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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ELIZABETH BOARDMAN,

Plaintiff,

v.

COMMISSIONER OF INTERNAL REVENUE, Douglas H. Shulman,

Defendant.

Case No. 2:12-cv-632-MCE-GGH

UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

Hearing Date: August 23, 2012
Time: 2:00 p.m.
Courtroom: 7

The Defendant United States of America ("United States")[1], by and through its undersigned counsel, hereby moves this Court to dismiss this action with prejudice pursuant to FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction and pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief may be granted. In support of its motion, the United States submits the following:

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[1]Although the caption of the Complaint and Claim for Injunctive Relief (Free Exercise of Religion; Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*), (Doc. No. 1) (hereafter "Complaint"), identifies the Commissioner of the Internal Revenue Service as a defendant, it is well established that such a suit, one against a federal employee in his official capacity, is essentially a suit against the United States. *See Dugan v. Rank*, 372 U.S. 609 (1962); *Atkinson v. O'Neil*, 867 F.2d 589, 590 (10th Cir. 1989); *Burgos v. Milton*, 709 F.2d 1 (1st Cir. 1983); *Hutchinson v. United States*, 677 F.2d 1322, 1327 (9th Cir. 1982). Therefore, the only proper defendant to this action is the United States of America.

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INTRODUCTION

In her Complaint, Plaintiff Elizabeth Boardman contends that, as a result of her religious beliefs and conscience, she is entitled to refuse to pay half of her federal income tax liability.[2] Plaintiff filed returns reflecting a federal tax liability, but based on her objection to the use of tax dollars in support of the military, did not pay the liability that she agrees is owed. Even if Plaintiff is sincere in her conviction that she may decline to pay taxes as a result of her personal beliefs, that argument is legally frivolous as it has been rejected by every court to hear the issue. Plaintiff nonetheless contested the IRS's attempts to collect those self-reported liabilities after she failed to remit full payment to the IRS. Plaintiff also contends that the IRS deprived her of the ability to contest her "deficiency" in the United States Tax Court, even though by self-reporting her taxes no deficiency arises.

Congress has determined that the IRS is not required to entertain arguments that have been deemed legally frivolous in certain kinds of administrative hearings. However, Plaintiff contends that she should have been entitled to receive an administrative hearing and then take an appeal to the Tax Court to advance her argument that she should not pay taxes in the amount she self-reported before the IRS commences collection activity. Plaintiff also asserts that being precluded from raising legally frivolous arguments as a result of the statutory scheme enacted by Congress is evidence of "religious discrimination" by the IRS. As a result, Plaintiff requests that this Court issue a permanent injunction that would require the IRS to create a wholly new set of procedures to accommodate people wishing to advance religious arguments objecting to the payment of taxes..

Plaintiff's prayer for relief may not be granted because she prays that the Court enter a permanent injunction that would restrain and impair the collection of taxes. As explained more fully below, Plaintiff's Complaint should be dismissed because (1) Plaintiff cannot establish that this Court has subject-matter jurisdiction because the injunctive relief she requests is barred by the Anti-Injunction Act, and (2) Plaintiff fails to state a claim upon which relief may be granted because the statutory scheme challenged by Plaintiff does not impermissibly burden Plaintiff's rights to Free

[2]The Complaint is at times unclear and confusing, and some of the allegations are inconsistent with one another and the relief she is requesting, but the United States attempts to address what it understands to be the gravamen of Plaintiff's Complaint.

Exercise under the First Amendment of the Constitution, and the Religious Freedom Restoration Act does not afford Plaintiff a right to avoid the payment of taxes for religious reasons because the government's interest in maintaining a uniform and mandatory system of taxation is a compelling interest achieved by the least restrictive means.

LEGAL STANDARD

FED. R. CIV. P. 12(b)(1) allows a defendant to move to dismiss an action for lack of subject matter jurisdiction. On such a motion, the plaintiff bears the burden of establishing that subject matter jurisdiction exists. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). To establish subject matter jurisdiction in an action against the United States there must be (1) "statutory authority granting subject matter jurisdiction," and (2) "a waiver of sovereign immunity." *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1016 (9th Cir. 2007) (quoting *Alford v. United States*, 934 F.2d 229, 231 (9th Cir. 1991)). The United States, as a sovereign, may not be sued except in strict accordance with the terms of a specific and explicit waiver of sovereign immunity granted by Congress, and the terms of the waiver define the court's jurisdiction. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992); *United States v. Dalm*, 494 U.S. 596, 608 (1990); *United States v. Sherwood*, 312 U.S. 584, 586-587 (1941); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985). Waivers of sovereign immunity "cannot be implied, but must be unequivocally expressed," and are strictly construed in favor of the sovereign. *Dunn & Black P.S. v. U.S.*, 492 F.3d 1084, 1088 (9th Cir. 2007) (*quoting Gilbert*, 756 F.2d at 1458). Where the United States has not consented to suit, the court lacks jurisdiction over the subject matter of the action and dismissal is required. *See*, *e.g.*, *id*.

Fed. R. Civ. P. 12(b)(6) allows a defendant to move to dismiss an action for failure to state a claim. In order to state a claim, the plaintiff's complaint must contain sufficient factual matter, if accepted as true, to state a claim to relief that is plausible on its face. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))). Although a court must consider the factual allegations in a complaint as true, courts are not bound to accept as true a legal conclusion couched as a factual allegation. *See Caviness v.*

Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (citing *Iqbal*, 129 S. Ct. at 1949). "Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Id*. (quoting *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996)).

