In the United States Court of Federal Claims

No. 07-852 T

(Filed March 6, 2009)

UNPUBLISHED

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JANICE and STEVEN OPPENHEIM, *Pro Se*,	*	Tax; Refund Claim; 26 U.S.C. § 6402(a) (2006), *amended by* Pub. L. No. 110-328, 122 Stat. 3570 (2008); 26 U.S.C. § 6159(a) (2006); RCFC 12(b)(6); Whether the Installment Agreement Compromised Defendant's Discretionary Authority under 26 U.S.C. § 6402(a).
Plaintiffs,	*	
v.	*	
THE UNITED STATES,	*	
Defendant.	*	
* * * * * * * * * * * * * * * * * * *	*	

Janice and Steven Oppenheim, North Potomac, MD, *pro se.*

Richard H. Bowles, United States Department of Justice Tax Division, with whom were *Nathan J. Hochman*, Assistant Attorney General, *David Gustafson*, Chief, Court of Federal Claims Section, Washington, D.C., for defendant.

OPINION

Bush, *Judge.*

Before the court is defendant's motion to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC). The motion has been fully briefed. Oral argument was neither requested by the parties nor required by the court. For the reasons set forth herein, defendant's motion to dismiss is granted.

BACKGROUND[1]

The Internal Revenue Service (IRS) is allowed "to enter into written agreements with any taxpayer under which such taxpayer is allowed to make payment on any tax in installment payments if the Secretary determines that such agreement will facilitate full or partial collection of such liability." 26 U.S.C. § 6159(a) (2006). On December 1, 2005, plaintiffs Janice and Steven Oppenheim each signed an Internal Revenue Service Form 433-D (installment agreement). Compl. at 5. The installment agreement reflected that plaintiffs, as of December 31, 2005, had a tax liability in the amount of $77,661.36 for the tax years 1989 and 1990. *Id*. The installment agreement further reflected that plaintiffs had "agreed to pay the federal taxes shown above, PLUS PENALTIES AND INTEREST PROVIDED BY LAW, as follows: $550.00 on 01/15/2006 and $550.00 on the 15 of each month thereafter," with a handwritten notation "(FOR 11 MONTHS)." *Id*. The IRS executed the agreement on December 16, 2005.[2]

The installment agreement provides that "All terms of this agreement are provided on the back of this page. Please review them thoroughly." Compl. at 5. Immediately following that instruction, the agreement provides: "Please initial this box after you've reviewed all terms and any additional conditions." *Id*. In the box next to that request, plaintiffs inserted their handwritten initials. *Id*. In the section entitled "Additional Conditions/Terms" that was completed by the IRS, is the following statement: "The collection statutes on both years will expire in approximately 11 months . . . . No extension waiver will be secured." *Id*.

As previously stated, the terms of the installment agreement are located on the back of IRS Form 433-D. Compl. at 9. Taxpayers are instructed to "[r]eview the terms of [the] agreement" prior to signing it. *Id*. Taxpayers are also advised that "[b]y completing and submitting this agreement, you (taxpayer) agree to the following terms." *Id*. Those terms, in pertinent part, are as follows:

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[1]/ The facts recited here are taken from plaintiffs' filings and are undisputed for the purposes of resolving defendant's motion, unless otherwise indicated.

[2] / Because the IRS executed the installment agreement on December 16, 2005, the eleven month period expired on November 16, 2006.

> This agreement will remain in effect until your liabilities *including penalties and interest*[] are pa[id] in full, the statutory period for collection has expired, or the agreement is terminated.
>
> . . . .
>
> This agreement is based on your current financial condition. We may modify or terminate the agreement if our information shows that your ability to pay has significantly changed. You must provide updated financial information when requested.
>
> While this agreement is in effect, you must file all federal tax returns and pay any (*federal*) taxes you owe on time.
>
> We will apply your federal tax refunds or overpayments (*if any*) to the amount you owe until it is fully paid.
>
> . . . .
>
> We can terminate your installment agreement if:
>
> > You do not make monthly installment payments as agreed.
> >
> > You do not pay any other federal tax debt when due.
> >
> > You do not provide financial information when requested.
>
> If we terminate your agreement, we may collect the entire amount you owe by levy on your income, bank accounts or other assets, or by seizing your property.
>
> We may terminate this agreement at any time if we find that collection of the tax is in jeopardy.

Id.

