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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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GRANT A HOLYOAK, et al.,

No. CV 08-08168-PHX-MHM

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Plaintiff,

**ORDER**

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vs.

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UNITED STATES OF AMERICA, et al.,

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Defendants.

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This matter comes before the Court on the United States’ Motion to Dismiss and Alternative Motion for Summary Judgment. (Dkt. #9). The United States (“Defendant”) seeks dismissal of Plaintiffs’ Complaint because Plaintiffs have not alleged a claim under any statute or law that waives Defendant’s sovereign immunity or gives the district court subject matter jurisdiction to hear the case.

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**I. FACTUAL BACKGROUND**

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Plaintiffs have not filed a valid federal income tax return since 1994. (Dkt. #9, p. 1). As a result, Plaintiffs owe a balance to the Internal Revenue Service (“IRS”) for unpaid federal income tax as well as certain civil penalties that have arisen due to non-payment. (Dkt. #9, p. 2). The IRS filed Notices of Federal Tax Lien on Plaintiffs’ real and personal property. Id. As of March 3, 2009, Plaintiffs still owed the IRS approximately \$200,000 for taxes between the years of 1994 and 1996 and \$50,000 for

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1 taxes from 1997 through 2002. Id. On December 12, 2008 Plaintiffs filed their  
2 Complaint. (Dkt. #1). In his Amended Complaint, Plaintiff seeks injunctive and  
3 declaratory relief to prevent the IRS from collecting funds the IRS claims Plaintiff owes,  
4 as well as damages from the IRS for a number of tax-related claims. In response, on  
5 April 8, 2009, Defendant filed a Motion to Dismiss Complaint and Alternative Motion for  
6 Summary Judgment. (Dkt. #9). This motion is addressed below.

## 7 **II. STANDARD OF REVIEW**

8 “A federal court is presumed to lack jurisdiction in a particular case unless the  
9 contrary affirmatively appears.” Stock W., Inc.v. Confederate Tribes of Colville  
10 Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989). Plaintiffs assert a claim that would  
11 result in a restraint on the federal government’s tax collection efforts; therefore, this is a  
12 suit against the sovereign. See Dugan v. Rank, 372 U.S. 609, 620 (1962). To establish  
13 subject matter jurisdiction in an action against the United States there must be (1)  
14 “statutory authority granting subject matter jurisdiction,” and (2) “a waiver of sovereign  
15 immunity.” Alvarado v. Table Mountain Rancheria, 509 F.3d 1016 (9th Cir. 2007)  
16 (quoting Alford v. United States, 934 F.2d 229, 231 (9th Cir. 1991)); see also United  
17 States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003) (“Jurisdiction over any  
18 suit against the Government requires a clear statement from the United States waiving  
19 sovereign immunity, . . . together with a claim falling within the terms of the waiver[.]”)  
20 (citations omitted). Waiver of sovereign immunity “cannot be implied, but must be  
21 unequivocally expressed.” Dunn & Black P.S., v. U.S., 492 F.3d 1084, 1088 (9th Cir.  
22 2007) (quoting Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985)). Unless  
23 Plaintiffs can show that Defendant did, in fact, unequivocally waive sovereign immunity,  
24 this action must be dismissed. See Id.

25 In addition to these jurisdictional issues, a case may be dismissed if it fails to state  
26 a claim upon which relief can be granted. Big Bear Lodging Ass’n v. Snow Summit Inc.,  
27 182 F.3d 1096, 1101 (9th Cir. 1999); Fed. R. Civ. P. 12(b)(6). Upon consideration of a  
28 motion to dismiss the court must view all allegations in the complaint in the light most

1 favorable to the non-moving party, and all material allegations must be accepted as true.  
2 Id. Pursuant to this rule, dismissal is appropriate *only* if its clear that no relief could be  
3 given under any circumstances, or set of facts, with the allegations set forth in the  
4 complaint. Id. A complaint may only be dismissed without leave to amend when it is  
5 clear that the complaint cannot be saved by further changes. Id.