DISCUSSION

I. This Action Should Be Dismissed Pursuant to FED. R. CIV. P. 12(b)(1) Because Plaintiff Has Failed to Establish Subject Matter Jurisdiction.

This action should be dismissed pursuant to FED. R. CIV. P. 12(b)(1) because the Court lacks subject-matter jurisdiction. On a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(1), the plaintiff bears the burden of establishing subject matter jurisdiction and asserting a waiver of sovereign immunity. However, Plaintiff's Complaint fails to assert any such waiver of sovereign immunity by the United States. Plaintiff has thus failed to satisfy the requirements necessary to meet her burden of showing that the Court may exercise subject matter jurisdiction over the Complaint. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Testan*, 424 U.S. 392, 399 (1976). Regardless, even if Plaintiff had alleged that some statute waives sovereign immunity for the purpose of maintaining this action, the Anti-Injunction Act operates as an affirmative bar precluding this Court from granting any of the relief sought by Plaintiff's Complaint.

A. The Anti-Injunction Act operates as a specific jurisdictional bar to Plaintiff's Claims.

26 U.S.C. § 7421, the Anti-Injunction Act, provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The purpose of the Anti-Injunction Act is the "protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference and to require that the legal right to the disputed funds be determined in a suit for refund." *Bob Jones University v. Simon*, 416 U.S. 725, 736 (1974); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962). So broad is the prohibition against judicial intervention contained in § 7421(a) that it applies not only to the assessment and collection of the tax itself, but also to activities intended to, or which may culminate in, the assessment or collection of taxes. *See Church of Scientology of*

California v. U.S., 920 F.2d 1481, 1484 (9th Cir. 1980) (citing *Blech v. United States*, 595 F.2d 462, 466 (9th Cir. 1979)). The Act is strictly enforced by the courts. *Maxfield v. U.S. Postal Service*, 752 F.2d 433, 434 (9th Cir. 1984). Section 7421 not only prohibits suits to restrain the assessment or collection of tax, but also prevents the Court from granting equitable relief, *Shannon v. United States*, 521 F.2d 56 (9th Cir. 1975), or if the relief requested by a complaint would have the effect of injunctive relief if granted. *See Uptergrove v. United States*, 104 A.F.T.R.2d 2009-5637, *4 (E.D. Cal. 2009). Where the Anti-Injunction Act bars a suit, the court lacks jurisdiction to hear the claim or to grant the relief requested. *See Life Science Church v. Internal Revenue Service*, 525 F. Supp. 399, 404 (N.D. Cal. 1981).

Moreover, the Anti-Injunction Act operates to bar suits seeking injunctions that would impair or restrain the assessment or collection of taxes regardless of whether or not the suit is based on constitutional complaints. *See Bob Jones University*, 416 U.S. at 759 ("[D]ecisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim, as distinct from its probability of success, is of no consequence under the Anti-Injunction Act."); *U. S. v. American Friends Service Committee*, 419 U.S. 7, 11 (1974) ("Even though the remitting of the employees to a refund action may frustrate their chosen method of bearing witness to their religious convictions, a chosen method which they insist is constitutionally protected, the bar of the Anti-Injunction Act is not removed"). The only relevant inquiry is whether or not a complaint seeks injunctive relief and whether that relief, if granted, would restrain the assessment and collection of taxes, and other activities related to tax administration.

In the present case, Plaintiff candidly admits that she does not seek a refund of taxes paid, but rather only seeks an injunction. "Plaintiff . . . does not contend herein that the amount of any determination of tax or penalty by the Service was improper and she does not seek any monetary damages." (Complaint, ¶ 55). Instead, Plaintiff only seeks an injunction requiring the government to reorganize the method it has chosen to assess and collect taxes. (Complaint, Prayer for Injunctive Relief, ¶ 1.a (praying that the United States "put into operation procedures for processing disputes, claims, collections and litigation adverse to taxpayers who refuse to pay taxes because of conscience or religion that are respectful, efficient, transparent and minimally burdensome and that lead to Tax

Court determinations upon taxpayer request")). Because the statutory framework challenged by Plaintiff facilitates the IRS's ability to avoid engaging in legally frivolous and ultimately meritless arguments advanced by taxpayers regardless of their religious or moral beliefs, such relief, if granted, would impermissibly restrain and hamper the IRS's ability to assess and collect taxes.

Because Plaintiff's Complaint seeks injunctive relief affirmatively barred by the Anti-Injunction Act, because Plaintiff cannot establish a waiver of sovereign immunity in this case, and because this Court does not have subject-matter jurisdiction over this action, Plaintiff's Complaint should be dismissed pursuant to FED. R. CIV. P. 12(b)(1).

B. Plaintiff cannot show that an exception to the Anti-Injunction Act applies.

The courts have recognized a narrow judicial exception to the Anti-Injunction Act where the taxpayer shows both (1) that "under no circumstance could the Government ultimately prevail" on the merits and (2) that "equity jurisdiction otherwise exists" because the taxpayer may show the existence of an irreparable injury for which there is no legal remedy. *See Church of Scientology of California*, 920 F.2d at 1485 (citing *Commissioner v. Shapiro*, 424 U.S. 614, 627 (1976)); *see also Williams Packing*, 370 U.S. at 6-8. Here, Plaintiff has made neither showing.

As to the first prong, the Plaintiff cannot establish that the under no circumstance could the Government ultimately prevail on the merits of the action with respect to (1) whether Plaintiff's Free Exercise rights were violated by virtue of the existing framework of tax administration or (2) whether the Religious Freedom Restoration Act requires the relief requested by Plaintiff. In fact, Plaintiff is unlikely to prevail on the merits for either issue.

