

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE BANK OF NORTHERN MICHIGAN,

Plaintiff,

CASE NO. 1:11-CV-610

v.

HON. ROBERT J. JONKER

STRAITSLAND CORPORATION – (d/b/a,
Bob’s Restaurant and d/b/a Christopher’s
Restaurant); RANDALL S. SAGANTE,
UNITED STATES OF AMERICA – IRS, and
MICHIGAN DEPARTMENT OF TREASURY,

Defendants.

_____ /

ORDER

This matter is before the Court on Plaintiff’s Motion to Reopen the case given lift of stay orders entered in the bankruptcy proceeding of Defendant Straitsland Corporation and Defendant Sagante. The motion is **DENIED** without prejudice. The lift of stay orders permit Plaintiff to enforce its security interests or other rights in the property to two debtors still in bankruptcy. The Court sees no reason to withdraw the reference to the Bankruptcy Court in either matter. Bankruptcy Courts routinely resolve such matters, including liquidation of debtor’s property and priority determinations of competing claimants. If this Court needs to take action independent of the Bankruptcy Courts, the Court will need additional information on what is necessary and why the Bankruptcy Court cannot handle it.

IT IS SO ORDERED.

Dated: January 20, 2012

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 4.2
Eastern Division**

Albert Brown

Plaintiff,

v.

Case No.: 1:11-cv-06257

Honorable Robert M. Dow Jr.

Internal Revenue Service

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, January 19, 2012:

MINUTE entry before Honorable Robert M. Dow, Jr: MOTION by Plaintiff Albert Brown that lawsuit be upheld[13]is denied without prejudice. Time to file joint status report is extended to 2/9/2012. Mailed notice(tbk,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

For scheduled events, motion practices, recent opinions and other information, visit our web site at www.ilnd.uscourts.gov.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MICHAEL T. EARNEST,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 11-2404 JPM-cgc
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

ORDER SETTING TRIAL AND PRETRIAL DATES

Pursuant to Local Rule 72.1(f), a Rule 16(b) Scheduling Order was entered on January 11, 2011, by United States Magistrate Judge Charmiane G. Claxton. In accordance with the deadlines established in that order, trial and pretrial dates are set as follows before the District Court:

1. The jury trial in this matter, which is anticipated to last two to three (2-3) days, is set to begin Monday, October 22, 2012 at 9:30 a.m. in courtroom no. 1.
2. A pretrial conference is set for Tuesday, October 16, 2012 at 8:45 a.m.

3. The joint pretrial order and proposed jury instructions and voir dire questions are due by no later than 4:30 p.m. on October 9, 2012.

Absent good cause, the dates established by this order shall not be extended or modified.

IT IS SO ORDERED this 20th day of January, 2012.

s/ JON PHIPPS McCALLA
CHIEF UNITED STATES DISTRICT JUDGE

Healy Gallagher, Erin (TAX)

From: wiwd_ecf@wiwd.uscourts.gov
Sent: Friday, January 20, 2012 10:40 AM
To: courtmail@wiwd.uscourts.gov
Subject: Activity in Case 3:11-cv-00626-bbc Freedom From Religion Foundation, Inc. et al v. Geithner, Timothy et al Order on Motion for Extension of Time

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

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U.S. District Court

Western District of Wisconsin

Notice of Electronic Filing

The following transaction was entered on 1/20/2012 at 9:40 AM CST and filed on 1/20/2012
Case Name: Freedom From Religion Foundation, Inc. et al v. Geithner, Timothy et al
Case Number: [3:11-cv-00626-bbc](#)
Filer:
Document Number: 15(No document attached)

Docket Text:
**** TEXT ONLY ORDER ****
ORDER granting [14] Motion for Extension of Time. Response to amended complaint due 2/24/12. Signed by Magistrate Judge Stephen L. Crocker on 1/19/12. (krj)

3:11-cv-00626-bbc Notice has been electronically mailed to:

Richard L. Bolton B6 B6

Leslie K. Herje leslie.herje@usdoj.gov, USAWIW.EFILE@usdoj.gov

Richard Adam Schwartz richard.a.schwartz@usdoj.gov

Erin Healy Gallagher erin.healygallagher@usdoj.gov, Central.Taxcivil@usdoj.gov, russell.s.clarke@usdoj.gov

3:11-cv-00626-bbc Notice will be delivered by other means to::



1 Raymond L. Miller, Esq.
2 MILLER LAW FIRM
3 1820 E Ray Road
4 Chandler AZ 85225
5 480.695.3821
6 ABN: 011011
7 raymilleratty@yahoo.com
8 Attorney for Debtor

Sarah S. Curley
Sarah S. Curley, Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re) Chapter 13
TAMI GERMAN,)
Debtor) Case No. 2:09-BK-30903-SSC
) STIPULATED ORDER CONFIRMING
) CHAPTER 13 PLAN - SECOND AMENDED
)
)
)

The Chapter 13 Plan having been properly noticed out to creditors and any objection to confirmation having been resolved,

IT IS ORDERED confirming the Plan of the Debtor(s) as follows:

(A) INCOME SUBMITTED TO THE PLAN. Debtors shall submit the following amounts of future income to the Trustee for distribution under the Plan.

(1) **Future Earnings or Income.** Debtors shall make the following monthly Plan payments:

<u>Months</u>	<u>Amount</u>
1-15	\$165.00
16-60	\$25.00

The payments are due on or before the 1st day of each month commencing January 1, 2010. Debtors are advised that when payments are remitted late, additional interest may accrue on secured debts, which may result in a funding shortfall at the end of the Plan term. Any funding shortfall must be cured before the plan is deemed completed.

The Debtors shall provide, directly to the Trustee copies of their **federal and state** income tax returns for post-petition years within 30 days of filing them. The purpose is to assist the Trustee in determining any change in debtor's annual disposable income.

1 (2) Other Property. The Debtors shall provide, directly to the Trustee their net federal and
2 state income tax refunds for the years 2010, 2011, and 2012, as supplements to the plan.
3 In the event that other property is submitted, it shall be treated as supplemental payments.
4 In no event will the term of the Plan be reduced to less than 60 months, exclusive of any
5 property recovered by the Trustee, unless all allowed claims are paid in full.

6 (B) **DURATION**. This Plan shall continue for 60 months from the first regular monthly
7 payment described in Paragraph (A)(1) above. If at any time before the end of the Plan
8 period all claims are paid, then the Plan shall terminate.

9 (C) **CLASSIFICATION AND TREATMENT OF CLAIMS**. Claims shall be classified
10 and paid as listed below. The Plan and this Order shall not constitute an informal proof of
11 claim for any creditor. The Trustee shall receive the percentage fee on the Plan payments
12 pursuant to 28 U.S.C. § 586(e), then the Trustee will pay creditors in the following order:

13 (1) Administrative expenses:

14 Attorney Fees: *Not applicable*

15 (2) Claims Secured by Real Property:

16 (a) MORTGAGE COMPANY: *Not applicable* Stay relief has been granted
17 (b) SECURED CREDITOR: *Not applicable* regarding claims numbered
18 (c) SECURED CREDITOR: *Not applicable*. 2, 3 and 4.

19 (3) Claims Secured by Personal Property: *Not applicable*

20 (4) Unsecured Priority Claims: *Not applicable*

21 (5) Surrendered Property. Upon confirmation of this plan or except as otherwise ordered
22 by the Court, bankruptcy stays are lifted as to collateral to be surrendered. Such
23 creditor shall receive no distribution until the creditor timely files a claim or an
24 amended proof of claim that reflects any deficiency balance remaining on the claim.
25 Assuming the creditor has an allowed proof of claim, should the creditor fail to file an
amended claim consistent with this provision, the Trustee need not make any
distributions to that creditor. Debtors surrender the following property:

The debtor will surrender: *Not applicable*

(6) Other Provisions: NONE

(7) Unsecured Nonpriority Claims. All other claims shall be classified as unsecured and
nonpriority. Such claims shall be paid pro rata the balance of the payments under the
Plan and any unsecured debt balance remaining unpaid at the end of the Plan may be
discharged as provided in 11 U.S.C. § 1328.

