

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEP 15 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRUCE A. NORVELL,

Plaintiff-Appellant,

v.

SECRETARY OF THE TREASURY;
UNITED STATES INTERNAL REVENUE
SERVICE,

Defendants-Appellees.

No. 19-35156

D.C. No. 1:18-cv-00251-BLW

MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Submitted September 8, 2020**

Before: TASHIMA, SILVERMAN, and OWENS, Circuit Judges.

Bruce A. Norvell appeals pro se from the district court's judgment dismissing for lack of subject matter jurisdiction his action for declaratory and injunctive relief arising from his submissions to the Internal Revenue Service's

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Whistleblower Office (“IRS”). We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Federal Rule of Civil Procedure 12(b)(1).

Rattlesnake Coal. v. U.S. EPA, 509 F.3d 1095, 1100 (9th Cir. 2007). We affirm.

The district court properly dismissed Norvell’s action arising from 26 U.S.C. § 7623 because Norvell failed to show that the Administrative Procedure Act’s (“APA”) waiver of sovereign immunity applies to his claims. *See Int’l Bhd. of Teamsters v. U.S. Dep’t of Transp.*, 861 F.3d 944, 952 (9th Cir. 2017) (“Section 704 of the APA provides for judicial review of ‘[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.’” (quoting 5 U.S.C. § 704)); 26 U.S.C. § 7623(b)(4) (IRS’s determination regarding an award under § 7623(b)(1), (2), or (3) may be appealed to the Tax Court, which has jurisdiction with respect to such matter). However, a dismissal for lack of subject matter jurisdiction should be without prejudice. *See Kelly v. Fleetwood Enters., Inc.*, 377 F.3d 1034, 1036 (9th Cir. 2004). We affirm the dismissal and instruct the district court to amend the judgment to reflect that the dismissal of the action is without prejudice.

We reject as without merit Norvell’s contention that the IRS’s disposition of his March 21, 2018 application was not a “determination” within the meaning of § 7623(b)(4).

We do not consider matters not specifically and distinctly raised and argued

in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED with instructions to amend the judgment.