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11 IN THE UNITED STATES DISTRICT COURT
12 DISTRICT OF ARIZONA
13

14 CHRISTOPHER D. MOORE-BACKMAN,)
15 Plaintiff,)
16 v.)
17 UNITED STATES OF AMERICA)
18 Defendant.)
19

Case No. 4:09-cv-00397-TUC-BPV

**UNITED STATES' MOTION TO
DISMISS COMPLAINT**

20 The United States of America, by and through its undersigned counsel, hereby submits this
21 Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.
22 The Internal Revenue Service has already refunded to Moore-Backman the portion of his 2007
23 federal income taxes to which he is entitled. However, Moore-Backman's complaint alleges that he
24 is entitled to a full refund based on the single argument that the Government's collection of federal
25 taxes from him violates the Religious Freedom Restoration Act of 1993. (Dkt. #1, ¶¶1, 39-46.) The
26 federal courts have repeatedly rejected this argument as frivolous. E.g., Jenkins v. Comm'r., 483
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1 F.3d 90, 92 (2d Cir. 2007). In addition to the refund, Moore-Backman also claims that the
2 Government's violation of the Religious Freedom Restoration Act of 1993 entitles him to injunctive
3 relief in the form of an order directing the Internal Revenue Service to apply his taxes solely to non-
4 military programs. (Dkt. #1, p. 17.) However, such relief is expressly barred by the Declaratory
5 Judgment Act (28 U.S.C. § 2201) and the Anti-Injunction Act (26 U.S.C. § 7421). For these reasons,
6 and as discussed more fully herein, this Court should dismiss the complaint with prejudice.

7 LEGAL STANDARDS

8 In order to establish subject matter jurisdiction in an action against the United States, there
9 must be: (1) "statutory authority vesting a district court with subject matter jurisdiction"; and (2) "a
10 waiver of sovereign immunity." Alvarado v. Table Mountain Rancheria, 509 F.3d 1008, 1016 (9th
11 Cir. 2007); accord Dunn & Black P.S. v. United States, 492 F.3d 1084, 1087 n.2 (9th Cir. 1007)
12 ("Sovereign immunity and subject matter jurisdiction are distinct doctrines."). In other words, even
13 where statutory authority vests the district courts with subject matter jurisdiction, the United States
14 cannot be sued unless it has expressly consented to be sued. Dunn & Black P.S., 492 F.3d at
15 1087-88. Waivers of sovereign immunity cannot be implied, must be unequivocally expressed, and
16 is to be strictly construed in favor of the sovereign. Id. at 1088. The burden is on the party bringing
17 the action against the United States to establish both elements of subject matter jurisdiction, and
18 where it has failed to do so "dismissal of the action is required." See id.

19 A complaint may also be dismissed if it fails to state a claim upon which relief can be granted.
20 Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1101 (9th Cir. 1999). When
21 considering such a motion, all allegations in the complaint are to be viewed in the light most
22 favorable to the non-moving party and all material allegations must be accepted as true. Id.
23 Dismissal pursuant to this rule is appropriate only if it is clear that no relief could be granted under
24 any set of facts that could be proven consistent with the allegations set forth in the complaint. Id.
25 Further, "[a] complaint may be dismissed without leave to amend only when it is clear that the
26 complaint cannot be saved by further amendment." Id. (internal quotation omitted).

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ARGUMENT

A. **The complaint should be dismissed because Moore-Backman has received the refund he is entitled to from his 2007 federal income taxes and cannot challenge the Internal Revenue Service's right to off-set.**

The complaint alleges that Moore-Backman filed his 2007 federal income tax return stating that he was entitled to a refund in the amount of \$3,255.00. (Dkt. #1, ¶1.) It also alleges that the IRS applied \$1,509.69 of that refund amount to offset Moore-Backman's liabilities for the tax year 2001, in the amount of \$1,026.04, and for the tax year 2004, in the amount of \$483.65. (Dkt. #1, ¶1.) The balance, \$1,745.31, was refunded to Moore-Backman. (See Dkt. #1, ¶1.) The complaint seeks a refund of the amounts from Moore-Backman's 2007 overpayment that the IRS properly applied to his outstanding federal tax liabilities for the years 2001 and 2004.

The IRS's right to set off derives from section 6402(a), which permits the IRS to set off any existing tax deficiencies against any tax refunds due the taxpayer. Section 6402(a) provides:

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). The Treasury Regulations reiterate this authority:

[T]he Internal Revenue Service, within the applicable period of limitations, may credit any overpayment of individual . . . against (i) First, any outstanding liability for any tax (or for any interest, additional amount, additions to the tax, or assessable penalty) owed by the taxpayer making the overpayment.

Treas. Reg. § 301.6402-3(a)(6). Effectively, § 6402(a) and the Treasury Regulations provide that a party is entitled to a tax refund only of the amount which exceeds any outstanding tax liabilities. In re Davis, 889 F.2d 658, 661 (5th Cir.1989); Richmond v. Comm'r, No. 7438-04L, 2005 WL 2560805, at *6 (U.S. Tax Ct. Oct. 12, 2005) ("It is well settled that the IRS need only refund, or apply to the taxpayer's estimated tax, that portion of the overpayment that exceeds the taxpayer's "outstanding liability for any tax.").