1 (D) EFFECTIVE DATE AND VESTING. The effective date of the Plan shall be the date of
2 this Order. Property of the estate vests in Debtors upon confirmation.

3 ORDER SIGNED ABOVE

4 Approved as to Form and Content by:

5  Russell Brown
Trustee

Russell Brown
2012.01.19 16:22:02
-07'00'

6 Russell Brown, Trustee

7 

8
9 Raymond E. Miller, Esq.
Attorney for Debtor

10
11 The Debtors certify: All required State and Federal income tax returns have been filed. No
12 domestic support obligation is owed or, if owed, such payments are current since the filing of the
13 Petition.

14 /s/ Tami German
15 Debtor

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case no. 2:10-cv-14938
)	Honorable Sean F. Cox
PAUL G. HAYES, CHRISTOPHER L.)	Referral Judge: Honorable Mark A. Randon
HAYES,)	
)	
Defendants.)	

**STIPULATED ORDER OF DISMISSAL OF COUNT II OF COMPLAINT,
WITHOUT PREJUDICE**

Pursuant to Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure, the plaintiff United States of America, and the defendant Christopher L. Hayes, stipulate that Count II of the United States' Complaint, against the defendant Christopher L. Hayes, is hereby dismissed without prejudice. The remaining Count I of the United States' complaint is against the defendant Paul G. Hayes, only, and Christopher L. Hayes is no longer a defendant in this case.

The defendant Paul G. Hayes is in default for failure to appear (*see* Dock. # 11 (Clerk's Entry of Default)), and he is therefore not a required signatory to this stipulation. *See* Fed. R. Civ. P. 41(a)(1)(A)(ii).

S/Sean F. Cox

Sean F. Cox
United States District Judge

Dated: January 20, 2012

Agreed by:

JOHN A. DICICCO
Principal Deputy Assistant Attorney General
U.S. Department of Justice, Tax Division

/s/ James E. Brown
JAMES E. BROWN
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 55, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-6053
Facsimile: (202) 514 5238
Email: James.E.Brown2@usdoj.gov
Attorney for Defendant United States

THOMAS J. BUDZYNSKI P.C.

/s/ with consent of Thomas J. Budzynski
THOMAS J. BUDZYNSKI
43777 N. Groesbeck Hwy.
Clinton Township, Michigan 48036
Telephone: (586) 463-5253
Email: lawoffice@tjbudzynskipc.com
Attorney for Plaintiff Christopher L. Hayes

CERTIFICATE OF SERVICE

I certify that service of the foregoing document has been made on this 19th day of January, 2012, by emailing a copy to the above-identified counsel who approved the stipulation, and by depositing a copy in the United States' mail, first class postage prepaid, addressed to the following:

Paul G. Hayes
51270 Village Edge E Apt. 201
Chesterfield, Michigan 48047

/s/ James E. Brown
JAMES E. BROWN
Trial Attorney, Tax Division
U.S. Department of Justice
Post Office Box 55, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-6053
Fax: (202) 514-5238
Email: james.e.brown2@usdoj.gov

ORIGINAL

FILED

In the United States Court of Federal Claims

JAN 20 2012

No. 11-134T

U.S. COURT OF FEDERAL CLAIMS

(Filed: January 20, 2012)

ROBERT M. HEGER,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES,)
)
 Defendant.)
)

Claim for refund of taxes paid; substantial variance doctrine; I.R.C. § 7422(a); 26 C.F.R. § 301.6402-2(b)(1); application of standards for summary judgment; burden of proof; 26 U.S.C. § 7491; loss or destruction of IRS administrative files

Robert M. Heger, *pro se*, Phelan, California.

Gregory S. Knapp, Attorney, Court of Federal Claims Section, Tax Division, United States Department of Justice, Washington, D.C., for defendant. With him on the briefs were John A. DiCicco, Principal Deputy Assistant Attorney General, Steven I. Frahm, Chief, and Mary M. Abate, Assistant Chief, Court of Federal Claims Section, Tax Division, United States Department of Justice, Washington, D.C.

OPINION AND ORDER

LETTOW, Judge.

In this tax-refund case, plaintiff Robert M. Heger seeks the refund of \$311,640.36 paid by a title company on his behalf to the Internal Revenue Service (“IRS”) for taxes, penalties, and interest allegedly owed for tax years 1996 through 2001. The United States (“the government”) has counterclaimed for \$36,025.17 for taxes, penalties, and interest allegedly owed and unpaid by Mr. Heger for the 2006 tax year. Mr. Heger has moved for summary judgment regarding the taxes and penalties for 1996 through 2001 on the grounds that he had no taxable income for those years and that the IRS failed to furnish him notices of deficiency for the amounts allegedly owed. The government has filed a cross-motion to dismiss the claims of Mr. Heger insofar as they are based on the contention that the taxes and penalties were imposed absent notices of deficiency. Both motions have been briefed and argued and are ready for disposition.

BACKGROUND¹

On March 20, 2008, Cornerstone Title Company issued checks of \$311,640.36 and \$475.75 payable to the IRS for taxes, penalties, and interest allegedly owed by Mr. Heger for tax years 1996 through 2001. Compl. ¶¶ 1, 5; Addendum to Pl.'s Mot. for Partial Summary Judgment ("Pl.'s Addendum") Exs. B-1, B-2. Apparently, the tax obligations were secured by liens on a property owned by Mr. Heger as a result of a bequest made by Mr. Heger's father, and those obligations were satisfied and the liens removed by the payment by the title company out of proceeds received upon sale of the property. Compl. ¶ 5; Pl.'s Mot. for Partial Summary Judgment ("Pl.'s Mot.") at 8.

On November 24, 2008, Mr. Heger submitted a letter to the IRS Commissioner in Washington, D.C., requesting a refund of the money paid. See Pl.'s Addendum Ex. A. In the letter, Mr. Heger contended that "for years 1996 [through] 2001 I did not have any taxable income and therefore am entitled to [a full] refund." *Id.* The IRS did not respond to Mr. Heger's refund request. Compl. ¶ 9. After passage of considerable time, on September 27, 2010, Mr. Heger mailed a request for records invoking the Freedom of Information Act to an IRS office located in Chamblee, Georgia. See Notice of Errata Ex. A. This request specifically sought copies of any available notices of deficiency, and any proof of their mailing, related to his income taxes for tax years 1996 through 2001. *Id.*² The IRS did not respond to Mr. Heger's request. Pl.'s Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") at 3.

Roughly six months later, on March 2, 2011, Mr. Heger filed the complaint in the present action. The government's answer denied Mr. Heger's claims and asserted a counterclaim of \$36,025.17 for taxes allegedly unpaid by Mr. Heger for the 2006 tax year. Although neither party has directly addressed the counterclaim in the pending motions, the dispute over taxes for 2006 appears to stem from Mr. Heger's alleged failure to report as income his receipt of \$206,775 from a life insurance and annuity company in that year. See Def.'s Opp'n to Pl.'s Mot. ("Def.'s Opp'n") Exs. 12, 14.