Though Plaintiff's Complaint is somewhat disjointed in its factual allegations and its prayer for relief, the gravamen of Plaintiff's Complaint is that the statutory scheme enacted by Congress has deprived her of certain procedural opportunities to advance her argument that she should be entitled to decline to pay taxes in the full amounts that she self-reported; she seeks to advance an argument that has no support in the law. Plaintiff acknowledges that her actual federal income tax liabilities are consistent with the amounts she reported on her income tax returns (Forms 1040). (*See* Complaint, ¶ 55). Plaintiff even acknowledges that the IRS provided her with a hearing to determine if she had any valid grounds for contesting the amount of her taxes due. (*See id*. at ¶ 41). However,

Plaintiff appears to take issue with the statutory scheme enacted by Congress in the Tax Relief and Health Care Act of 2006, Pub. L. 109-432, 120 Stat. 2922 (2006) (hereafter "TRHCA") (adding 26 U.S.C. §§ 6330(c)(4)(B), (g) and amending § 6702), which only precludes taxpayers from raising frivolous arguments in the context of an administrative hearing prior to IRS collection action, on the grounds that it has burdened her free exercise of religion.

According to Plaintiff, "Refusing to make tax payments for war, bearing witness on behalf of the Peace Testimony to the Service and to the world and suffering levies and court orders is a practice of the religion of plaintiff Elizabeth Boardman." (Complaint, ¶ 35). Plaintiff asserts that because her religious practice is to refuse to pay taxes until compelled, she "objected on the phone . . . and by letter . . . to any hearing which will result in denial of my right to appeal to a tax court." (*Id.* at ¶ 40). However, Plaintiff has not explained why a denial of an administrative hearing (which she was provided) or her opportunity to appeal to the Tax Court somehow burdened her right to free exercise. Plaintiff simply contends that "she desired to obtain a Tax Court determination," (*id.* at ¶ 39), prior to IRS collection action and "was denied the Tax Court determination she desired," (*id.* at ¶ 40), although she does not allege that she ever filed a petition with the Tax Court and was denied review. Indeed, the bulk of Plaintiff's factual contentions center around the hearing that the IRS actually provided, and it is clear that Plaintiff was not deprived of any process to which she was entitled. As discussed below, Plaintiff was, at most, precluded from having the IRS conduct a collection due process hearing to determine whether her legally frivolous arguments entitled her to relief, but she was not foreclosed from raising such arguments in a suit for refund of taxes.

Instead of directly stating what injury she suffered, Plaintiff concludes that as a result of the IRS's collection efforts and rejection of her contention that she should be entitled to refuse to pay half of her self-reported federal income taxes because she "has suffered from intentionally discriminatory action . . . in violation of the Free Exercise clause of the First Amendment to the United States Constitution." (*Id.* at 53). As explained herein, Plaintiff's contentions are erroneous as a matter of law, and therefore she cannot succeed in demonstrating that under no circumstance could the Government ultimately prevail on the merits of this action.

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1. Congress has legislated a specific statutory scheme for the assessment, determination, and collection of taxes.

Plaintiff challenges a statutory scheme devised by Congress to facilitate the assessment and collection of federal income taxes. As is relevant here, Congress has determined that individuals should self-report their own federal income tax liabilities, and that the Secretary of Treasury is authorized to make assessments of taxes based on those self-reported liabilities. 26 U.S.C. § 6201. Where a taxpayer submits a tax return that form the basis of his or her federal income tax liability, the resulting assessment does not give rise to a "deficiency" that may be contested in the United States Tax Court. *See* 26 U.S.C. § 6211(a) (generally defining a "deficiency" as the amount of tax imposed less any amount that may have been reported by the taxpayer on her return); *see Moore v. Cleveland Ry. Co.*, 108 F.2d 656, 659 (6th Cir. 1940); *Meyer v. C.I.R.*, 97 T.C. 555, 559-60 (1991). The United States Tax Court has jurisdiction to redetermine a deficiency determination made by a delegate of the Secretary of Treasury, but the Tax Court does not have jurisdiction to redetermine any liabilities that are not based on a "deficiency," as defined by 26 U.S.C. § 6211. *See* 26 U.S.C. § 6213; *Clark v. Campbell*, 501 F.2d 108, 116 (5th Cir. 1974); *Meyer*, 97 T.C. at 560. As a result, if a taxpayer self-reports their federal income tax liabilities by reporting their liabilities on a Form 1040, there will be no deficiency. There is no jurisdiction for the Tax Court to hear a challenge to the self-reported taxes. Therefore, Plaintiff's contention that she had "not received any 'notice of deficiency' from the IRS in relation to [her] 2007 taxes," (Complaint, ¶ 37), is not an allegation of any error or deprivation of process by the IRS. A notice of deficiency was not required to be sent to Plaintiff because her liabilities were based on the amounts she reported on her federal income tax return (Form 1040) and submitted to the IRS. *See In re Marine Energy Systems Corp.*, 430 B.R. 348, 354 (D.S.C. 2010) ("a notice of deficiency under § 6212(a) is not required where the unpaid tax is based upon the liability reflected on the taxpayer's own returns."). If a taxpayer wishes to challenge their tax liabilities in the absence of a deficiency, they may sue for refund in district court after fully paying the outstanding taxes. *See* 26 U.S.C. § 7422(a); *Flora v. United States*, 357 U.S. 63 (1958), *aff'd on rehearing*, 362 U.S. 145 (1960)*; Dunn & Black*, 492 F.3d, 1084 1089 (2007) (citing § 7422(a)); *Thomas v. United States*, 755 F.2d 728, 729 (9th Cir.1985)).

