IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

ROBERT A. McNEIL, Plaintiff, v. COMMISIONER, INTERNAL REVENUE and UNITED STATES ATTORNEY GENERAL, Defendants.	)	Case No. 1:15-cv-01288

UNITED STATES' REPLY MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS

Defendant the United States of America submits this reply in support of its motion to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim.

Introduction

Once the Opposition's inflammatory rhetoric and *ad hominem* attacks are stripped away, very little remains for discussion. The plaintiff does not present any legal authority that would allow him to challenge the IRS's preparation of returns or the use of such returns in proceedings to collect taxes. The plaintiff does not show that he has standing to enjoin the assessment and collection of taxes from him. Nor does the plaintiff identify any legal authority lending even an iota of legitimacy to his constitutional and Administrative Procedure Act claims. Most importantly, neither the Opposition nor the Complaint establishes any *facts* showing that the IRS violated the law in any way.

This action purports to be a challenge to "illegal" activity by the IRS and the DOJ. Instead, it is an attempt by an individual taxpayer to prevent the IRS from assessing and

collecting tax liabilities from him using the procedures authorized by Congress. This action should be dismissed.

Argument

This action must be dismissed for two reasons: (1) the Court does not have subject matter jurisdiction over the plaintiff's claims because the injunctive relief he seeks is barred by the Anti-Injunction Act, and he lacks standing; and (2) the plaintiff cannot state plausible claims under the Fifth Amendment or the Administrative Procedure Act. The plaintiff has not meaningfully opposed either point.

I. THE COURT LACKS SUBJECT MATTER JURSIDICTION OVER THIS ACTION

As discussed in the opening brief, the Anti-Injunction Act withdraws jurisdiction from this Court to entertain this suit because it is a "suit for the purpose of restraining the assessment or collection of [a] tax." Op. Mem. 4-5; 26 U.S.C. § 7421(a)(1); *Lundberg v. United* States, 720 F. Supp. 2d 25, 28 (D.D.C. 2010). The preparation of a return under section 6020(b) of the Internal Revenue Code (26 U.S.C. § 6020), and the use of that return in court are covered by the Act. *See Ellis v. Comm'r of Internal Revenue*, 67 F. Supp. 3d 325, 333 (D.D.C. 2014).

The plaintiff offers no principled response. McNeil does not assert that the preparation and use of a return prepared pursuant to 26 U.S.C. § 6020(b) are somehow beyond the reach of the Anti-Injunction Act. In fact, he *admits* that they are. Opp'n 8 ("[I]f Plaintiff WERE seeking to prevent IRS from performing substitute 1040 income tax returns, or using valid certifications, the AIA WOULD apply to bar the case."). Instead, he argues that the Anti-Injunction Act is "inapposite" because he "is NOT seeking to enjoin any **lawful** assessment or collection activity." *Id.* (emphasis in original). This is a distinction without a difference. There is no exception to the Anti-Injunction Act for assessment and collection activities that a plaintiff claims are unlawful.

See Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 8 (1962) ("Thus, in general, the Act prohibits suits for inunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid."). If there were, all a plaintiff would need to do to sidestep the Anti-Injunction Act is simply assert that the assessment or collection activity was "unlawful" or "illegal." Such an exception would swallow the rule.

Additionally, a suit for injunctive relief is not the appropriate way for the plaintiff to challenge the lawfulness of the taxes assessed against him. If the plaintiff seeks to challenge in the "lawfulness" of the tax assessments, he has one option: he must pay the disputed tax, file a refund claim, and sue for a refund under 26 U.S.C. § 7422. *Kim v. United States*, 461 F. Supp. 2d 34, 39 (D.D.C. 2006) (dismissing claim under Anti-Injunction Act and noting no exceptions to Act apply because plaintiff "can challenge the validity of the tax assessments by filing a refund claim.").

Even assuming, *arguendo*, that the Anti-Injunction Act does not bar this case, dismissal is still warranted because the plaintiff cannot establish the causation and redressability elements of Article III standing. Op. Mem. 5-6; *Ellis*, 67 F. Supp. 3d at 336-38. His only response is to repeat the Complaint's allegation that "seizure of his monies resulted directly from the Service's falsification of its annual internal IMF records[.]" Opp'n 8. This type of "threadbare recital" of causation "supported by mere conclusory statements, do[es] not suffice." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). Tellingly, the Opposition does not even suggest that, in the absence of the challenged conduct, the plaintiff would not have been liable for the taxes at issue. This is fatal to his claim.

II. THE COMPLAINT FAILS TO STATE A CLAIM

A. The Plaintiff's Fifth Amendment Claim is Baseless

The filing of a tax return does not implicate the Fifth Amendment. McNeil disagrees, stating that he "can never be forcibly required . . . to swear out evidence [i.e., a Form 1040] which can be used against him in court[.]" Opp'n 10. This issue is not open to dispute: the Supreme Court has unequivocally held that "the requirement that [income tax] returns be completed and filed simply does not involve the compulsion to incriminate." *Garner v. United States*, 424 U.S. 648, 661 (1975). This argument warrants no further response.