On August 23, 2011, Mr. Heger moved for partial summary judgment on his refund claims for the 1996 through 2001 tax years, arguing in accord with his complaint that he had no taxable income for those years and that the IRS had failed to furnish him with notices of deficiency. Thereafter, on October 18, 2011, Mr. Heger filed an addendum to his motion consisting of, among other things, a copy of the original refund-request letter sent to the IRS Commissioner. See Pl.'s Addendum Ex. A. On October 26, 2011, in light of the addendum, the government moved to dismiss Mr. Heger's complaint in part. The government contends that Mr. Heger's refund request to the IRS Commissioner, if construed as an administrative refund claim, raises only the no-taxable-income argument. See Def.'s Mot. to Dismiss ("Def.'s Cross-

¹The recitation of background information does not constitute findings of facts by the court and is given solely to provide a context for deciding the current motions. Unless otherwise noted, however, the circumstances appear to be undisputed.

²The IRS cannot begin proceedings to collect a tax deficiency until it has mailed the taxpayer in question a notice of that deficiency. See 26 U.S.C. ("I.R.C.") § 6213(a).

Mot.”). As a consequence, the government takes the position that the other claim raised by Mr. Heger, that he was never provided with notices of deficiency, must be dismissed for lack of jurisdiction under the so-called variance doctrine. *See id.* at 4-5. Given this jurisdictional contention, the court will turn first to the government’s cross-motion.

I. The Government’s Motion to Dismiss

A. Jurisdiction

The Tucker Act, 28 U.S.C. § 1491(a)(1), grants this court jurisdiction over federal tax-refund claims. *See Ledford v. United States*, 297 F.3d 1378, 1382 (Fed. Cir. 2002); *Dominion Res., Inc. v. United States*, 97 Fed. Cl. 239, 246 (2011); *cf.* 28 U.S.C. § 1346(a)(1) (providing that district courts shall have jurisdiction concurrent with the Court of Federal Claims to consider tax-refund suits). The plaintiff bears the burden of demonstrating that each of his or her claims falls within this jurisdictional grant. *See Barrett v. Nicholson*, 466 F.3d 1038, 1041 (Fed. Cir. 2006) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188-89 (1936)). In doing so, although “unchallenged allegations of the complaint should be construed favorably to the pleader,” *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)); *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007), disputed jurisdictional facts must be proved by a preponderance of the evidence, *see Nez Perce Tribe v. United States*, 83 Fed. Cl. 186, 188 (2008). In this respect, Mr. Heger’s *pro se* pleadings are to be construed liberally, but leniency alone cannot relieve Mr. Heger of his burden to show jurisdiction. *See, e.g., Jackson v. United States*, 100 Fed. Cl. 34, 39 (2011) (quoting *Riles v. United States*, 93 Fed. Cl. 163, 165 (2010) (in turn citing *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002))).

In tax-refund cases, the variance doctrine limits this court’s jurisdiction. *Ottawa Silica Co. v. United States*, 699 F.2d 1124, 1139 (Fed. Cir. 1983). The doctrine springs from I.R.C. § 7422(a), which requires taxpayers to file a refund claim with the IRS before proceeding with an action in court for refund, and 26 C.F.R. § 301.6402-2(b)(1), which instructs taxpayers that a “claim must set forth in detail each ground upon which a . . . refund is claimed and facts sufficient to apprise the [IRS] of the exact basis thereof.” “Courts have long interpreted [these two provisions] as stating a ‘substantial variance’ rule which bars a taxpayer from presenting claims in a tax refund suit that ‘substantially vary’ the legal theories and factual bases set forth in the tax refund claim presented to the IRS.” *Lockheed Martin Corp. v. United States*, 210 F.3d 1366, 1371 (Fed. Cir. 2000) (citing *Cook v. United States*, 599 F.2d 400, 406 (Ct. Cl. 1979)); *see also Marandola v. United States*, 76 Fed. Cl. 237, 243 (2007) (Under the variance doctrine, “to be addressed by a court, both the legal and factual grounds for a refund claim must first have been presented by the taxpayer to the IRS.”). This prohibition on presenting new claims to the trial court serves to give the IRS fair notice at the administrative level of the nature of the claims it must correct or defend. *See Lockheed Martin*, 210 F.3d at 1371; *Union Pac. R.R. Co. v. United States*, 389 F.2d 437, 442 (Ct. Cl. 1968).

B. Analysis

The issue presented by the government's cross-motion to dismiss is whether any of the claims set out in the complaint "substantially vary" from the claim or claims Mr. Heger submitted to the IRS via the letter sent to the IRS Commissioner. A comparison of the two submissions shows that the refund request alleges only one basis for recovery, which states in full: "for years 1996, 1997, 1998, 1999, 2000 and 2001 I did not have any taxable income and therefore am entitled to the refund of the \$311,640.36." Pl.'s Addendum Ex. A. In contrast, Mr. Heger's complaint sets out two bases for recovery. The first, titled "Factual and Legal Basis for Claim; Non-Receipt of Taxable Income," states that "any income [Mr.] Heger received for the years in question was not taxable as contemplated under . . . [f]ederal [s]tatutes." Compl. ¶ 7. The second, titled "Factual and Legal Basis for Claim; Failure to Issue Statutory Notice of Deficiency," states that "the IRS failed to issue [Mr.] Heger a statutory notice [of] deficiency for the years 1996 through 2001, inclusive. . . . [I]f [Mr.] Heger had taxable income on which the IRS believed he owed taxes and had not paid, a tax deficiency would have issued." Compl. ¶ 8.

In short, neither the facts nor the legal theory of Mr. Heger's notice-of-deficiency argument were expressed in his refund request. As the Supreme Court opined in *United States v. Garbutt Oil Co.*, 302 U.S. 528, 533 (1938), the IRS Commissioner is "entitled to take [the claim] at face value and to examine only the points to which [the taxpayer] directed his attention." See also *Lockheed Martin*, 210 F.3d at 1371 (grounds for refund must be "expressly" or "impliedly" contained in the administrative claim for a refund (quoting *Burlington N., Inc. v. United States*, 684 F.2d 866, 868 (Ct. Cl. 1982))).

Given these general principles, Mr. Heger submits two reasons why the claim should not be dismissed. First, he contends that his notice-of-deficiency argument is only a specific variant of his more general claim that he had no taxable income from 1996 through 2001. Pl.'s Opp'n at 4-5. However, as explained by the Federal Circuit, "the general claim doctrine [applies] where (1) the taxpayer has filed a formal general claim [with the IRS] within the limitations period; and (2) an amendment is filed outside the limitations period that makes the general claim more specific." *Computervision Corp. v. United States*, 445 F.3d 1355, 1368 (Fed. Cir. 2006) (citing *United States v. Andrews*, 302 U.S. 517, 524 (1938)). Here, Mr. Heger seeks to amend a claim before a court, not a claim still before the IRS. In this case, there is no indication that the IRS considered, or logically should have considered, whether it had sent notices of deficiency as part of its deliberations related to Mr. Heger's refund request. Both factually and legally, the notice-of-deficiency contention is "unrelated" to the no-taxable-income claim. *Computervision*, 445 F.3d at 1369 (citing *United States v. Henry Prentiss & Co.*, 288 U.S. 73, 83 (1933)).³

³In this vein, Mr. Heger contends that his refund request denying taxable income encompasses his notice-of-deficiency argument because, without a notice of deficiency, the IRS could not collect any tax from him. Based upon these postulates, Mr. Heger concludes that he necessarily had no taxable income. See Pl.'s Opp'n at 5. This reasoning is unpersuasive. While there is no question that "notice is generally a prerequisite to any attempt by the IRS to assess or collect on [a] deficiency," *Bush v. United States*, 655 F.3d 1323, 1328 (Fed. Cir. 2011) (*en banc*) (citing *Commissioner v. Shapiro*, 424 U.S. 614, 618 (1976)), such notice bears on the IRS' ability to collect the tax, not the existence of taxable income in the first instance. *Cf.*