Once a delegate of the Secretary of Treasury has made an assessment of taxes and a taxpayer does not pay, the IRS may attempt to collect any outstanding, unpaid taxes through a variety of collection mechanisms, including by levy. *See* 26 U.S.C. § 6331. If any person liable for taxes neglects or refuses to pay his or her income tax liabilities within 10 days after notice and demand, the IRS may levy property of the taxpayer. *Id*. It is well-settled that a judicial proceeding is not constitutionally required prior to levy. *See Towe Antique Ford Foundation v. I.R.S.*, 999 F.2d 1387, 1394 (9th Cir. 1993); *Tavares v. U.S.*, 491 F.2d 725, 726 (9th Cir. 1974) ("'The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained.' . . . 'The right of the United States to exact immediate payment and to relegate the taxpayer to a suit for recovery, is paramount.'" (quoting *Philips v. Commissioner of Internal Revenue*, 283 U.S. 589, 611-612 (1931)). If a taxpayer believes that the amount outstanding was not legally owed, that taxpayer may initiate a lawsuit to contest whether the taxpayer actually owes the assessed amount in a federal district court. *See U.S. v. Rodgers*, 461 U.S. 677, 682-83 (1983) (citing *Bull v. United States*, 295 U.S. 247, 260 (1935)).

Even though a taxpayer is not constitutionally entitled to a *judicial* proceeding prior to levy, Congress has determined that a taxpayer may seek an administrative hearing such as a collection due process or equivalent hearing[3] prior to levy. 26 U.S.C. § 6330(b) provides that the taxpayer must make a timely request for an administrative hearing in response to a levy notice, stating the grounds for the requested hearing. However, Congress has determined that, in order to facilitate the administration of federal tax laws, a taxpayer may not raise, at a hearing, an issue that falls under either 26 U.S.C. §§ 6702(b)(2)(A)(i) or (ii), *i.e.*, a taxpayer may not raise an issue which has been identified as frivolous under § 6702(c) or which reflects a desire to delay or impede the

[3]If a taxpayer fails to properly request a collection due process hearing pursuant to 26 U.S.C. § 6330(b) within the specified 30 day period, the IRS Appeals Office will nevertheless provide an opportunity for a conference called an "equivalent hearing." An equivalent hearing is substantially similar to the collection due process hearing, except that the IRS is not under a statutory obligation to cease enforced collection action during the pendency of the hearing, *see* 26 U.S.C. § 6330(e), and unlike a formal collection due process hearing, a taxpayer will not be entitled to seek judicial review from the Appeals Office determination resulting from an equivalent hearing. *See* 26 U.S.C. § 6330(d)(1).

administration of federal tax laws. *See* 26 U.S.C. § 6330(c)(4)(B). A taxpayer is not precluded from raising such arguments in their request for a hearing, but if the IRS determines that any portion of the taxpayer's request for a hearing falls under §§ 6702(b)(2)(A)(i) or (ii), the IRS may treat that portion as if it were never submitted, and that portion of the request is not subject to further administrative or judicial review prior to levy. 26 U.S.C. § 6330(g). Of course, after the taxes have been paid, a taxpayer may assert whatever arguments they wish in a claim for refund or a refund action pursuant to 26 U.S.C. § 7422(a), as described above.

Section 6702(c) requires the Secretary of Treasury to prescribe, and periodically revise, a list of positions identified as frivolous. In discussing the prospective operation of § 6702, the Senate Finance Committee Report described the types of frivolous objections to the tax laws that would warrant the imposition of a penalty pursuant to § 6702[4] as including an individual claiming "a 'war tax' deduction under which the taxpayer reduces his taxable income or shows a reduced tax due by that individual's estimate of the amount of his taxes going to the Defense Department budget." *See* S. Rep. No. 494, 97th Cong., 2nd Sess. 277, 278, *reprinted in* 1982 U.S. Code Cong. & Ad. News 781, 1024. More generally, a "frivolous" position has been interpreted by the courts as "having no basis in law or fact." *Kahn v. U.S.*, 753 F.2d 1208, 1214 (3d Cir. 1985) ("a claim is frivolous when there is no argument on either the law or the facts to support it"); *Rowe v. United States*, 583 F. Supp. 1516, 1520 (D. Del. 1984), *aff'd*, 749 F.2d 27 (3d Cir. 1984). As a result, because the position advanced by Plaintiff, though undoubtedly heartfelt and sincere, has no legal merit with respect to the tax laws, her position is frivolous and falls within the definition of § 6702(b)(2)(A). *Bradley v. U.S.*, 817 F.2d 1400, 1405 (9th Cir. 1987) ("Clearly the Internal Revenue Code does not permit taxpayers to refuse to pay tax because of their antiwar sentiments. Such a refusal is frivolous.") (citing *Jenney v. U.S.*, 755 F.2d 1384, 1387 (9th Cir. 1985)).