#### 6 **IV. ANALYSIS**

7 Defendant's Motion to Dismiss challenges Plaintiffs' Complaint in several ways.  
8 First, Defendant argues that Plaintiffs' claims seeking injunctive and declaratory relief are  
9 barred. Second, Defendant argues that it has not waived its sovereign immunity. Third,  
10 Defendant argues that Plaintiffs' due process right to an administrative hearing have not  
11 been violated. Fourth, Defendant argues that the statute of limitations has not expired on  
12 its collection activities as Plaintiffs' claim. Fifth, Defendant argues that Plaintiffs do not  
13 have a right of action based on their claim that the assessed tax penalties were improper.  
14 Finally, Defendant argues that Plaintiffs' 26 U.S.C. § 6331 claims are frivolous and  
15 meritless.

##### 16 **A. Injunctive and Declaratory Relief Claims**

17 Plaintiffs request injunctive and declaratory relief in Counts II, III, and V of the  
18 Complaint. (Dkt. #1, pp. 9-12). The Anti-Injunction Act ("AIA") precludes a court from  
19 exercising jurisdiction to enjoin the IRS from tax collection activity. See 26 U.S.C. §  
20 7421. The AIA also precludes suits "for the purpose of restraining the assessment or  
21 collection of any tax." Id. In Arford v. United States, 934 F.2d 229 (9th Cir. 1991), the  
22 Ninth Circuit stated that the AIA "is a further bar to suit against the government in federal  
23 court on the taxpayers' claim that they *do not* owe taxes: the government cannot be  
24 enjoined from the collection of taxes unless the taxpayer timely proceeds through the  
25 administrative process in tax court." Id. at 231 n.3.

26 There is one notable statutory exception to the AIA. This exception permits suits  
27 to enjoin a levy in cases where the IRS did not send the taxpayer a properly issued Notice  
28 of Deficiency prior to the levy action. See 26 U.S.C. § 6213(a). This exception does not

1 apply because the Notice of Deficiencies were properly filed. (Dkt. #9, Exhs. A-E). The  
2 evidence submitted shows that the IRS sent Notices of Deficiency to Plaintiffs' known  
3 address as required by statute. Id.; see 26 U.S.C. § 6212. The "4340" forms submitted by  
4 Defendant, (Dkt. #9, Exhs. A-E), combined with the mailing records, provide clear proof  
5 that the assessments were made. See Hughes v. United States, 953 F.2d 531, 535 (9th  
6 Cir. 1992).

7 The Supreme Court recognizes a very narrow judicial exception to the AIA: relief  
8 may nevertheless be granted if "(1) it is clear that under no circumstances could the  
9 government ultimately prevail and (2) equity jurisdiction otherwise exists, i.e., the  
10 taxpayer shows that he would otherwise suffer irreparable injury." Church of Scientology  
11 of Cal. v. United States, 920 F.2d 1481, 1485 (9th Cir. 1990) (citing Comm'r v. Shapiro,  
12 424 U.S. 614, 627 (1976)) (internal quotations and citation omitted). Under the first  
13 prong "the district court must determine the possibility of success of the Government's  
14 assessment based upon the information available to the court at the time of the filing of  
15 the action." Church of Scientology, 920, F.2d at 1485-1486. "Only if it is then manifest,  
16 under the most liberal view of the law and the facts, that the government cannot prove its  
17 claim" is the first part of the test satisfied." Id. at 1486 (citing Schildcrout v. McKeever,  
18 580 F.2d 994, 997 (9th Cir. 1978). In the second prong of the test, "[t]he taxpayer must  
19 show that he has no adequate remedy at law and that the denial of relief would cause him  
20 immediate, irreparable harm." Id. (Quoting Jensen v. IRS, 835 F.2d 196, 198 (9th Cir.  
21 1987)) (internal quotations and citations omitted).

22 In the present case, Plaintiffs have not established either prong of the Church of  
23 Scientology test. Plaintiffs have failed to meet their burden of showing that the  
24 Government's claim is baseless either by arguing that the government failed to make a  
25 valid assessment or by showing the IRS could never succeed on the merits. See Hughes,  
26 953 at 535. This alone is sufficient to defeat jurisdiction. Id. However, it is also clear  
27 that Plaintiffs have not met the second prong of the test. Plaintiffs failed to argue that  
28 they would suffer irreparable injury without the requested injunctive relief. Id. It is

1 evident that Plaintiffs are unable to establish either prong of this test. Plaintiffs' request  
2 for injunctive and declaratory relief in Counts II, III, and V are therefore dismissed for  
3 lack for subject matter jurisdiction.