Second, Mr. Heger argues that the IRS waived its variance defense by failing to respond to his administrative refund request. Pl.'s Opp'n at 6-7. However, waiver only applies "if the IRS considers that specific claim" during administrative proceedings. *Computervision*, 445 F.3d at 1365. Similar to the rationale behind the general-claim exception, the waiver exception is concerned with notice to the IRS. When the IRS chooses to examine a taxpayer's claim, even though the taxpayer did not specifically set it out in his or her refund request, the IRS has notice of that claim. *See id.* at 1366 (In this situation, it is "unmistakable that the Commissioner has in fact seen fit to dispense with [the] formal requirements and to examine the merits of the claim." (alteration in original) (quoting *Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 297 (1945))). Therefore, when the IRS relies on grounds not stated in a taxpayer's administrative claim, the IRS waives the variance defense as to those grounds. *See id.* (citing *Consolidated Coppermines Corp. v. United States*, 296 F.2d 743, 744 (Ct. Cl. 1961)). In this case, just the opposite has occurred. Mr. Heger has failed to demonstrate that the IRS considered his claim at all, much less that it considered the notice-of-deficiency ground presented in his complaint. *See Cencast Servs., L.P. v. United States*, 94 Fed. Cl. 425, 443 (2010) ("Plaintiffs must present specific evidence that they 'adequately alerted the [IRS] to the fact that the item is a ground for refund.'" (quoting *Davis v. United States*, 21 Cl. Ct. 84, 86 (1990))). Consequently, the IRS has not waived its variance defense.

Because Mr. Heger's refund request to the IRS Commissioner only contended that Mr. Heger had no taxable income from 1996 through 2001, Mr. Heger did not raise, explicitly or implicitly, the notice-of-deficiency claim now proffered to this court. Accordingly, that aspect of his complaint for refund must be dismissed for lack of jurisdiction.

II. Mr. Heger's Motion for Summary Judgment

A. Standards for Decision

Summary judgment can be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a) of the Rules of the Court of Federal Claims ("RCFC"); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A material fact is one "that might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Because the party moving for summary judgment bears the burden of demonstrating the absence of any genuine issue of material fact, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (alteration in original) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); *see also AEY, Inc. v. United States*, 99 Fed. Cl. 300, 304 (2011).

In tax-refund suits generally, "the taxpayer bears the burden of establishing the right to a refund." *Stobie Creek Invs. v. United States*, 82 Fed. Cl. 636, 663 (2008) (quoting *Abrahamsen*

Philadelphia & Reading Corp. v. United States, 944 F.2d 1063, 1073 (3d Cir. 1991) (positing that the IRS may correct a failure to issue a notice of deficiency simply by reassessing the tax, so long as the statute of limitations has not expired).

v. United States, 228 F.3d 1360, 1364 (Fed. Cir. 2000)), *aff'd*, 608 F.3d 1366 (Fed. Cir. 2010); *see also Cook v. United States*, 46 Fed. Cl. 110, 115-16 (2000). Additionally, an IRS assessment will be presumed correct unless it is “naked,” that is, “arbitrary in the sense that the calculation has no support and the true amount of tax owed is incapable of being ascertained.” *Cencast Servs.*, 94 Fed. Cl. at 453 (quoting *United States v. Schroeder*, 900 F.2d 1144, 1149 (7th Cir. 1990)).

Against this background of common-law-derived procedures, *see Cook*, 46 Fed. Cl. at 116, Congress enacted I.R.C. § 7491, *see Internal Revenue Service Restructuring and Reform Act of 1998*, Pub. L. No. 105-206, § 3001(a), 112 Stat. 685, 726-27. Under this statute, a taxpayer may shift to the IRS the burden of proof “with respect to any factual issue relevant to ascertaining the liability of the taxpayer” if the taxpayer “introduces credible evidence” and meets other conditions. I.R.C. § 7491(a)(1); *see Jade Trading, LLC v. United States*, 80 Fed. Cl. 11, 46 (2007), *aff'd in part, rev'd in part, vacated in part, and remanded in part on other grounds, sub nom. Jade Trading, LLC ex rel. Ervin v. United States*, 598 F.3d 1372 (Fed. Cir. 2010).

B. Analysis

Mr. Heger contends that he is entitled to summary judgment on two independent grounds. First, he argues that it is undisputed that the IRS failed to send him notices of deficiency for the taxes allegedly owed from 1996 through 2001, thus invalidating collection of the taxes. Pl.’s Mot. at 4-5. Second, he argues that the IRS has not produced evidence substantiating its assessments for those years, so those assessments are “naked” and invalid regardless of whether he produces proof of his own showing that he is entitled to a refund. *Id.* at 11-12. The government responds that Mr. Heger bears the burden of proof on this motion, that he has not carried that burden with competent evidence, and that, in any event, the government has produced evidence showing that material facts remain in dispute. Def.’s Opp’n at 2-3, 5.

Mr. Heger’s first ground for summary judgment, that he did not receive notices of deficiency, fails because it varies from the basis of his administrative refund request. *See supra*, at 4-5.

Mr. Heger’s second ground for summary judgment, essentially that the IRS has failed to carry its burden of proof, requires discussion. Mr. Heger primarily relies on I.R.C. § 7491, arguing that the government has the burden of proof and therefore he need not come forward with any affirmative evidence to prevail at summary judgment. It is true that “the moving party is entitled to a judgment as a matter of law [if] the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof.” *Celotex*, 477 U.S. at 323 (internal quotation marks omitted). It is also true that I.R.C. § 7491 shifts the burden of proof to the government under certain conditions. If those conditions were met, then the government could conceivably be required to come forward with evidence of disputed material facts.

Mr. Heger’s submissions, however, fail to meet the conditions of I.R.C. § 7491. The statute requires the taxpayer to bring forward “credible evidence.” I.R.C. § 7491(a)(1); *see*

Stobie Creek, 82 Fed. Cl. at 663 (citing *Long Term Capital Holdings v. United States*, 330 F. Supp. 2d 122, 166 (D. Conn. 2004)).⁴ Evidence held by courts to be credible includes expert witness reports and testimony, see *Okerlund v. United States*, 53 Fed. Cl. 341, 345, 355-56 (2002), *aff'd*, 365 F.3d 1044 (Fed. Cir. 2004), and documentary evidence presented at trial, see *Southgate Master Fund, LLC ex rel. Montgomery Capital Advisors, LLC v. United States*, 651 F. Supp. 2d 596, 649 (N.D. Tex. 2009), *aff'd*, 659 F.3d 466 (5th Cir. 2011). Contrastingly, Mr. Heger has presented only the assertions made in his pleadings and declarations. These submissions are not credible evidence under I.R.C. § 7491. See *Kolbeck v. Commissioner*, 90 T.C.M. (CCH) 459, 2005 WL 2848030, at *2 (2005) (sworn affidavit in lieu of inaccessible tax records held not credible); *Evan v. Commissioner*, T.C.M. (RIA) 2004-180, 2004 WL 1730295, at *3, *7-8 (2004) (petitioners' unsubstantiated oral and written testimony held not credible); *Higbee v. Commissioner*, 116 T.C. 438, 444 (2001) (self-generated receipts of charitable donations held not credible).