The United States Tax Court has exclusive jurisdiction to review determinations made in connection with an administrative hearing challenging a collection action. *Craig v. C.I.R.*, 119 T.C. 252, 256-57 (2002); 26 U.S.C. § 6330(d)(1). Pursuant to 26 U.S.C. § 6330(b)(1), a taxpayer is not

[4]Even though the type of argument advanced by Plaintiff has been uniformly deemed sufficiently frivolous to uphold a penalty asserted under § 6702, there is no contention that a penalty has been asserted in this case. Section 6702 is applicable here only because it is incorporated into §§ 6330(c)(4)(B) and (g).

entitled to such a hearing if the taxpayer does not provide a proper ground for a hearing, and therefore may not be entitled to a reviewable determination. Regardless of whether the Tax Court has jurisdiction to review a determination that a portion of a request falls under §§ 6330(c)(4)(B) or 6330(g), a taxpayer must first file a petition with the Tax Court in order to invoke Tax Court jurisdiction over his or her claims. *See* 26 U.S.C. § 6330(d)(1); *Craig*, 119 T.C. at 256-57. Plaintiff does not allege that she has attempted to do so.

In the present case, Plaintiff confusingly asserts that she received a collection due process hearing, (*see* Complaint, ¶ 41) but then claims that she was "denied the Tax Court determination she desired," (*id*. at ¶ 40), even though Plaintiff would have been unable to invoke the jurisdiction of the Tax Court without first obtaining a determination in a hearing held pursuant to 26 U.S.C. § 6330. *See* 26 U.S.C. § 6330(d). Plaintiff does not allege that she timely filed a request for a collection due process hearing. Plaintiff also does not allege that any determination by the IRS at her hearing was in any way incorrect or inconsistent with 26 U.S.C. § 6330, nor does Plaintiff allege that she filed a petition to the Tax Court challenging any determination made by the IRS. Plaintiff apparently obtained an equivalent hearing, did not attempt to obtain review in the Tax Court; as a result, it appears as though Plaintiff obtained all of the process to which she was entitled.[5]

At bottom, Plaintiff essentially takes issue with the fact that the IRS had previously determined that her position, *i.e.*, that she is entitled to decline to remit half of her self-determined income tax liabilities on religious, moral, or conscientious grounds, is legally frivolous. However, her conclusory allegation that she believes that "the Service is selecting practitioners of religious war tax resistance for threats, punishment and/or discriminatory bureaucratic action," (*id.* at ¶ 53), is undermined by the fact that the courts, *see, e.g., Bradley v. U.S.*, 817 F.2d at 1405, Congress, *see* S. Rep. No. 494, 97th Cong., 2nd Sess. 277, 278, and the IRS have all determined that *any* argument that one may refuse to pay taxes based on moral or conscientious objections to the military is legally frivolous, regardless of whether or not the belief is grounded in religious doctrine or secular, moral or conscientious reasoning. *See* Rev. Rul. 2005-20 ("*Any claim* that individuals may reduce their

[5]The United States observes that Plaintiff may not have even suffered an injury required for standing to maintain this action if she has not been denied any of the process that she properly requested.

federal tax liability based on objections to the use of the taxes to support government programs or policies is frivolous and has no merit." (emphasis added)); IRS Notice 2010-33, 2010-17 I.R.B. 609 at (9)(a), (g). Simply put, the TRHCA framework does not, and has not, create any distinction between religious adherents and non-religious taxpayers. As a result, TRHCA has not impermissibly deprived Plaintiff of any process or otherwise burdened her right to free exercise of religion, and Plaintiff will not be able to demonstrate that she is entitled to the relief she seeks.

2. The challenged statutory framework does not violate the Free Exercise Clause of the First Amendment.

Plaintiff asserts that the statutory framework under TRHCA unconstitutionally burdens her right to free exercise of religion. Though Plaintiff makes it clear that she objects to the full payment of her self-determined tax liabilities on the basis of her moral and religious objections to the military she does not contend that her federal income taxes were not in fact due and owing in the amounts she self-reported. However, it is not clear how TRHCA precludes her right to religious exercise. Indeed, Plaintiff has apparently exhausted all of the avenues available to her to contest the IRS's collection of her unpaid tax liabilities. Plaintiff does not seem to assert that her religious practice requires that she be afforded treatment to which any other non-religious taxpayer in the same circumstances would not be afforded. Nor is it clear whether Plaintiff would be similarly aggrieved in the absence of TRHCA, that is, if Congress offered no right to an administrative hearing. Indeed, Congress enacted § 6330 in 1998 and did not provide for any collection due process hearing until 1999. P.L. 105-206. Assuming Plaintiff's preferred religious exercise is to state her objection to paying the full amount of her taxes due, she has made that objection clear. Conversely, Plaintiff has not demonstrated that under no circumstances could the government prevail on the merits of this action, if for no other reason than that it is not evident in what way Plaintiff's ability to exercise her religious beliefs has been affected by the statutory scheme, or whether she has even suffered injury at all.

Moreover, Plaintiff's allegations of religious discrimination are erroneous because TRHCA does not distinguish on the basis of religion. *Kahn v. U.S.*, 753 F.2d at 1214 (holding that § 6702 is neutral, requiring only that the taxpayer assert a position that is frivolous, *i.e.*, meritless, from the

perspective of the tax laws, which includes a claimed "war tax credit"). Neutral laws of general application (such as the federal tax laws in question) do not run afoul of the Free Exercise Clause of the First Amendment, even when they somehow burden religious practices. *See Hernandez v. C.I.R.*, 490 U.S. 680, 696 (1989) ("even a substantial burden would be justified by the 'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs'") (quoting *United States v. Lee*, 455 U.S. at 260); *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629-30 (7th Cir. 2000) (rejecting Free Exercise challenge to tax laws which were not restricted in application to religious entities and which provided no indication that they were enacted for the purposes of burdening religious practices on the grounds that they were neutral laws of general application).