According to plaintiffs' understanding of the agreement, the eleven payments of $550, which totaled $6,050.00, would satisfy the Oppenheims' total tax debt. Furthermore, plaintiffs claim that they were "told by the settlement

officer that the $550.00 per month would satisfy all outstanding liabilities for the tax periods 1989 & 1990." Compl. at 2. However, by letter of March 20, 2006, the IRS informed plaintiffs that a tax overpayment by the Oppenheims in the amount of $6,146.00 for the tax year 2005 had been applied as a credit to their unpaid balance for tax year 1990.[3] *Id*. at 4. The letter further advised plaintiffs that they had two years within which to file a claim for refund. *Id*.

Soon thereafter, plaintiffs filed a claim for a $6,146.00 refund for their 2005 tax year. Compl. at 6. That claim was denied by the IRS on March 30, 2007. Plaintiffs then appealed the claim disallowance, and the IRS Appeals Office denied plaintiffs' appeal on July 11, 2007, stating that:

> My review of the facts shows that you entered into a partial payment installment agreement whereby the settlement officer computed monthly payments that you should make for approximately 11 months until the collection statute expired. In addition to accepting the terms of the monthly payment, the agreement did contain other conditions.
>
> Please refer to page two of the installment agreement (I have enclosed a copy) where the terms of accepting the installment agreement are listed. Listed among those terms is the statement, "We will apply your federal tax refunds or overpayments to the amount you owe."
>
> Your 2005 refund was available before the collection statute expired. Your 11 monthly payments did not full[y] pay the balance due so the government had the right to apply the 2005 refund to the 1990 tax prior to when the collection statute expired. This is the reason your 2005 refund was applied to the taxes due and it is in

[3]/ Plaintiffs use both $6,146.00 and $6,140.00 to refer to the amount of this refund; the six dollar discrepancy is immaterial.

accordance with the installment agreement terms.

Compl. at 6.

By letter dated July 13, 2007, plaintiffs responded to the IRS Appeals Office, disagreeing with the government's assessment of the facts. Compl. at 7. Plaintiffs insisted that they had fully complied with the terms of the installment agreement, and that the agreement called for a final settlement of their 1989 and 1990 tax liability in the amount of $6,050.00, not approximately $12,190.00:

> The agreement that I made with the appeals office to settle the liabilities for 1989 & 1990 was $550.00 each month for 11 months (Total sum $6,050.00). This agreement was fully complied with. The 2005 tax refund that you confiscated was for the years 1989 & 1990. In effect, the IRS received $12,190.00 for the liabilities owed for 1989 & 1990 (Tax Refund $6140.00 + $6,050.00 as per agreement)
>
> . . . .
>
> The supplement page that you sent me, states that the tax refund can be taken only if their [sic] was non-compliance with terms of the agreement. Also, any funds taken by the IRS must not exceed the amount the IRS is owed (Terms of Agreement).

Id. In the final IRS rejection letter, dated July 25, 2007, the Appeals Officer stated that "[b]ased on the information submitted, there is no basis to allow any part of your claim." *Id*. at 8. Additionally, the IRS letter reminded plaintiffs that the two-year period for filing a suit for refund had begun to run on the date of the claim disallowance letter (March 30, 2007), and had not been extended by the IRS Appeals Officer's reconsideration of the claim. *Id*.

Based on the foregoing, plaintiffs timely filed suit in this court on December 3, 2007, seeking a tax refund in the amount of $6,146.00 plus interest. Compl. at

2. In the complaint, plaintiffs assert that the IRS' application of the 2005 refund in the amount of $6,146.00 to plaintiffs' 1990 tax liability violated the terms of the installment agreement:

> The $6146.00 that was taken on March 20, 2006 violates the terms of the written agreement between my wife and I (Taxpayers). Under the "Instructions to Taxpayer," the regulations are very specific. If their [sic] was non-compliance with the terms of an agreement, then the IRS has the statutory right to confiscate any refunds, execute levy on various assets and income. The payments that I made each month were on a timely basis (which the appeals office agreed). . . . The written agreement calls for a total payment of $6,050.00 and not $12,190.00. Therefore, I am seeking the overpayment that the IRS took above the written agreement which amounts to $6,146.00. I am seeking interest on the $6,146.00. The IRS statute states that the interest will accrue from the date that the IRS took the funds.

Compl. at 2. Thus, plaintiffs assert that the installment agreement fully resolved their outstanding tax liability for 1989 and 1990, and did not permit the IRS to obtain further payments toward the $77,661.36 they owed.