In the absence of Section 7491's burden-shifting provisions, Mr. Heger bears the burden of proof and so must affirmatively produce evidence demonstrating that "there is no genuine dispute as to any material fact." RCFC 56(a); see *Monarch Knitting Mach. Corp. v. Sulzer Morat GmbH*, 139 F.3d 877, 880-81 (Fed. Cir. 1998). This he has failed to do. As just discussed, the only evidence produced by Mr. Heger thus far is his own pleadings and declarations. These are insufficient as sources of evidence not only for Section 7491 purposes, but for summary judgment as well. See *Applied Cos. v. United States*, 144 F.3d 1470, 1475 (Fed. Cir. 1998) (a single affidavit containing "a conclusory statement on the ultimate issue does not create a genuine issue of fact" (quoting *Imperial Tobacco Ltd. v. Philip Morris, Inc.*, 899 F.2d 1575, 1581 (Fed. Cir. 1990))); cf. *Celotex*, 477 U.S. at 324 (summary judgment may be opposed by the evidentiary materials permitted in Rule 56 "except the mere pleadings themselves" (emphasis added)); *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984) ("In countering a motion for summary judgment, more is required than mere assertions of counsel."). This is so even though the government faces a major obstacle of its own, *i.e.*, that it reportedly has lost or destroyed the administrative file for Mr. Heger's tax years prior to 2001.

⁴Section 7491's accompanying legislative history defines the term "credible evidence" as:

[T]he quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted (without regard to the judicial presumption of IRS correctness). A taxpayer has not produced credible evidence for these purposes if the taxpayer merely makes implausible factual assertions, frivolous claims, or tax protestor-type arguments. The introduction of evidence will not meet this standard if the court is not convinced that it is worthy of belief. If after evidence from both sides, the court believes that the evidence is equally balanced, the court shall find that the Secretary has not sustained his burden of proof.

H.R. Rep. No. 105-599, at 240-41 (1998) (Conf. Rep.). The definition was not included in the statute itself, so the court considers it to be merely informative rather than authoritative. Cf. *United States v. Louisiana*, 394 U.S. 11, 38-39 (1969); *Teledyne, Inc. v. United States*, 50 Fed. Cl. 155, 174 (2001).

See Def.'s Opp'n at 8 n.4. As noted in *Jenkins v. United States*, __ Fed. Cl. __, __, 2011 WL 4098972, at *6 (2011), while the loss of a taxpayer-plaintiff's IRS administrative file "did not shift the burden of proof . . . , it did require [the government] to show that a *prima facie* case for the assessment of the penalty existed, *i.e.*, that the assessment was not naked."


The factual inferences arising from the IRS' missing files do not themselves serve to perfect the deficiencies in Mr. Heger's evidence to support summary judgment. See *Broomall Indus., Inc. v. Data Design Logic Sys., Inc.*, 786 F.2d 401, 405 (Fed. Cir. 1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1969)). Notwithstanding the missing files, the government has made a showing that material facts remain in dispute. The government has submitted a Form 4340 Certificate of Assessments and Payments for each tax year in question. See Def.'s Opp'n Exs. 1-6. These certificates are presumed valid, see *Dallin ex rel. Estate of Young v. United States*, 62 Fed. Cl. 589, 600 (2004); see also *Brach v. United States*, 98 Fed. Cl. 60, 67 n.13 (2011), *aff'd on other grounds*, __ Fed. Appx. __, 2011 WL 4821969 (Fed. Cir. 2011), and raise the possibility that Mr. Heger had taxable income for each year. In particular, each form notes a "substitute for return," *e.g.*, Def.'s Opp'n Ex. 1, at A-2, and several award Mr. Heger a "withholding credit," *id.* Ex. 1, at A-2; Ex. 3, at A-12; Ex. 4, at A-17. Moreover, for the 2001 tax year, the government has furnished additional documents. One such document is a letter from the IRS to Mr. Heger that states "we [the IRS] have figured your tax and proposed penalties based on the information your employers, banks, and other payers reported on Forms W-2, W-2P, 1099, etc." *Id.* Ex. 11, at A-40. Another is an Income Tax Examination Changes chart, which lists several sources of income for Mr. Heger: "Non-Employee Compensation," "Wages," and "Dividends." *Id.* Ex. 13, at A-44. This evidence is sparse, but it is enough to show "that a reasonable [judge] could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; see *Dallin*, 62 Fed. Cl. at 600-01.

In conclusion, Mr. Heger's summary judgment motion fails because material facts remain in dispute. In this instance, although the court strongly disfavors seriatim motions for summary judgment, either party may move for summary judgment in the future if the party can demonstrate, after adequate time for discovery, a record free of genuine disputes of material fact. See *Metropolitan Life Ins. Co. v. Bancorp Servs., L.L.C.*, 527 F.3d 1330, 1336-37 & n.3 (Fed. Cir. 2008). Otherwise, a trial will be required.

CONCLUSION

For the reasons stated, Mr. Heger's motion for partial summary judgment is DENIED, and the government's motion to dismiss the complaint in part is GRANTED. The parties shall file a joint preliminary status report on or before February 21, 2012.

It is so ORDERED.


 Charles F. Lettow
 Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA)
)
v.) CR NO. 2:11cr134-MEF
)
MARGARET KIRKSEY)

SECOND PRETRIAL CONFERENCE ORDER

A pretrial conference was held on January 18, 2012, before the undersigned Magistrate Judge. Present at this conference were Cleophus Gaines, Jr., counsel for the defendant, and Assistant United States Attorney Justin Gelfand, counsel for the government. As a result of the conference, it is hereby

ORDERED as follows:

1. Jury selection is set for February 6, 2012, in Montgomery, Alabama. The trial of this case has been continued to the trial term commencing on February 6, 2012 in Montgomery, Alabama before United States District Judge Mark E. Fuller and is expected to last 4-5 days.
2. All applicable deadlines contained in the prior arraignment order and pretrial order are adjusted accordingly, provided, however, that the deadline for the filing of pretrial, dispositive motions is not extended.
3. The court will not consider a plea pursuant to Rule 11(c)(1)(A) or (C) unless notice is filed on or before noon on January 25, 2012. The

government and the defendant are informed that if a defendant waits until the last minute to enter a plea, and if that plea, for whatever reason is not accepted by the court, the defendant and the government will be expected to be prepared to go to trial on February 6, 2012, in Montgomery, Alabama. The Court will not continue the trial of this case as to any defendant because a defendant's plea was not accepted. In other words, the defendant and the government should not wait until the last minute for a defendant to enter a guilty plea, and both the defendant and the government should all be ready to go to trial on February 6, 2012, in Montgomery, Alabama, as to all defendants, even though a particular guilty plea was not accepted by the court.

DONE, this 20th day of January, 2012.

/s/ Susan Russ Walker
SUSAN RUSS WALKER
CHIEF UNITED STATESMAGISTRATE JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Mark Wade Lindros,

Debtor.

_____ /

Case No. 04-16558-MGW
Chapter 7

Mark Wade Lindros,

Plaintiff,

Adv. No. 8:08-ap-00140-MGW

v.

United States of America,
Internal Revenue Service,

Defendant.

_____ /

**ORDER GRANTING MOTION FOR EXTENSION
OF TIME TO FILE NOTICE OF APPEAL**

THIS PROCEEDING came on for consideration without a hearing on the Plaintiff's Motion for Extension of Time to File Appeal ("Motion") (Doc. No. 46). The Court has reviewed the Motion, and based on the allegations in the Motion, the Court finds that sufficient excusable neglect exists to warrant extending the deadline for filing a notice of appeal under Federal Rule of Bankruptcy Procedure 8002(c). Accordingly, it is

ORDERED:

1. The Plaintiff's Motion is GRANTED.
2. The Plaintiff has until January 24, 2012 to file a notice of appeal of the Court's December 19, 2012 Order Denying Plaintiff's Motion for Reasonable

Administrative and Litigation Costs and Fees (Doc. No. 45).