In this case, as previously indicated, it is not clear how TRHCA creates any distinction on the basis of religion. Plaintiff seems to take issue with the IRS's position that "[a]ny claim that individuals may reduce their federal tax liability based on objections to the use of the taxes to support government programs or policies is frivolous and has no merit." Rev. Rul. 2005-20, 2005-1 C.B. 821, 2005 IRB LEXIS 108. However, that position is neutral, not conditioned on any religious criteria, and well-supported by an abundance of case law. *See United States v. Lee*, 455 U.S. at 258-60 ("If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief") (citing *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036 (1970)*; Lull v. Commissioner*, 602 F.2d 1166 (4th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980)); *Jenkins v. C.I.R.*, 483 F.3d 90, 91 (2nd Cir. 2007) ("It is well settled that the collection of tax revenues for expenditures that offend the religious beliefs of individual taxpayers does not violate the Free Exercise Clause of the First Amendment. . . . It is similarly well settled that RFRA does not afford a right to avoid payment of taxes for religious reasons."); *Adams v. Commissioner*, 170 F.3d 173, 179 (3rd Cir. 1999) (holding that the government

has a compelling interest in implementing a system of federal taxation system in a uniform, mandatory way, "with Congress determining in the first instance if exemptions are to [be] built into the legislative scheme"); *Schehl v. Commissioner*, 855 F.2d 364, 367 (6th Cir. 1988) ("Alleged vocal opposition to taxes for a particular reason, and refusal to pay taxes, even if all assertions were taken as true … are simply not a basis to challenge an assessment of taxes."); *Nelson v. United States*, 796 F.2d 164 (6th Cir. 1986) (upholding the applicability and constitutionality of a frivolous return penalty imposed against a taxpayer who claimed a deduction based on religious objection to war expenditures); *Randall v. Commissioner*, 733 F.2d 1565, 1567 (11th Cir. 1984) ("[A]rguments involving objections to the Government's military expenditures as a basis for non-payment of taxes have been raised by taxpayers many times, and in each instance the courts have rejected them.").

In addition to the universal support for the IRS's determination that Plaintiff's argument for why she should not have to pay her full tax liabilities is legally frivolous, it is well-established that the statutory framework at issue did not unconstitutionally burden Plaintiff's ability to exercise her beliefs because they are neutral laws of general application, and further a compelling government interest. *See Bradley v. U.S.*, 817 F.2d at 1405 ("a first amendment interest can be overridden by an important government interest unrelated to the suppression of free expression. . . . In the context of section 6702, the Government's compelling interest in maintaining a sound and administratively workable tax system justifies the alleged restriction on free expression."); *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 630 (7th Cir. 2000); *accord U.S. v. Philadelphia Yearly Meeting of the Religious Society of Friends*, 322 F. Supp. 2d 603, 610-12 (E.D. Pa. 2004) (finding that a levy imposed a substantial burden on the Free Exercise rights of the source of funds levied, not the taxpayer herself); *see also United States v. Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."). Moreover, the "Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 700 (1986); *Browne v. U.S.*, 176 F.3d 25, 26 (2d Cir. 1999) (holding that taxpayers "are not entitled to

force the IRS to levy the taxes due at additional time and expense").

Plaintiff acknowledges that her self-reported federal income tax liabilities were properly assessed and would be collected from her by means including levy, seizure, or court order. (*See* Complaint, ¶ 35, 55). Plaintiff does not appear to dispute that those taxes are owed or that the IRS was legally entitled to collect from her. Instead, Plaintiff simply asserts that the fact that the statutory structure establishes no right to raise her arguments prior to collection in a collection due process hearing, and then to seek review in Tax Court, constitutes "discriminatory bureaucratic action." (*Id*. at ¶ 53). However, Plaintiff's treatment does not result from her religious beliefs; rather, Plaintiff's treatment results from her assertion of a position that is deemed frivolous in the eyes of the tax law. *See Wall v. U.S.*, 756 F.2d 52, 53 (8th Cir. 1985) ("the courts have clearly held that taxpayers assessed a penalty under section 6702 for claiming a "war tax deduction" are not unlawfully penalized for expressing their moral or religious beliefs, but are penalized because they file returns containing substantially incorrect self-assessments based on a clearly unallowable credit"). Thus, Plaintiff cannot trace the challenged structure of tax administration to a violation the First Amendment because she is only precluded from raising an argument in an administrative hearing if it has been determined to be legally frivolous, irrespective of the argument's religious content or source and meanwhile retains the right to file an administrative claim for refund and then a lawsuit in district court seeking a refund. The statutory structure contains only religiously neutral laws of general application, and so Plaintiff has not been deprived of her right to the free exercise of religion. Therefore, for purposes of determining whether an exception to the Anti-Injunction Act applies, Plaintiff's contentions do not demonstrate that under no circumstances could the United States prevail on the merits with respect to any claims related to her Free Exercise rights.

