

WAGENET v. U.S., 104 AFTR 2d 2009-7804, Code Sec(s) 6532; 7422, (DC CA), 09/14/2009

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David J. WAGENET, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT.

Case Information:

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Code Sec(s):	6532; 7422
Court Name:	U.S. District Court, Central Dist. of California,
Docket No.:	No. SACV 08-00142 AG (ANx),
Date Decided:	09/14/2009.
Disposition:	Decision for Govt.
Cites:	, 2009-2 USTC P 50,766.

HEADNOTE

1. Refund actions-jurisdiction-limitations periods on suits. Taxpayer's refund complaint, seeking to recover taxes for which he duly filed administrative claim decades earlier and in respect to which IRS never mailed disallowance notice, was dismissed as untimely: although  **Code Sec. 6532(a)(1)** 's 2-years-from-disallowance period for filing refund suits didn't apply, suit was still barred by  28 USC 2401 (a) 's general 6-year period on any civil suit against govt. Taxpayer's objection that  **Code Sec. 6532** was exclusive/only time limit on filing refund suits was belied by  28 USC 2401 (a) 's plain language, establishing it as catch-all provision/period for filing suits against U.S. Case law to contrary was distinguished and/or otherwise not followed.

Reference(s): ¶ [74,336.504\(33\)](#) ; ¶ [65,325.01\(75\)](#)  **Code Sec. 6532**;  **Code Sec. 7422**

OPINION

Jennifer McGready-Ornelas, Jerome Edelman, Law Office of Jerome Edelman, Tustin, CA, for Plaintiff.

Gavin L. Greene, AUSA - United States Attorney Office, Los Angeles, CA, for Defendant.

United States District Court, C.D. California,

ORDER GRANTING MOTION TO DISMISS

Judge: ANDREW J. GUILFORD, District Judge.

This action involves a taxpayer's suit against the United States seeking the refund of taxes. Defendant United States of America ("Defendant") has filed a motion to dismiss ("Motion") the Complaint filed by Plaintiff David J. Wagenet ("Plaintiff"). After considering all papers and arguments submitted, the Court GRANTS the Motion.

BACKGROUND

The following allegations are taken from Plaintiff's Complaint, and for the purposes of this Motion, the Court assumes them to be true. In the 1980's, the Internal Revenue Service ("IRS") determined that Plaintiff owed unpaid taxes. (Compl.¶ 7.) Around April 1987, the IRS levied Plaintiff's bank account to satisfy the unpaid taxes and took \$2,901.55 from this account. (Compl.¶ 8.) But in March 1988, the IRS performed a re-audit and determined that Plaintiff "was entitled to have [some] of the obligation amount abated." (Compl.¶ 7.)

Plaintiff "duly made a claim for refund of \$15,011 for abatement of taxes and \$2,901.55 for levying his bank account." (Compl.¶ 9.) "Since 1988, [Plaintiff] has sought to have the IRS either reject his claim for refund or ... apply the taxes received to [his] unpaid taxes" for later years. (Compl.¶ 10.) But the IRS failed to act on Plaintiff's request. (Compl.¶ 10.)

In 2008, Plaintiff sued Defendant for a refund of taxes based on these allegations. Defendant now moves to dismiss Plaintiff's claim under Federal Rule of Civil Procedure 12(b)(1), arguing that the Court has no jurisdiction over this case because it is barred by time limits.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a complaint for lack of subject matter jurisdiction. Because federal courts are courts of limited jurisdiction, it is "presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting

jurisdiction." *Vacek v. United States Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir.2006) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (citations omitted)). Dismissal without leave to amend is appropriate only when the Court is satisfied that the deficiencies of the complaint could not possibly be cured by [pg. 2009-7805] amendment. *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir.2003).

ANALYSIS

[1] Defendant argues that this action should be dismissed for multiple reasons. Among these reasons is that Plaintiff's claim is barred by 28 U.S.C. § 2401(a), which provides a time limit for filing actions against the United States. If true, this argument would mean that the Court lacks jurisdiction over this action. Thus, the Court addresses Defendant's Section 2401(a) argument at the outset.