DISCUSSION

I. *Pro Se* Litigants

Pro se plaintiffs are entitled to a liberal construction of their pleadings. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (requiring that allegations contained in a *pro se* complaint be held to "less stringent standards than formal pleadings drafted by lawyers"). In that regard, the court has examined the complaint and briefs thoroughly and has attempted to discern all of plaintiffs' legal arguments. However, while "[t]he fact that [a plaintiff] acted *pro se* in the drafting of his complaint may explain its ambiguities, . . . it does not excuse its failures, if such

there be." *Henke v. United States*, 60 F.3d 795, 799 (Fed. Cir. 1995). In other words, the leniency afforded to a *pro se* litigant with respect to mere formalities does not relieve the burden to meet jurisdictional requirements. *Kelley v. Sec'y, U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987); *Biddulph v. United States*, 74 Fed. Cl. 765, 767 (2006).

II. Jurisdiction

Pursuant to the Tucker Act, the United States Court of Federal Claims has jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2006). The Tucker Act, however, "does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists." *United States v. Testan*, 424 U.S. 392, 398 (1976) (citation omitted). A plaintiff coming before the United States Court of Federal Claims, therefore, must also identify a separate provision of law conferring a substantive right for money damages against the United States. *Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004).

In the present case, plaintiffs seek a tax refund for the 2005 tax year. The Court of Federal Claims has jurisdiction over tax refund claims pursuant to 26 U.S.C. § 7422 (2006), 28 U.S.C. § 1346(a)(1) (2006) and 28 U.S.C. § 1491(a)(1). *Foreman v. United States*, 60 F.3d 1559, 1562 (Fed. Cir. 1995). Accordingly, the court has jurisdiction over this suit.

III. Motion Filed under RCFC 12(b)(6)

Defendant asks that plaintiffs' complaint be dismissed for failure to state a claim upon which relief can be granted, a request which is governed by RCFC 12(b)(6). *White & Case LLP v. United States*, 67 Fed. Cl. 164, 168 (2005). It is well-settled that a complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v.*

United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). When considering a motion to dismiss under this rule, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982). The court must inquire whether the complaint meets the "plausibility standard" recently described by the United States Supreme Court, *i.e.*, whether it adequately states a claim and provides a "showing [of] any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1968-69 (2007).

IV. Defendant Had the Discretionary Authority under 26 U.S.C. § 6402(a) to Credit the 2005 Tax Overpayment to Plaintiffs' 1990 Tax Liability

The Oppenheims insist that defendant violated the terms of the installment agreement when the IRS applied their 2005 tax overpayment in the amount of $6,146.00 to plaintiffs' 1990 tax liability. Pls.' Resp. at 1. The Oppenheims argue that the terms of the installment agreement were clear, and defendant's argument that plaintiffs owed a total of $77,661.36 is "flawed because the IRS agreed that a payment of $6,050.00 is to be paid to settle the outstanding liabilities of 1989 and 1990." *Id*. Plaintiffs further assert that "[t]he amount that was owed $6,050.00 was fully paid. Therefore, the IRS does not have the legal authority to confiscate any refunds." *Id*. Plaintiffs conclude that the IRS "violat[ed] their own regulations regarding the above matter." *Id*.

Defendant, on the other hand, argues that the IRS has the discretionary authority under 26 U.S.C. § 6402(a) (2006), *amended by* Pub. L. No. 110-328, 122 Stat. 3570 (2008), to credit a tax overpayment to an existing tax liability. Defendant asserts that "[i]f an overpayment exists, if a liability is in respect of an internal revenue tax, if the overpayment and liability are each on the part of the same person, and if the period of limitations has not lapsed, the plain language of the statute allows the IRS to credit, rather than refund, a tax overpayment." Def.'s Mot. at 7. Defendant contends that the installment agreement between the IRS and the Oppenheims did not obviate defendant's discretionary authority under the relevant statute, but rather explicitly stated that the IRS could exercise that discretion. Defendant thus concludes that it had the legal authority to apply the $6,146.00 to plaintiffs' 1990 tax liability, and that the installment agreement was

unambiguous on this point. *See infra.*

The court agrees with defendant that 26 U.S.C.§ 6402(a) gives the IRS discretion to apply a tax refund to a taxpayer's liability. Section 6402(a) in pertinent part provides:

> (a) General rule.--In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), (e), and (f), refund any balance to such person.