DONE and **ORDERED** in Chambers at Tampa, Florida, on January 20, 2012.

A handwritten signature in black ink that reads "M G Williamson". The signature is written in a cursive style with a large initial "M" and "G".

Michael G. Williamson
United States Bankruptcy Judge

Copies to be provided by CM/ECF

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 10-81127-CIV-DIMITROULEAS/SNOW

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD LLOYD *et al.*,

Defendants.

ORDER GRANTING MOTION TO AMEND ANSWER

THIS CAUSE is before the Court upon Defendant Donald Lloyd's Motion to Amend Answer [DE 88], filed on January 13, 2012. Plaintiff filed a Notice that it did not oppose this Motion. [DE 89]. The Court has carefully considered the Motion, notes that it is unopposed, and is otherwise fully advised in the premises.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant Donald Lloyd's Motion to Amend Answer [DE 88] is **GRANTED**. Defendant Donald Lloyd shall separately file his Amended Answer on or before January 27, 2012.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 20th day of January, 2012.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Counsel of Record

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 2:10-cv-1589-TFM
)	
JANET L. PRINGLE and KENNETH E. PRINGLE,)	
)	
Defendants.)	

ORDER OF SALE

The United States’ motion for entry of default judgment having been granted, and the United States’ federal tax liens against defendant Janet L. Pringle having attached to the subject real property described below, the Court ORDERS that:

The real property further described below is to be sold pursuant to 28 U.S.C. § 2001 in the manner set forth below:

1. That federal tax liens encumber the below-described parcel of real property known as 141 Griscom Street, Dawson, Pennsylvania (the “Real Property”).

This property has the legal description of:

All those two certain pieces, parcels or lots of land situate in the Borough of Dawson, Fayette County, Pennsylvania, bounded and described as follows:

FIRST: All Lots of Nos. 301 and 31 and a part of Lot No. 32, as described on the general plan of lots of the said Town of Dawson and more particularly bounded and described as follows: Beginning at a point on Griscom Street and near the Pittsburgh and Connellsville Railroad, now Baltimore & Ohio Railroad Company, a corner of Lot No. 30; thence with said Griscom Street, South 32 degrees 30 minutes West, 200.5 feet to a post, a corner of residue of Lot No. 32, formerly in the occupancy of Lydus

C. Cochran; thence through said Lot No. 32 and along the line of said residue, South 50 degrees 29 minutes East, 100 feet to a stake ; thence with the same South 2 degrees 44 minutes West, 48 feet to a stake; thence South 79 degrees 36 minutes East, 25.08 feet to a stake; thence with the line of what was formerly Sycamore Alley, North 32 degrees 30 minutes East 242.55 feet to a post, near said railroad, corner of said Lot No. 30, thence parallel with said railroad, North 57 degrees 30 minutes West , 150.15 feet to the place of beginning.

CONTAINING 120 perches, more or less.

EXCEPTING AND RESERVING thereout and therefrom all that certain piece, parcel or lot of land beginning part of Lot No. 32 in the plan of Dawson Borough, more particularly bounded and described as follows: Beginning at a pin near the curb line of Griscom Street and the Baltimore & Ohio Railroad Company right of way; thence South 50 degrees 29 minutes East 100 feet to a pin; thence South 2 degrees 44 minutes East 28 feet to a sycamore tree; thence North 25 degrees 44 minutes East, 42.5 feet to a pin; thence North 61 degrees 31 minutes West, 101.6 feet to a pin, thence North 57 degrees 30 minutes West, 9 feet to a pin, the place of beginning. Constituting .029 of an acre.

SECOND: Part of Lot No. 32 in the plan of Dawson Borough, more particularly bounded and described as follows: Beginning at a pin near the curb and along Griscom Street, a distance of 200.6 feet from the corner of Griscom Street and the Baltimore & Ohio Railroad Company right of way; thence South 61 degrees 31 minutes East, 101.6 feet to a pin; thence North 22 degrees 39 minutes East, 11.5 feet to a pin; thence North 58 degrees 06 minutes West. 101.1 feet to a pin, the place of beginning, being a triangular lot containing .014 of an acre, as shown on a plan prepared by Thomas M. Zimmerman, Sr., Civil Engineer, on April 30, 1940 and of record in the aforesaid Recorder's Office in Plan Book 5, Page 221.

SUBJECT to the rights, privileges, easements, agreements, conditions, restriction and reservations as exist by virtue of prior recorded instruments.

2. That the federal tax liens are foreclosed against the Real Property and that the property in its entirety is ordered sold;

3. That the United States Marshal for the Western District of Pennsylvania or his/her representative, or an Internal Revenue Service Property Appraisal and Liquidation Specialist ("PALS"), is authorized under Title 28, United States Code, Sections 2001 and 2002, to offer for sale at public auction, the Real Property, with any improvements, buildings and appurtenances, thereunto pertaining;

4. That the public auction referred to in paragraph 3, above, shall be held either on the premises themselves, at another appropriate location in Fayette County, Pennsylvania, or at the County Courthouse, in accordance with the provisions of Title 28, United States Code, Section 2001, the times thereof to be announced by the Marshal or the PALS; after the Real Property is advertised once a week for four consecutive weeks preceding the date fixed for its sale in a daily newspaper of general circulation in Fayette County, and by any other notice that the Marshal or the PALS in their discretion may deem appropriate;

5. That any right, title, lien, claim or interest in the Real Property of the United States and of the defendants in this action is discharged upon sale of the Real Property and confirmation of the sale, as described in paragraphs 3, above, and 12, below;

6. That the Marshal or the PALS is authorized, within its sole discretion, to set a minimum bid for the Real Property. If the minimum bid is not met or exceeded,

the Marshal or the PALS or his representative may, without further action by the Court and under the terms and conditions in this order of sale, hold a new sale at public auction with or without a reduction of the minimum bid;

7. That the successful bidder(s) shall be required to deposit with the Marshal or the PALS, a minimum of \$50,000 by certified check, made payable to the United States District Court for the Western District of Pennsylvania (U.S.D.C.W.D.P.A.) and indicating the case number on the first page of this order (2:10-cv-1589-TFM), or a cash deposit at the time of sale. Before being permitted to bid at the sale, each bidder shall display proof to the Marshal or the PALS that the bidder is able to comply with this requirement. No bids will be received from any person(s) who has not presented proof that, if he is the successful bidder(s), he can make the deposit required by this order of sale;

8. That the balance of the purchase price for the Real Property shall be tendered to the Marshal or the PALS by the successful bidder within 30 days following the date of sale in the form of a certified check payable to the United States District Court for the Western District of Pennsylvania (U.S.D.C.W.D.P.A.) and indicating the case number on the first page of this order (2:10-cv-1589-TFM). In the event that the purchaser fails to fulfill this requirement, the deposit shall be forfeited and applied to the expenses of sale (with any balance being distributed as described in paragraph 15 below) and the Real Property shall be re-offered for sale in accordance with the provisions this order;

9. That pending the sale of the Real Property, the Marshal or the PALS is authorized to have free access to the premises and to take any and all actions necessary to preserve the premises, including, but not limited to, retaining a locksmith or other person to change or install locks or other security devices on any part of the Real Property, until the deed to the Real Property is delivered to the ultimate purchaser of the Real Property;

