)(2) "is designed to permit judicial recognition of material such as scientific data or historical fact that, although outside the common knowledge of the community, is nevertheless ascertainable with certainty without resort to cumbersome methods of proof"). At all events, because McNeil has done nothing to authenticate the memorandum (*see* Fed. R. Evid. 901), it cannot be said that such fact "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (Fed. R. Evid. 201(b)(2)).

At bottom, McNeil's motion for judicial notice is an attempt to supplement the record on appeal with documents that were not placed before the District Court. *See Swanson Group Mfg. LLC v. Jewell*, 790 F.3d 235, 241 (D.C. Cir. 2015) ("declarations that were not part of the record before the district court at the time of a judgment or order are not part of the record on appeal of that judgment or order"); Fed. R. App. P. 10(a). Supplementing the record under these circumstances would not be appropriate. *See Morgan Drexen, Inc. v. Consumer Financial Protection Bureau*, 785 F.3d 684, 690 n.2 (D.C. Cir. 2015); *Colbert v. Potter*, 471 F.3d 158, 165 (D.C. Cir. 2006).

3. Conclusion

The government's motion for summary affirmance should be granted, and McNeil's motion for judicial notice should be denied.

Respectfully submitted,

CAROLINE D. CIRAOLO
Principal Deputy Assistant Attorney General

/s/ Curtis C. Pett

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NOVEMBER 2016

CERTIFICATE OF SERVICE

It is hereby certified that, on this 29th day of November, 2016, the foregoing reply was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Service of this reply was made on the appellant, appearing pro se, on this 29th day of November, 2016, by sending a copy thereof by First Class Mail, postage prepaid, in an envelope properly addressed as follows:

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/s/ Curtis C. Pett
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