B. The Plaintiff Identifies No Basis For His Administrative Procedure Act Claim

The Administrative Procedure Act claim also fails because the plaintiff has not alleged any predicate unlawfulness on which he can base such a claim. Op. Mem. 9. His only attempt to address this point is to argue that the IRS "falsifies" in its database a transaction code ("TC 150") that apparently indicates that a substitute return has been prepared, and that the IRS "never prepares" such a return. Opp'n 2, 6 n.11. This argument fails as a matter of fact and law.

As a factual matter, the claim that the IRS "never performs" a return is demonstrably false. Of course the IRS prepares returns pursuant to section 6020(b); in fact, it prepared one for the plaintiff for the tax year 2006, a copy of which *is attached to the complaint*. *See* Exh. D to Complaint (attaching Form 13496/Form 866/Form 4549 for 2006 tax year); *see also* 26 CFR § 301.6020-1(b)(2) ("A Form 13496 'IRC Section 6020(b) Certification,' or any other form that an authorized Internal Revenue Officer or employee signs and uses to identify a set of documents containing the information set forth in this paragraph as a section 6020(b) return, and the documents identified, constitute a return under section 6020(b).").

As a legal matter, the IRS's preparation of a return and subsequent assessment of taxes forecloses any claim based upon an earlier, supposedly "falsified," entry of the TC 150 code.

Even if the "TC 150" transaction code meant what the plaintiff says it does (i.e., that a return has *already been* prepared at the time that the code is entered), the entry of the code did not cause him to lose money. The IRS's *assessment* of tax is the legal trigger for tax collection efforts, not the earlier entry of a TC 150 transaction code. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (noting "the assessment is the official recording of liability that triggers levy and collection efforts."). So, to the extent that the plaintiff has alleged a "falsification" at all, he has not alleged a "falsification" that caused his claimed injury.

Finally, the plaintiff does not assert a single violation of law on which he can premise an Administrative Procedure Act claim. He does not allege that the IRS violated any statute or regulation by supposedly entering the "TC 150" transaction code before conducting an examination and completing a Section 6020(b) return. Nor he does he dispute that the return prepared by the IRS complied with all applicable statutes and regulations. 26 U.S.C. § 6020(b) (authorizing the IRS is authorized to prepare returns for non-filers from information available to it; 26 CFR §301.6010-1(b)(2) (Form 13496 and documents attached thereto "constitute a return under section 6020(b)"). He responds by simply repeating that the IRS engaged in "deliberate layered falsification of [its] records[.]" Opp'n 11. Such "unadorned, the-defendant-unlawfully-harmed me" allegations are insufficient to withstand a motion to dismiss. *Iqbal*, 556 U.S. at 678.

Since the plaintiff has not alleged a violation of law, he cannot state a claim for violation of the Administrative Procedure Act. *See Vemuri v. Napolitano*, 845 F. Supp. 2d 125, 130-31 (D.D.C. 2012).

III. THE OPPOSITION'S REMAINING POINTS ALL FAIL

The Opposition asserts a litany of other arguments, all of which can be dealt with in short order.

The plaintiff argues that the preparation of substitute return "is directly limited to cases involving employment, excise and partnership taxes, thus not relevant to income taxes." This is incorrect: 26 U.S.C. § 6020(b)(1) provides that "if any person fails to make *any return required by any internal revenue law or regulation made thereunder* . . . the Secretary *shall make such return*[.]") (emphasis added).

The plaintiff repeats the argument that the IRS may not prepare a return without his express request. Opp'n 8. As set forth in the opening brief, that is also incorrect: 26 U.S.C. § 6020(b)(1) authorizes the IRS to do precisely that. Section 6020(a) is inapplicable to his claim.

The plaintiff appears to allege that IRS violated the law because it does not execute a "substitute 1040." Opp'n 7, 8, 9. The IRS is not required to complete a section 6020(b) return on the Form 1040. Any document prepared by the IRS "shall be" a return under 26 U.S.C. § 6020(b), so long as it "identifies the taxpayer by name and taxpayer identification number, contains sufficient information from which to compute the taxpayer's liabilities, and purports to be a return." 26 CFR § 301.6020-1(b)(2). As noted *supra*, this includes a Form 13496 and the documents appended thereto.

Finally, the plaintiff argues that he has met the particularity requirement of Rule 9 because he has pled "precisely which layered actions [the IRS and DOJ] have taken which resulted in falsification of both their internal and external records concerning Plaintiff, as well as the adverse impact of those actions upon the plaintiff." Opp'n 12. Since the plaintiff's alleged injury is the loss of money, the only misrepresentations that could be actionable are those that could have *caused* him to lose money (*e.g.*, that he did not file a tax return or pay taxes when he did file and/or pay, or that he owed more in taxes than he actually owed). The plaintiff has not even suggested that he does not owe the taxes that were assessed, other than to assert a frivolous

constitutional claim that he is not required to pay taxes at all. This is fatal. *See Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1279 (D.C. Cir. 1994) (affirming dismissal of complaint under Rule 9(b) where Plaintiff failed to "set forth sufficient facts to suggest that [defendant's representations] lacked a reasonable basis[.]").

Conclusion

For the reasons stated in the United States' motion and reply, the United States respectfully requests that the Court dismiss this entire action with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015, I filed the foregoing Reply Memorandum In Support Of Motion To Dismiss with the Clerk of Court using the CM/ECF system, and served it by U.S. mail, postage prepaid, to:

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