3. None of the challenged practices violate the Religious Freedom Restoration Act.

Even if TRHCA or the challenged method of tax administration did substantially burden Plaintiff's rights to free exercise of religion, which they do not, Plaintiff still cannot show that the United States would not prevail under RFRA. Under RFRA, laws of neutral application that substantially burden the free exercise of religion are nonetheless constitutional where the burden

furthers a compelling government interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1. Cases decided both before and after RFRA have uniformly held that maintaining an efficient, uniform, and mandatory system of tax administration is a compelling government interest that justifies even a substantial burden on a taxpayer's free exercise rights. *See Jenkins v. C.I.R.*, 483 F.3d at 92 (holding that it is "well settled that RFRA does not afford a right to avoid payment of taxes for religious reasons") (citing *Browne v. United States*, 176 F.3d at 26); *Adams v. Comm'r*, 170 F.3d 173, 176 (3d Cir.1999) (same)*; United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 629-30 (7th Cir. 2000); *Droz v. C.I.R.*, 48 F.3d 1120, 1122-24 (9th Cir. 1995) (holding that *United States v. Lee*, 455 U.S. 252 (1982) controlled for post-RFRA free exercise challenges to tax statutes of general application, and that a statute or regulation that did not); *Miller v. Commissioner*, 114 T.C. 511, 517 (2000). Moreover, facilitating the efficient administration, assessment and collection of federal income taxes is a compelling government interest. *See Jolly v. U.S.*, 764 F.2d 642, 646 (9th Cir. 1985) ("The government obviously has a powerful interest in the prompt collection of revenue," (internal quotation marks omitted)); *Adams v. Comm'r*, 170 F.3d at 176; *Philadelphia Yearly Meeting*, 322 F. Supp. 2d at 610. This compelling interest encompasses both the imposition of taxes and the administration of the tax system. *See Miller*, 114 T.C. at 517. That compelling interest in efficient tax administration also encompasses the interest to minimize differential treatment that might otherwise result from the assertion of specific religious beliefs. *Hernandez v. C.I.R.*, 490 U.S. at 699-700 (1989) ("*Lee* establishes that even a substantial burden would be justified by the 'broad public interest in maintaining a sound tax system,' free of 'myriad exceptions flowing from a wide variety of religious beliefs.'"); *United States v. Lee*, 455 U.S. at 260 ("The tax system could not function if denominations were allowed to challenge the tax system" on the ground that it operated "in a manner that violates their religious belief."). Indeed, not only is uniformity a compelling interest, courts have stated that uniformity satisfies the least restrictive means requirement: "The least restrictive means of furthering a compelling interest in the collection of taxes . . . is in fact, to implement that system in a uniform, mandatory way, with Congress determining in the first instance if exemptions are to built into the legislative scheme." *Adams v.*

Comm'r, 170 F.3d.

In the present case, Plaintiff challenges the statutory structure that allows the IRS to decline to entertain arguments that have been identified as frivolous or reflect a desire to delay or impede the administration of federal tax laws. *See* 26 U.S.C. §§ 6330(c)(4)(B), (g), 6702(b)(2)(A). The challenged statutory scheme furthers the government's compelling interest in facilitating the assessment and collection of federal income taxes in an efficient and uniform manner. *See Thornberry v. C.I.R.*, 136 T.C. 356, 365-66 (2011) (examining the legislative history behind TRCHA); S. Rep. 109–336, at 49–50 (2006) ("frivolous returns and submissions consume resources at the IRS and in the courts that can better be utilized in resolving legitimate disputes with taxpayers. Expanding the scope of the penalty to cover all taxpayers and tax returns promotes fairness in the tax system. The Committee believes that adopting this provision will improve effective tax administration."); *Bradley v. U.S.*, 817 F.2d at 1403 ("In the context of section 6702, the Government's compelling interest in maintaining a sound and administratively workable tax system justifies the alleged restriction on free expression."); *Franklet v. U.S.*, 578 F.Supp. 1552, 1556 (N.D. Cal. 1984) *aff'd*, 761 F.2d 529, 530 (9th Cir. 1985) (rejecting the contention that penalties imposed under § 6702 for claiming "war tax deductions" impermissibly burdens First Amendment right to the free exercise of religion on the grounds that "the necessities of revenue collection under enactments of general applicability raise governmental interests sufficiently compelling to outweigh the free exercise rights of those who find the tax objectionable on bona fide religious grounds"); *accord Hernandez v. C.I.R.*, 490 U.S. at 699-700; *United States v. Lee*, 455 U.S. at 620.

In passing TRHCA, Congress was aware that an inordinate amount of time and money was spent by the IRS in dealing with frivolous positions advanced by taxpayers, especially in the context of administrative hearings. *See* Progress Report on the IRS Restructuring and Reform Act of 1998, Hearings Before the Joint Economic Committee, 107th Congress, 2nd Sess., May 14, 2002 (statement of Commissioner of Internal Revenue Charles O. Rossotti). As a result, Congress curtailed the arguments which may be heard in an administrative hearing, but did not preclude a taxpayer from raising the argument in a claim for refund or lawsuit in district court. Instead, TRHCA

only allows the IRS to decline to entertain arguments at a collection due process hearing that have no basis in law or fact, which includes the argument Plaintiff seeks to advance. *See Bradley*, 817 F.2d at 1403 ("We have repeatedly approved the assessment of a section 6702 penalty for purported tax returns which claim 'conscience' or 'war tax' deductions"); *Jenkins v. C.I.R.*, 483 F.3d at 92; *Browne v. United States*, 176 F.3d 25, 26 (2d Cir.1999); *First v. Comm'r*, 547 F.2d 45, 45-46 (7th Cir.1976).