Moore-Backman contends that the IRS cannot apply the overpayment of his voluntary 2007 estimated taxes to his outstanding 2001 and 2004 tax liabilities because on his 2007 return he

1 directed that the overpayment should be refunded. This argument fails.

2 When a taxpayer makes voluntary payments to the IRS, he or she has a right to direct the
3 application of those payments to whatever type of liability he chooses. Wood v. United States, 808
4 F.2d 411, 416 (5th Cir. 1987); Muntwyler v. United States, 703 F.2d 1030, 1032 (7th Cir. 1983);
5 O'Dell v. United States, 326 F.2d 451, 456 (10th Cir. 1964). Under the voluntary payment rule,
6 when a taxpayer who has outstanding tax liabilities voluntarily makes a payment, the IRS usually will
7 honor a taxpayer's request as to how to apply that payment. In re Ryan, 64 F.3d 1516, 1522 (11th Cir.
8 1995). However, the Treasury regulations promulgated under section 6402(a) demonstrate that the
9 IRS does not apply the voluntary payment rule to overpayments.

10 The regulations do provide that a taxpayer can instruct the IRS to credit his overpayment
11 against the estimated tax for the taxable year immediately succeeding the overpayment. See Treas.
12 Reg. § 301.6402-3(a)(5). However, the regulations mirror the statute and authorize the IRS to
13 override that election and apply the overpayment against "any outstanding liability for any tax." See
14 Treas. Reg. § 301.6402-3(a)(6)(i); accord N. States Power Co. v. United States, 73 F.3d 764, 767 (8th
15 Cir. 1996) ("[Section 6402], plainly gives the IRS the discretion to apply overpayments to any tax
16 liability"); Pettibone Corp. v. United States, 34 F.3d 536, 538 (7th Cir. 1994) (stating that section
17 6402(a) "leaves to the Commissioner's discretion whether to apply overpayments to delinquencies
18 or to refund them to the taxpayer"); Kalb v. United States, 505 F.2d 506, 509 (2d Cir. 1974)
19 (rejecting the argument that because tax overpayment was voluntary, IRS was bound to comply with
20 the taxpayer's direction about how to apply that payment; section 6402(a) "clearly gives the IRS
21 discretion to apply a refund to 'any liability' of the taxpayer"); United States v. Birkenstock, No. 86-
22 0040, 1990 WL 71383, at *2 (E.D. Wis. April 17, 1990) ("Thus, although the I.R.S. need not use a
23 refund to offset tax liability, the taxpayer has no choice in the matter. . . . [Taxpayer] had no choice
24 as to the ultimate disposition of his [] refund. Under the law, the option was within the sole
25 discretion of the I.R.S. and it chose to reduce the [taxpayer]'s tax liability.").

26 Clearly, Moore-Backman's right to designate payments does not extend to overpayments. The
27 Internal Revenue Service's application of his 2007 overpayment to his 2001 and 2004 liabilities falls
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1 within the Secretary's authority to credit overpayments to any liability for any tax year and was,
2 therefore, proper. See Judd v. Comm'r, No. 873-04S, 2005 WL 1163984, at *4 (U.S. Tax Ct. May
3 18, 2005). Accordingly, because Moore-Backman cannot challenge the Secretary's exercise of his
4 discretionary authority under § 6402(a), his complaint for refund should be dismissed for failure to
5 state a claim under Fed. R. Civ. P. 12(b)(6).

6 **B. Alternatively, the single basis on which Moore-Backman alleges he is entitled to**
7 **a file refund of his 2007 federal income taxes, the Religious Freedom Restoration**
8 **Act, does not entitle him to relief and, moreover, the relief he seeks for this**
9 **violation is barred.**

10 Under the Religious Freedom Restoration Act ("RFRA") the federal government may not
11 "substantially burden a person's exercise of religion even if the burden results from a rule of general
12 applicability," except where the burden "is in furtherance of a compelling governmental interest" and
13 "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C.
14 § 2000bb-1. The complaint alleges that Moore-Backman is entitled to a refund of his federal income
15 taxes under RFRA alleging that the United States has not satisfied the "compelling governmental
16 interest" nor the "least restrictive means" criteria articulated in the Act. See 42 U.S.C. §2000bb-1(b).
17 This argument is without merit.

