

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 23 2022

FOR THE NINTH CIRCUIT

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

JEFFREY ALAN RISCHE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 21-35655

D.C. No. 2:20-cv-00033-BAT

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Brian Tsuchida, Magistrate Judge, Presiding**

Submitted November 15, 2022***

Before: CANBY, CALLAHAN, and BADE, Circuit Judges.

Jeffrey Alan Rische appeals pro se from the district court's summary judgment in his action arising from penalties assessed against him under 26 U.S.C. § 6702 for the 2009-2011 tax years, and Rische's demand for a refund of his 2017

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

** The parties consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c).

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

federal income tax. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's ruling on cross-motions for summary judgment. *Hamby v. Hammond*, 821 F.3d 1085, 1090 (9th Cir. 2016). We affirm.

The district court properly granted summary judgment for the United States in connection with the assessed penalties because Rische failed to raise a genuine dispute of material fact as to whether the penalty assessments were invalid. *See* 26 U.S.C. § 6702(a) (providing for a civil penalty of \$5,000 for filing a frivolous tax return); *Olson v. United States*, 760 F.2d 1003, 1005 (9th Cir. 1985) (explaining that a Form 1040 filed to obtain a refund is a tax return and that the IRS may assess frivolous return penalties when a tax return is premised on a position that is frivolous under 26 U.S.C. § 6702).

The district court properly granted summary judgment for the United States in connection with Rische's claimed income tax refund for tax year 2017 because Rische failed to raise a genuine dispute of material fact as to whether he was entitled to a refund in excess of the amount calculated by the government. *See Stead v. United States*, 419 F.3d 944, 947 (9th Cir. 2005) (stating that in a tax refund suit the taxpayer bears the burden of proving the amount the taxpayer is entitled to recover).

The district court properly dismissed for lack of jurisdiction Rische's claim for a refund of a frivolous return penalty imposed for a purported return for 2012

because the penalty was not paid in full. *See Hutchinson v. United States*, 677 F.2d 1322, 1325 (9th Cir. 1982) (“Full satisfaction of the income tax assessment upon which refund is sought is a jurisdictional prerequisite to maintenance of a suit for refund in the district court.” (citation and internal quotation marks omitted)).

Contrary to Rische’s contention, the district court was not required to allow Rische to present grounds for recovery in this action that varied substantially from the bases for refund that he previously set forth. *See Boyd v. United States*, 762 F.2d 1369, 1372 (9th Cir. 1985) (“If the claim on its face does not call for investigation of a question, the taxpayer may not later raise that question in a refund suit.”).

We reject as without merit Rische’s contentions that the district court violated his constitutional rights or was biased against him.

AFFIRMED.