The Court agrees with Defendant that Section 2401(a) bars consideration of this case. But analysis of the parties' arguments is complicated for three reasons. First, the arguments involve the interplay of two separate statutes, Section 2401(a) and 26 U.S.C. § 6532(a)(1). Second, the only case with analogous facts is over fifty years old and was wrongly decided. And third, other cases contain language that seemingly supports a holding contrary to the Court's. The Court's analysis attempts to clarify these issues.

1. SECTION 2401(a) AND SECTION 6532(a)(1)

The parties dispute whether Section 2401(a) bars Plaintiff's action. This provision states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). For reasons that will become apparent, analysis of Defendant's Section 2401(a) argument requires an explanation of the interplay between Section 2401(a) and Section 6532(a)(1).

Section 6532(a)(1) provides a time limit for the filing of certain tax refund actions. It states that a taxpayer's action for a refund

shall [not] be begun before the expiration of 6 months from the date of filing [an administrative claim for a refund] unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance

Though Section 6532(a)(1) forbids suits after two years from the date a notice of disallowance is mailed, it is silent concerning refund actions where there is no notice of disallowance. In this case, no notice of disallowance was mailed to Plaintiff, so Section 6532(a)(1) does not apply.

But this provision acts as more than a time limit. It also establishes that an action for a refund accrues "6 months from the date of filing the [administrative claim]." 26 U.S.C. § 6532(a) (1); *Finkelstein v.*

United States 943 F.Supp. 425, 432 (D.N.J.1996); see also *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir.1999) (holding that a claim accrues when a plaintiff "knows or has reason to know of the injury which is the basis of the action"). Here, the date Plaintiff's claim accrued is crucial because Section 2401(a) bars all civil actions against the United States filed more than six years after they accrue. 28 U.S.C. § 2401(a).


Section 2401(a) places an "outside limit on the period within which *all* suits might be initiated" against the United States. *United States v. A.S. Kreider Co.*, 313 U.S. 443, 448 [25 AFTR 1264], 61 S.Ct. 1007, 85 L.Ed. 1447 (1941) (emphasis added). It bears repeating that Section 2401(a) forbids "every civil action" against the United States "unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). If an action is not filed within this statutory limit, it must be dismissed for a lack of subject matter jurisdiction. *Caton v. United States*, 495 F.2d 635, 637 (9th Cir.1974) ("As a sovereign, the United States is immune from suit save as it consents to be sued. The terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit[, and the] United States has not consented to be sued once the time period prescribed by 28 U.S.C. § 2401 has run.").

Plaintiff's action was filed outside the limits of Section 2401(a). This action accrued six months after Plaintiff filed his administrative claim. Plaintiff alleges he "duly made a claim for a refund," and "[s]ince 1988, [he] has sought to have the IRS either reject his claim [or] apply the taxes received to [Plaintiff's] unpaid taxes [for later years]." (Compl. ¶¶ 9-10.) Thus, although Plaintiff does not specify precisely when he made his administrative claim, it is clear from the complaint that it was made in or before 1988. And therefore, Plaintiff's action for a refund accrued six months after 1988 at the latest. See *TwoRivers*, 174 F.3d at 991. Since that was more than twenty years ago, Section 2401(a) bars this case.

Plaintiff disagrees and argues that Section 6532(a)(1) is the exclusive time limit in cases where the government does not give notice of disallowance. But Section 2401(a) protects against precisely this result.


Section 2401(a) "is the catchall statute of limitations provision" that "applies to all civil actions whether legal, equitable or mixed." *Nesovic v. United States*, 71 F.3d 776, 778 [77 [pg. 2009-7806](#)] AFTR 2d 96-435 [9th Cir.1995]. The words "every civil action" in Section 2401 "must be interpreted to mean what they say." *Id.* "The United States has not consented to be sued once the time period prescribed by 28 U.S.C. § 2401 has run. This Court, then, lacks jurisdiction if plaintiff's claim is barred by that section." *Caton*, 495 F.2d at 637.



The statutory scheme allowing suits for tax refunds is a limited waiver of the federal government's sovereign immunity, and "statutes in derogation of sovereignty are strictly construed in favor of the

sovereign." *Bruno v. United States*,  547 F.2d 71, 74 [39 AFTR 2d 77-573] (8th Cir.1976) (quoting 3 Sands, *Sutherland Statutory Construction* § 70.03, at 302 (1974)). Construing Section 6532(a) (1) and Section 2401(a) in favor of the sovereign, the Court finds that Section 2401(a) applies to refund actions where there has not been a notice of disallowance.