18 The federal courts have repeatedly rejected claims for refund of federal taxes by taxpayers
19 under the RFRA. See Jenkins, 483 F.3d at 92 ("It is similarly well settled that RFRA does not afford
20 a right to avoid payment of taxes for religious reasons.") (citing Browne v. United States, 176 F.3d
21 25, 26 (2d Cir.1999) (rejecting RFRA claim on the ground that "voluntary compliance is the least
22 restrictive means by which the IRS furthers the compelling governmental interest in uniform,
23 mandatory participation in the federal income tax system"); accord Adams v. Comm'r, 170 F.3d 173,
24 176 (3d Cir.1999). Further, there are strong policy reasons supporting these holdings. As one court
25 aptly noted:

26 Undoubtedly, many Americans disagree with some discrete potential use of their tax
27 monies. Allowing individuals like the plaintiffs to withhold a portion of their due
28 taxes would encourage chaos in that every individual with an objection to a particular
governmental expenditure would be able to unilaterally impose additional,
time-consuming administrative burdens on the IRS. Furthermore, acceptance of the

1 plaintiffs' arguments would encourage more governmental involvement in religious
2 matters in that the IRS would be required to assess the genuineness of each tax
3 protester's religious beliefs. Finally, it is difficult to imagine a means of compliance
with the tax laws which is less restrictive than the voluntary compliance to which the
plaintiffs object.

4 Packard v. United States, 7 F.Supp.2d 143, 147 (D. Conn. 1998) (internal citations omitted).
5 Accordingly, Moore-Backman's complaint for refund must be dismissed for failure to state a claim
6 under Fed. R. Civ. P. 12(b)(6) because it is clear that no relief could be granted under any set of facts
7 that could be proven consistent with its allegations. See Big Bear Lodging Ass'n, 182 F.3d at 1101.

8 Moreover, Moore-Backman's requested relief under the Religious Freedom Restoration Act
9 of 1993 is barred. The complaint "demands judgment against defendant UNITED STATES OF
10 AMERICA . . . directing defendant to accommodate plaintiff's practice of religion and conscience
11 by applying his taxes solely to non-military purposes." (Dkt. #1, p. 17.) In effect, this is a request
12 for injunctive or declaratory relief.

13 While the Declaratory Judgment Act permits declaratory judgments as a remedy in certain
14 civil actions, it specifically exempts from its reach matters involving federal taxes. 28 U.S.C. § 2201.
15 The Declaratory Judgment Act carves out a single exception for cases brought pursuant to 26 U.S.C.
16 § 7428, which allows religious, charitable or scientific organizations to seek a determination of their
17 tax-exempt status under 26 U.S.C. § 501(c)(3). This exception does not apply because Moore-
18 Backman is not such an organization, nor does he allege that he is. Thus, to the extent that his
19 complaint seeks declaratory relief, such a claim is barred.

20 The Anti-Injunction Act, subject to certain exceptions, prohibits any suit to restrain the
21 collection of taxes. 26 U.S.C. § 7421. "If a taxpayer fails to establish that his suit falls within one
22 of the statutory or judicially created exceptions to the [Anti-Injunction] Act, the district court lacks
23 subject matter jurisdiction and must dismiss the complaint." Jensen v. IRS, 835 F.2d 196, 198 (9th
24 Cir. 1987). None of the statutory exceptions to the Anti-Injunction Act apply to this case, nor has
25 Moore-Backman alleged that they do. See 26 U.S.C. § 7421.

26 Likewise, the single, narrow judicial exception to the Anti-Injunction Act, which requires a
27 taxpayer to demonstrate that the Government's claim is "baseless" and that there is "no adequate
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1 remedy at law,” Church of Scientology of Cal. v. United States, 920 F.2d 1481, 1486 (9th Cir. 1990)
2 (citing Enochs v. Williams Packing & Navigation Co., Inc., 370 U.S. 1, 7 (1962)), does not apply,
3 nor does the complaint allege that it does. Even if it were alleged, Moore-Backman could not meet
4 the Enochs exception because the courts have routinely held that “taxpayers have no constitutional
5 right to refuse to pay federal taxes because of their anti-war sentiments.” E.g., Jenney v. United
6 States, 755 F.2d 1384, 1387 (9th Cir. 1985). Thus, to the extent that Moore-Backman seeks
7 injunctive relief allocating his federal tax payments to non-military programs, such a claim is barred.

8 Accordingly, because the complaint does not identify a waiver of sovereign immunity or the
9 statutory authority vesting this court with subject matter jurisdiction, the complaint’s request for
10 declaratory or injunctive relief must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). See Alvarado,
11 509 F.3d at 1016.

12 CONCLUSION

13 For the foregoing reasons, the United States respectfully requests that this Court dismiss the
14 complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can
15 be granted pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), respectively. The United States also
16 requests that this Court grant any other relief to which it may be entitled.

17
18 DATED this 29th day of September, 2009.

19
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21
22 By: /s Caroline A. Newman
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Case No. 4:09-cv-00397-TUC-BPV

CERTIFICATE OF SERVICE

20
21 I HEREBY CERTIFY that service of the foregoing **UNITED STATES' MOTION TO DISMISS**
22 has been made this 29th day of September, 2009, by filing electronic copies using the Court's
23 CM/ECF system and by placing a true and correct copy thereof in the United States Mail addressed
24 to:

25 ///
26 ///
27

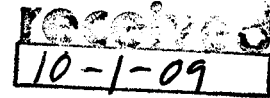
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Motions4:09-cv-00397-RCC Moore-Backman v. USA

CASREF, STD



U.S. District Court

DISTRICT OF ARIZONA

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4537d7012b0f54b4421d225e085e38233b7c1a94762729c16d44b6bef01b5]]