10. The sale is made pursuant to 28 U.S.C. § 2001, and is made without right of redemption;

11. Within 30 days from the date this order is entered by the Court or from the date on which a copy of it is delivered to the persons occupying the Real Property, whichever is later, all persons occupying the Real Property shall (1) leave and vacate the Real Property permanently taking with them their personal property (but leaving all improvements, buildings, fixtures, and appurtenances to the Real Property); (2) turn over the keys to the Real Property to the Marshal or the PALS; and (3) provide proof of current insurance. If any person occupying the Real Property fails or refuses to leave and vacate the Real Property by the time specified in this order, the Marshal, or the PALS in coordination with the Marshal, to take all actions that are necessary to bring about the ejection of those persons. If any person fails or refuses to remove his or her personal property from the Real Property by the time specified herein, the personal property remaining on the Real Property thereafter is deemed forfeited and abandoned; and, the Marshal or the PALS is authorized to remove the personal property and

dispose of it in any manner they see fit, including sale, in which case the proceeds of the sale are to be applied first to the expenses of sale with the balance being distributed as described in paragraph 15 below;

12. That the sale of the Real Property shall be subject to confirmation by this Court, and upon confirmation the Marshal or the PALS shall execute and deliver its deed, conveying the Real Property to the successful purchaser;

13. That, when the sale is confirmed by this Court, the Office of the County Clerk, County of Fayette, Pennsylvania shall cause transfer of the Real Property to be reflected upon that county's register of title;

14. A successful third-party bidder at the sale shall pay, in addition to the amount of the bid, any documentary stamps and registry fees as provided by law.

15. After the sale is confirmed by this Court, the proceeds shall be distributed as follows:

a. First, to the Internal Revenue Service or the United States Marshal to cover the expenses of the sale, including any expenses incurred to secure or maintain the Real Property pending sale and confirmation by the Court;

b. Second, to Fayette County, Pennsylvania for any property taxes unpaid, matured and owing; and

c. Third, to the United States Treasury (via instrument made payable to the "U.S. Treasury", and sent to Daniel J. Healy, Trial Attorney, U.S. Department of Justice, P.O. Box 227, Washington, D.C. 20044) for the unpaid federal tax liabilities for

which Janet L. Pringle is liable.

16. The Court retains jurisdiction over this cause for purpose of entering all further orders as may be appropriate, including without limitation, deficiency and contempt of court judgments.

17. The Clerk of Court is hereby ORDERED to accept checks for payment of the required deposit, the purchase price or any other amounts related to the sale of the Real Property, to deposit and maintain such funds in the Registry of the Court until the Court orders their distribution.

SO ORDERED THIS 20th DAY OF JANUARY, 2012:

s/ Terrence F. McVerry

UNITED STATES DISTRICT JUDGE



ORDERED in the Southern District of Florida on January 20, 2012.

A handwritten signature in black ink, appearing to read "Erik P. Kimball".

Erik P. Kimball, Judge
United States Bankruptcy Court

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
www.flbs.uscourts.gov**

In re:

**Case No.: 09-15556-BKC-EPK
Chapter 7 proceeding**

KANE & KANE, A PARTNERSHIP,

Debtor.

**MICHAEL R. BAKST, Trustee in Bankruptcy
for KANE & KANE, A PARTNERSHIP,**

Plaintiff,

Adv. Case No.: 10-01022-EPK

v.

UNITED STATES OF AMERICA,

Defendant,

and

**CHARLES J. KANE, and
HARLEY N. KANE,**

Intervenors.

**AGREED ORDER CONTINUING DEADLINES IN ORDER SETTING BRIEFING
SCHEDULE ON MOTIONS FOR SUMMARY JUDGMENT (ECF#247)**

THIS MATTER came before the Court in West Palm Beach, Florida, pursuant to the Trustee's Agreed Motion to Continue Deadlines in Order Setting Briefing Schedule on Motions for Summary Judgment, the Court having being otherwise fully advised in the premises, it is

ORDERED as follows:

1. The Motion is **GRANTED**.
2. The January 26, 2012 deadlines in the Order Setting Briefing Schedule on Motions for Summary Judgment (ECF#247) are extended through and including February 9, 2012, and the February 6, 2012 deadlines therein are extended through and including February 20, 2012.

###

Submitted By:
G. Steven Fender, Esq.
222 Lakeview Avenue, Suite 800
West Palm Beach, FL 33401
T. (561) 838-4509 F. (561) 514-3409

Movant/Attorney for Movant is directed to mail a conformed copy of this order to all interested parties and to file a certificate of service with the clerk of the Bankruptcy Court.

Electronic Mail Notice List

The following is the list of **parties** who are currently on the list to receive email notice/service for this case.

- Michael R. Bakst [b6] b6
- [b6] b6
- G Steven Fender [b6] b6
- [b6] b6
- Charles J Kane [b6] b6
- Julie B Schwartz [b6] b6
- Joseph S Van De Bogart [b6] b6
- Katherine P Walsh katherine.walsh@usdoj.gov, Southern.Taxcivil@usdoj.gov

Manual Notice List

- (No manual recipients)

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE:

Case №.: 8:10-bk-00648-MGW

JOSEPH WAYNE SHARP,

Debtor

JOSEPH WAYNE SHARP,

ADV. №.: 8:11-ap-00505-MGW

Plaintiff

v.

UNITED STATES OF AMERICA
(Treasury Department, Internal
Revenue Service Division)

Defendant

**ORDER GRANTING PLAINTIFF'S *ORE TENUS* MOTION
FOR LEAVE TO FILE AMENDED COMPLAINT
AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNT II**

THIS CASE is before the Court for a Pre-Trial Conference and the United States' Motion to Dismiss Count II (Dkt. №. 7) scheduled and heard on Tuesday, January 10, 2012 at 9:30 a.m. The Plaintiff, moving *ore tenus* for Leave to File an Amended Complaint with no objection by Defendant, United States of America, it is

ORDERED that:

1. Defendant's Motion to Dismiss Count II is denied as being moot.
2. Plaintiff's *Ore Tenus Motion* for Leave to File Amended Complaint is granted.

3. Plaintiff shall file an Amended Complaint within twenty (20) days from the date of this Order, and Defendant, United States of America, shall have twenty (20) days to file a responsive pleading to the Amended Complaint.

January 20, 2012

DONE and ORDERED in Tampa, Florida, on _____.



Michael G. Williamson,
United States Bankruptcy Judge

Copies Furnished to:

Keith H. Johnson, Esquire
Attorney for Plaintiff
Johnson and Johnson, P.A.
8810 Goodby's Executive Drive
Suite A
Jacksonville, Florida 32210

Thomas K. Vanaskie, Trial Attorney
Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044

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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 United States of America,

No. CV-10-444-PHX-GMS

10 Plaintiff,

ORDER

11 vs.

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13 Vistoso Partners, LLC,

14

Defendant.

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16 On January 3, 2012, the Court issued its Findings of Fact and Conclusions of Law in
17 this action. (Doc. 85). Pending before the Court is Defendant’s Motion for Reconsideration
18 of the Court’s January 3 decision. (Doc. 88). As discussed below, Defendant’s motion is
19 denied.

20 Generally, motions to reconsider are appropriate only if the Court “(1) is presented
21 with newly discovered evidence, (2) committed clear error or the initial decision was
22 manifestly unjust, or (3) if there is an intervening change in controlling law.” *School Dist.*
23 *No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A
24 motion for reconsideration should not be used to ask a court “to rethink what the court had
25 already thought through, rightly or wrongly.” *Above the Belt, Inc. v. Mel Bohannon Roofing,*
26 *Inc.*, 99 F.R.D. 99, 101 (E.D.Va. 1983)).