26 U.S.C. § 6402(a). Section 6402(a) clearly states that the IRS "*may* credit the amount of such overpayment . . . *against any liability*." *Id.* (emphasis added); *see Georgeff v. United States*, 67 Fed. Cl. 598, 608 (2005) ("The statute, 26 U.S.C. § 6402, gives the IRS the discretionary authority to credit tax overpayments to any tax liability."); *see also In re Ryan*, 64 F.3d 1516, 1523 (11th Cir. 1995) (holding that § 6402(a) gives the IRS the discretion to apply overpayments to any tax liability); *Pettibone Corp. v. United States*, 34 F.3d 536, 538 (7th Cir. 1994) (stating that the discretion lies with the Commissioner as to whether to apply overpayments to tax liabilities or refund them to the taxpayer); *Estate of Bender v. Comm'r*, 827 F.2d 884, 887 (3d Cir. 1987). The discretionary power of the IRS under this provision is such that even if a taxpayer asks the IRS to apply an overpayment to his tax liability, the IRS is not obligated to do so. *See Georgeff*, 67 Fed. Cl. at 608 (stating that the IRS has no obligation to apply any taxpayer's overpayment to a pre-existing outstanding liability upon the taxpayer's request).

The statute and case law are clear that the IRS has discretion to credit an overpayment to any pre-existing tax liability of a taxpayer. Thus, the IRS, in the present case, did not abuse its discretion, or violate its regulations when it applied the 2005 overpayment to plaintiffs' 1990 tax liability. Furthermore, the IRS did not limit its ability to exercise its discretion under § 6402(a) by entering into an installment agreement with plaintiffs. *See infra*.

V. The Installment Agreement Did Not Compromise Defendant's Discretionary Authority under 26 U.S.C. § 6402(a)

The Oppenheims contend that the written installment agreement was a reflection of the IRS' acknowledgment that plaintiffs' payment of $6,050.00 would settle their outstanding tax liability in the total amount of $77,661.36. Plaintiffs contend that they paid the required $6,050.00, as instructed by the installment agreement, and thus no longer owed the original tax liability of $77,661.36. Plaintiffs further assert that their argument is supported by an IRS representative who told them "that the $550 per month would satisfy all outstanding liabilities for the tax periods 1989 & 1990." Compl. at 2. The Oppenhiems insist that the installment agreement called for a settlement of $6,050.00, and the IRS' taking of an additional $6,146.00 was in violation of the terms of that agreement.

Defendant argues, on the other hand, that the Oppenheims misunderstand the terms of the installment agreement. The installment agreement was not a settlement agreement designed to waive plaintiffs' tax liability of $77, 661.36. Defendant states that "[t]he installment agreement plainly identifies 'the amount owed as of 12/31/05' to be '$77, 661.36.'" Def.'s Mot. at 8. Defendant correctly asserts that "the terms explicitly provided that the installment agreement did not impinge upon the discretion of the IRS under 26 U.S.C. § 6402(a) to apply overpayments of other taxes to the tax obligation identified by the installment agreement ('We *will* apply your federal tax refunds or overpayments (*if any*) to the amount you owe until it is fully paid')." *Id*. In short, defendant accurately points out the fact that the plain language of the installment agreement explicitly provided that:

> The amount owed was $77,661.36. Plaintiffs would pay $550 per month for eleven months toward that sum. The government would also apply plaintiffs' federal tax refunds or overpayments to the amount owed until fully paid.

Id. at 11.

The government, citing to *Marathon Oil Co. v. United States*, 42 Fed. Cl. 267, 274 (1998), *aff'd*, 215 F.3d 1343 (Fed. Cir. 1999) (table), asserts that the installment agreement should be construed according to ordinary contract law

principles. However, the court is reluctant to accord much weight to that particular case inasmuch as the agreement in dispute in *Marathon Oil* was not an installment agreement, but rather a closing agreement, which contains different provisions and is set forth under a completely separate chapter of the controlling statute. *See* 26 U.S.C. § 7121 (2006). More on point is *United States v. Ullman*, No. 01-cv-00272, 2002 WL 987998 (E.D. Pa. May 8, 2002), which actually involved a contested installment agreement. Therein the district court stated: "In contrast to the legal concept of a binding contract, which requires consideration, an installment agreement operates pursuant to statute." *Ullman*, 2002 WL 987998, at *4 (citing 26 U.S.C. § 6159). The district court in *Ullman* found that under installment agreements, no legal contract exists for which a breach of its terms would give rise to a cause of action, because a lack of consideration on the part of the taxpayer prevents installment agreements from being treated as such. *Id.*

Despite the holding in *Ullman* which appears to cast doubt on the propriety of characterizing installment agreements as contracts or as being controlled by those principles, the court notes that it matters little in this scenario whether the installment agreement here is analyzed pursuant to contract law principles or not, since the result remains the same. The determinative issue in this case is the plain language of the agreement which controls the outcome. Whether examining the installment agreement under the microscope of contract law principles or simply holding the parties to the express terms of an agreement founded upon the provisions of a statute or regulation, the plain language of the agreement must control in a case where the terms of that agreement are clear. *See also* 26 C. F. R. § 301.6159-1 (granting the IRS the authority to take actions to protect the interests of the government, including any actions enumerated in the installment agreement).