Because Plaintiff's claim against the United States accrued more than six years ago, the Court lacks jurisdiction to hear this case.

2. THE ERRONEOUS RULING IN DETROIT TRUST

Plaintiff cites *Detroit Trust Co. v. United States*,  131 Ct.Cl. 223, 130 [47 AFTR 1040] F.Supp. 815 (Ct.Cl.1955), to support his argument. That case held, in a situation similar to Plaintiff's, that Section 2401(a) did not apply. But *Detroit Trust* was wrongly decided.

Detroit Trust conflicts with Supreme Court precedent. In *United States v. Michel*, the Supreme Court held that permission to sue for a tax refund "did not depend upon the rejection of the claim or upon the giving of the notice."  282 U.S. 656, 658-59 [9 AFTR 990],  51 S.Ct. 284, 75 L.Ed. 598 (1931). Thus, Section 6532(a)(1) acts "merely as a direction to the commissioner to send the notice to [the taxpayer] without making the failure to do so have the effect of enlarging the period for suing as otherwise definitely prescribed." *See id.*





If the holding in *Detroit Trust* were accepted, plaintiffs could sue the United States for a refund hundreds of years after accrual of their claims. Congress obviously did not intend such a result. Section 2401(a) "was intended merely to place an outside limit on the period within which *all* suits might be initiated [against the United States, but] nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions." *A.S. Kreider Co.*, 313 U.S. at 448 (emphasis added).

With Section 6532(a)(1), Congress applied "a different and shorter period of limitation to an individual class of [tax refund] actions." *See id.* Section 2401(a), the "outside limit on the period within which all suits [against the United States] might be initiated," still applies. *See id.*

The Court does not lightly say that another court's holding was incorrect, but the Court cannot escape such a conclusion here, particularly since Supreme Court authority supports this conclusion. *Detroit Trust* was wrongly decided. Section 2401(a) applies to this case.

3. OTHER TAX CASES DISCUSSING SECTION 2401(a)

Though Plaintiff's argument relies almost exclusively on *Detroit Trust*, Plaintiff could have found some additional support in other cases concerning Section 2401(a). Some courts have held in different

situations that Section 2401(a) "does not apply to actions for tax refunds." *Bruno v. United States*,  547 F.2d 71, 74 [39 AFTR 2d 77-573] (8th Cir.1976); *Hampton v. United States*,  206 Ct.Cl. 422, 436 [35 AFTR 2d 75-1033],  513 F.2d 1234 (Ct.Cl.1975); *Phoenix State Bank & Trust Co. v. Bitgood*,  28 F.Supp. 899, 900 [23 AFTR 670] (D.Conn.1939). At first glance, the language in these cases seems to support the *Detroit Trust* holding and Plaintiff's position. But these cases are distinguishable, and their language is inapplicable here. To avoid confusion, the Court takes the opportunity to discuss these cases and finds that they cannot save Plaintiff's claim.

Bruno, *Hampton*, and *Phoenix State Bank* each involved *plaintiffs* arguing Section 2401(a) *allowed* refund actions against the United States for six years after accrual despite the existence of other statutes with shorter limitations periods. The courts disagreed and held that Section 2401(a) must yield to the specific language in the other sections. The courts construed the applicable statutes strictly in favor of the sovereign, and found that the shorter, more specific limitations barred the plaintiffs' actions. *See, e.g., Bruno*, 547 F.2d at 74.

It's a different case where no shorter statute of limitations applies. Plaintiff argues that the shorter, specific limitations period in Section 6532(a)(1) removes the longer, general limits in Section 2401(a). But construing these statutes strictly in favor of the sovereign, this cannot be the case. Section 6532(a)(1) does not purport to be the exclusive time limit for tax refund actions. It merely established a shorter limit in cases meeting certain criteria. Where those criteria are not met, Section 2401(a) remains. *See A.S. Kreider Co.*, 313 U.S. at 448. [\[pg. 2009-7807\]](#)

DISPOSITION

The Court finds that it lacks jurisdiction over Plaintiff's claim. Thus, Defendant's Motion is GRANTED WITH PREJUDICE.

IT IS SO ORDERED.