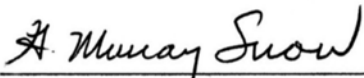
27 In the instant case, Defendant contends that the Court’s “Conclusions of Law 7, 8, and
28 9 constitute manifest error.” (Doc. 88 at 1). In essence, however, Defendant’s motion is a

1 request for the court to rethink what the court has already thought through. (*See* Doc. 88).
2 Such requests should be directed to the court of appeals. *Sullivan v. Faras-RLS Group, Ltd.*,
3 795 F. Supp. 305, 309 (D. Ariz. 1992).

4 **IT IS THEREFORE ORDERED** that Defendant's Motion for Reconsideration
5 (Doc. 88) is **denied**.

6 DATED this 20th day of January, 2012.

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G. Murray Snow
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES L. WATTS; JAMES L. WATTS, TRUSTEE
OF THE WATTS FAMILY LORTON RESIDENCE
TRUST; JAMES L. WATTS, TRUSTEE OF THE
WATTS FAMILY QUEENS DRIVE RESIDENT
TRUST; WATTS TRUCKING SERVICE, INC.;
A-1 DISPOSAL SERVICE, INC.; BLACK HAWK
WASTE DISPOSAL CO., INC.; CEDAR VALLEY
RECYCLING AND TRANSFER CO.; COUNTY
WASTE SYSTEMS, INC.; HAWKEYE WASTE
SYSTEMS, INC.; L & M WASTE SYSTEMS, INC.;
CITY WASTE SYSTEMS, INC.; TRI-STAR WASTE
SYSTEMS, INC.; SCOTT COUNTY TREASURER;
and IOWA DEPARTMENT OF REVENUE,

Defendants.

No. 3:11-cv-00116 – JEG-TJS

O R D E R

Now before the Court is a Motion for Preliminary Injunction brought by Plaintiff United States of America (Plaintiff) against Defendants James L. Watts, Watts Trucking Service, Inc., A-1 Disposal Service, Inc., Black Hawk Waste Disposal Co., Inc., Cedar Valley Recycling and Transfer Co., County Waste Systems, Inc., Hawkeye Waste Systems, Inc., L & M Waste Systems, Inc., City Waste Systems, Inc., and Tri-Star Waste Systems, Inc. (Defendants).¹ Plaintiff requests, pursuant to Federal Rule of Civil Procedure 65(a) and 26 U.S.C. § 7402(a), that Defendants be required to comply with federal tax laws during the pendency of this litigation. Defendants responded to the Motion on October 28, 2011. A hearing on the Motion,

¹ Also named as defendants in Plaintiff's Motion were City Waste Systems, Inc., and Metro Waste Systems, LLC. City Waste Systems, Inc., failed to respond to Plaintiff's complaint, resulting in an entry of Default on October 25, 2011 (ECF No. 15). This Court transferred all claims against Metro Waste Systems, LLC, to the United States District Court for the Eastern District of Missouri on January 19, 2012.

attended by James Watts and counsel for both parties,² was held on January 19, 2012, making the matter fully submitted and ready for disposition.

Plaintiff, supported by a declaration from Internal Revenue Service (IRS) Officer Rebecca Denning, alleges that Defendants have repeatedly failed to pay the IRS withheld income taxes and their employers' share of Form 941 employment taxes. Plaintiff further asserts that James Watts, president of Watts Trucking Services, Inc., has formed at least twenty-three different entities, most of which owe delinquent payroll tax liabilities. According to Plaintiff, Defendants, along with other inactive entities associated with Defendants but not named in this action, collectively owe the United States Department of the Treasury over \$30 million in unpaid federal employment and unemployment taxes.

Generally, a district court must consider four factors when determining whether to issue a preliminary injunction: “(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties; (3) the probability that the movant will succeed on the merits; and (4) the public interest.” Roudachevski v. All-American Care Ctrs, Inc., 648 F.3d 701, 705 (8th Cir. 2011). While Plaintiff has satisfied these elements as a result of the Defendants' response, doing so is not necessary because an injunction issued pursuant to § 7402, which authorizes a district court to issue an injunction “as may be necessary or appropriate for the enforcement of internal revenue laws,” derives from the court's statutory authority, not its equitable powers. See United States v. White, 769 F.2d 511, 515 (8th Cir. 1985) (“When an injunction is explicitly authorized by statute, proper discretion usually requires its issuance if the prerequisites for the remedy have been demonstrated and the injunction would fulfill the legislative purpose.” (internal quotation marks and citation omitted)).

² Counsel for Metro Waste Systems, LLC, was excused from attending the hearing on the expectation that the action against that entity would be transferred to the United States District Court for the Eastern District of Missouri in the absence of some change in circumstances at the hearing.

Upon review of the record, and in light of Defendants' limited opposition to the Motion and agreement that an injunction in some form is the appropriate remedy, the Court finds that Plaintiff has sufficiently shown, for the purpose of this Motion, that Defendants have violated various sections of the Internal Revenue Code, and that a preliminary injunction is necessary to prevent further similar violations.

Accordingly, Plaintiff's Motion for Preliminary Injunction against Defendants (ECF No. 4) is **granted**, and, pursuant to 26 U.S.C. § 7402 and Rule 65, Defendants and their representative, servants, employees and anyone acting in active concert or participation with them shall:

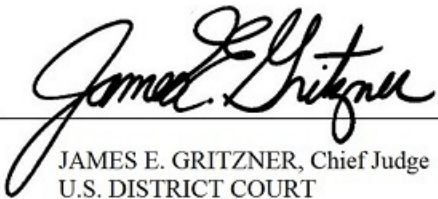
- (1) Deposit withheld Federal Insurance Contributions Act (FICA) and income taxes, as well as the employer's share of FICA taxes of the Corporation, in an appropriate federal depository bank in accordance with federal deposit regulations;
- (2) Deposit Federal Unemployment Tax Act (FUTA) taxes in an appropriate federal depository bank in accordance with federal depository regulations;
- (3) Ensure that one individual at each of the corporate Defendants responsible for carrying out the duties established in paragraphs 1 and 2 sign and deliver to an IRS officer designated by the Department of Justice on the first day of each month an affidavit stating that the requisite withheld income, FICA, and FUTA tax deposits were timely made;
- (4) Timely file all federal employment and unemployment returns (including Forms 940 and 941) with the IRS;
- (5) Timely pay all required outstanding liabilities due with each tax return, at the time the return is filed, regarding employment taxes on returns due after the date of this preliminary injunction;
- (6) Be prohibited from assigning any property or making any disbursements after the date of this preliminary injunction if amounts withheld from wages after the date of this preliminary injunction have not been timely paid to the United States;

- (7) Be prohibited from transferring any money or property to any other entity in order to have the net salaries or net wages of the Defendants' employees paid by the entity unless funds are also provided to the entity to pay employment taxes associated with the payment of net wages or salaries;
- (8) Be prohibited from closing a waste handling entity and reopening the entity under a new name without the written consent of the United States;
- (9) Be prohibited from engaging in any fraudulent or deceptive conduct that substantially interferes with the proper administration of the Internal Revenue Laws in any way, including, but not limited to, the following:
 - (1) making false statements to customers about the legitimacy or status of a levy issued by the IRS; and
 - (2) neglecting to issue bills for services rendered in order to avoid subsection funds to an IRS levy; and
- (10) Deliver a copy of this Order to all managers of Defendants and all payroll department employees of Defendants, and certify to the Court in twenty (20) days that they have done so by providing a list to the Court of the names of the people who have been notified.

Notwithstanding anything in this injunction to the contrary, this injunction only applies to employment taxes on returns due after the date of this injunction. This injunction will remain in effect until a permanent injunction is ordered or until other order of the Court.

IT IS SO ORDERED.

Dated this 20th day of January, 2012.


JAMES E. GRITZNER, Chief Judge
U.S. DISTRICT COURT