While the court sympathizes with the Oppenheims' plight, the court finds it impossible, in light of the plain language of the installment agreement, to accept plaintiffs' interpretation of the agreement. The installment agreement provided for a fixed schedule of payments to reduce plaintiffs' tax debt while simultaneously allowing the IRS the right to capture any federal tax refund or overpayment otherwise due to the taxpayer to also pay down the debt. The provisions setting forth these conditions were explicit and plaintiffs cannot now be heard to disavow the terms to which they agreed. To the extent that plaintiffs considered the installment agreement to be a "settlement," it was one which also accorded the IRS the option of seizing refunds or overpayments otherwise due plaintiffs within the

applicable period of limitations.

Furthermore, the court finds plaintiffs' reliance on the oral advice of an IRS representative unpersuasive. To the extent that plaintiffs are attempting to assert a claim of estoppel against the government, plaintiffs have failed to allege facts sufficient to support that claim. *See Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 61 (1984) (stating that the plaintiff bears a substantial burden to establish estoppel against the government). The IRS representative may have made the representation that the $550 per month would settle the total liability of $77,661.36, but plaintiffs have presented no written evidence in this case to support that statement or the context in which it may have been made. Even assuming this bare allegation of fact to be true, an oral representation from an IRS agent is insufficient to estop the government from enforcing the written terms of the installment agreement executed by the IRS and plaintiffs, which clearly contradict that alleged representation. *See Henry v. United States*, 870 F.2d 634, 637 (Fed. Cir. 1989) (noting that "reasonable reliance [is] one of the essential traditional elements of estoppel" and that a plaintiff's "alleged reliance on advice given to him by the IRS is undermined to the extent that the advice was oral"); *see also First Alabama Bank, N.A. v. United States*, 981 F.2d 1226, 1228-29 (11th Cir. 1993) (finding no reasonable reliance on an IRS agent's oral representation when that representation contradicted a written notice the taxpayers had received, and also contradicted the language of the relevant statute); *Bunce v. United States*, 28 Fed. Cl. 500, 506 (1993) ("One requisite of a successful estoppel claim is that the party seeking estoppel protection have reasonably relied to its detriment on the adversary's conduct.") (citations omitted). Consequently, the court cannot accord any weight to the alleged IRS oral representation.

In the court's view, the installment agreement expressly provides that plaintiffs, as of December 31, 2005, owed $77,661.36 in tax liability for the 1989 and 1990 tax years. Compl. at 5. The installment agreement, executed on December 16, 2005, further provides that plaintiffs agreed to make eleven monthly payments of $550 on the fifteenth of each month, beginning January 15, 2006, towards the $77,661.36. *Id*. at 9. Most importantly, the installment agreement explicitly states that "[w]e will apply your federal tax refunds or overpayments (*if any*) to the amount you owe until it is fully paid," which, in simple terms, means that the IRS had the authority to apply any refund or overpayment to any outstanding tax liability covered by the agreement.

Based on the foregoing, plaintiffs' claim is unsubstantiated. Here, the Oppenheims made eleven monthly payments pursuant to the installment agreement which defendant treated as payments towards their 1989 and 1990 tax liability. Plaintiffs then filed a 2005 tax return that showed an overpayment of $6,146.00. Defendant, acting pursuant to the installment agreement, and in compliance with § 6402(a), also applied the overpayment of $6,146.00 to plaintiffs' outstanding liability for the 1990 tax year. The installment agreement did not compromise defendant's discretionary authority to capture federal tax refunds or overpayments under § 6402(a), and, in fact, was consistent with the statutory requirements of that section. Accordingly, the court finds that defendant complied with the terms of the installment agreement, as well as the requirements of § 6402(a).

CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that

(1) Defendant's Motion to Dismiss, filed May 16, 2008, is **GRANTED**;

(2) The Clerk's Office is directed to **ENTER** final judgment in favor of defendant **DISMISSING** plaintiffs' complaint, with prejudice; and

(3) Each party shall bear its own costs.

s/Lynn J. Bush
LYNN J. BUSH
Judge