By eliminating as grounds for a hearing only arguments deemed legally frivolous in a uniform and non-discriminatory manner (except as to whether the argument itself is frivolous), the statutory structure under TRHCA is the least restrictive means of furthering the government's compelling interest in a uniform and efficient system of tax administration. *See Droz*, 48 F.3d at 1124 (holding that "the government's compelling interest . . . would be threatened by granting "myriad exceptions"); *Philadelphia Yearly Meeting*, 322 F.Supp.2d at 610 (upholding levy that substantially burdened Free Exercise rights of plaintiffs on the grounds that it was the least restrictive means of furthering the government's compelling interest "in quickly and inexpensively discharging [the taxpayer's] deficiency"). Precluding taxpayers from advancing legally frivolous arguments in a hearing is an efficient and non-restrictive means of assessing and collecting taxes from taxpayers generally or religious taxpayers specifically. *See Packard v. U.S.*, 7 F. Supp. 2d, 143, 147 (D. Conn. 1998) (holding that "the Government cannot be compelled to resort to cumbersome methods to encourage compliance"). Because a taxpayer may challenge these tax liabilities on the merits after the taxes have been collected in an administrative claim for refund or suit in federal court, this statutory scheme furthers the compelling government interest in efficient tax administration by the least restrictive means. Therefore, even if Plaintiff's rights to free exercise were substantially burdened, the government's compelling interest in efficient, uniform tax administration precludes Plaintiff from obtaining any differential treatment, even under RFRA.

As a result, Plaintiff cannot demonstrate that under no circumstances could the United States succeed on the merits of this action, for purposes of establishing an exception to the Anti-Injunction Act. Thus, because Plaintiff is unlikely to succeed on the merits, let alone show that the United

States cannot possibly succeed on the merits, Plaintiff cannot satisfy the first prong of the judicial exception to the Anti-Injunction Act, and is therefore unable to overcome the jurisdictional bar imposed by the Anti-Injunction Act.

4. Plaintiff has an adequate remedy at law.

As to the second prong of the judicial exception to the Anti-Injunction Act, Plaintiff has made no showing that equity jurisdiction exists by showing that she lacks an adequate remedy at law. *See Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 313 (9th Cir. 1981). Plaintiff has an adequate remedy at law. Plaintiff must pay her taxes, and she may then file an administrative claim for refund of taxes she believes she should not be required to pay, and then sue for refund in a district court or the Court of Federal Claims. *See* 26 U.S.C. § 7422(a); *Thomas v. United States*, 755 F.2d 728, 729 (9th Cir. 1985)). A refund suit in court is the method Congress has designated for challenges to the constitutionality of the requirement to pay taxes, not the IRS administrative process, which has been designed to facilitate the prompt and efficient collection of taxes.

Therefore, because Plaintiff cannot satisfy either prong of the judicial exception to the Anti-Injunction Act, Plaintiff cannot establish a waiver of sovereign immunity and cannot show that this Court may exercise subject-matter jurisdiction over the Complaint.

II. This Action Should Be Dismissed Pursuant to FED. R. CIV. P. 12(b)(6) Because Plaintiff Has Failed to State a Claim Upon Which Relief May be Granted.

For the same reasons more thoroughly discussed *supra* in sections I.B.1 through I.B.3, Plaintiff fails to state a claim upon which relief may be granted, even if she hadn't failed to establish that this Court may exercise subject-matter jurisdiction over her claims. Plaintiff's claims should fail because the overwhelming weight of authority has held that the government's interest in maintaining a uniform, mandatory system of taxation is compelling, and sufficient to defeat any claim of a substantial burden on Free Exercise under either the First Amendment or RFRA. *See, e.g., Jenkins v. C.I.R.*, 483 F.3d at 91 *Adams v. Commissioner*, 170 F.3d 173, 179 (3rd Cir. 1999) (holding that the government has a compelling interest in implementing a system of federal taxation system in a uniform, mandatory way, "with Congress determining in the first instance if exemptions are to [be] built into the legislative scheme"); *Indianapolis Baptist Temple*, 224 F.3d at 630 (citing *Employment*

Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 876-77 (1990)) (holding that tax laws not conditioned on religious affiliation are neutral laws of general application that do not violate the Free Exercise Clause). Moreover, this compelling interest extends to both the imposition of taxes and to the administration of the tax system. *See Miller v. Commissioner*, 114 T.C. at 517 (finding it unnecessary to determine whether the plaintiffs' rights to free exercise of religion had been substantially burdened in light of the compelling government interest in administering the tax system). As a result, the United States may determine how to organize its own internal procedures in order to best implement the uniform, mandatory system of taxation, including by declining to respond to taxpayers that advance frivolous legal arguments.

Plaintiff claims that she "does not invoke the First Amendment as justification for her refusal to pay the full amount of income taxes" and that she "is not challenging the tax system through her practice of religious war tax resistance." (*See* Complaint, ¶ 34). However, Plaintiff's claims are belied by her prayer for relief, which is that the Government should be compelled to create exceptions to this uniform, mandatory system of taxation in order to accommodate her particular religious beliefs, even though they have no bearing on her income tax liabilities or the Government's interest in collecting them. Because the law is clear that the "free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens," *Bowen v. Roy*, 476 U.S. at 700, Plaintiff fails to state a claim upon which relief may be granted.

CONCLUSION

Based on the foregoing, Plaintiff has failed to establish that this Court may exercise subject-matter jurisdiction over the Complaint because the United States has not waived sovereign immunity in this case and because the Anti-Injunction Act affirmatively bars suits for injunctive relief that would restrain the assessment and collection of taxes. As a result, this action should be dismissed pursuant to FED. R. CIV. P. 12(b)(1). In the alternative, Plaintiff has failed to state a claim upon which relief may be granted because the United States has a compelling interest in a uniform, mandatory, efficient system of taxation, and Plaintiff may not compel the United States to create

exceptions to this system. As a result, the Complaint should be dismissed pursuant to FED. R. CIV. P. 12(b)(6).

Respectfully submitted this 29th day of June, 2012.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this 29th day of June, 2012, I filed the foregoing **UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system, which sent notice of the foregoing via e-mail to:

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