4 **B. Sovereign Immunity**

5 In Count I of the Complaint, Plaintiffs argue that Defendant waived sovereign  
6 immunity under 28 U.S.C. § 2410(a). (Dkt. #1, pp. 7-9). Section 2410 provides that

7 the United States may be named a party in any civil action or suit in any  
8 district court, or in any State court having jurisdiction of the subject matter-  
(1) to quiet title to . . . real or personal property on which the United States  
9 has or claims a mortgage or other lien

10 28 U.S.C. § 2410. However, this statute may not be used to attack the merits of a tax  
11 assessment: "the taxpayer may only contest the procedural validity of a tax lien." Elias v.  
12 Connett, 908 F.2d 521, 527 (9th Cir. 1990). "A taxpayer may not use a section 2410  
13 action to collaterally attack the merits of an assessment." Id. The law is clear that  
14 Defendant only waives sovereign immunity under § 2410 if the suit challenges the  
15 procedural validity of a lien.

16 While Plaintiffs allege that the Notices of Federal Tax Lien and the Notices of  
17 Levy are not procedurally valid because the IRS failed to issue notices of deficiency,  
18 (Dkt. #1, pp. 8-9),<sup>1</sup> their allegations that the IRS failed to properly provide notices of  
19 deficiencies is a determination on the merits rather than a procedural issue. See Huff v.  
20 United States, 10 F.3d 1440, 1445 (9th Cir. 1991) (Courts will only permit actions under  
21 § 2410 if they can be construed as quiet title actions rather than on the "merits of the  
22 underlying tax assessments."). Therefore, this claim is not actionable under § 2410. As a  
23 result, the United States did not waive sovereign immunity and Count I of the Complaint  
24 is dismissed for lack of subject matter jurisdiction.

25 Plaintiffs also claim that 5 U.S.C. §§ 702 and 706 of the Administrative  
26 Procedures Act ("APA") waives Defendant's sovereign immunity. (Dkt. #1, pp. 14-16)

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27 <sup>1</sup> Specifically, the Complaint alleges that the notices did not meet the requirements  
28 set forth in 26 U.S.C. §§ 6212, and 6213. (Dkt. #1, p. 9).

1 (Count VIII). The § 702 claim has been directly contradicted by the Ninth Circuit. See  
2 Hughes, 953 F.2d at 537 (explaining that the AIA remains unchanged by § 702 and that  
3 the APA does not supersede the Anti-Injunction Act). Courts have also consistently  
4 dismissed Plaintiffs’ § 706 claim. See Lonsdale v. U.S., 919 F.2d 1440, 1444 (10th Cir.  
5 1990) (explaining that § 706 does not deal with sovereign immunity or waiver). Since  
6 there are no exceptions to the AIA in the Complaint, the APA does not provide a basis for  
7 jurisdiction in this instance. In Regards to Plaintiffs’ remaining waiver arguments, “a  
8 court need not elaborate or give reasons for rejecting claims which it regards as frivolous  
9 or totally without merit.” Sumner v. Mata, 449 U.S. 539, 548 (1984).

10 **C. Due Process Claims Arising Under 26 U.S.C. § 6330(a)(1)**

11 In Count IV of the Complaint, Plaintiffs argue that the IRS did not comply with 26  
12 U.S.C. § 6330(a)(1). (Dkt. #1 at 11). Section 6330 states “[n]o levy may be made on any  
13 property or right to property of any person unless the Secretary has notified such person  
14 in writing of their right to a hearing under this section before such levy is made.”  
15 Plaintiffs’ appear to argue that they did not have notice that they were entitled to a  
16 hearing. This argument is contradicted by the exhibits, (Exhs. F-N), which show that  
17 Plaintiffs requested a hearing, participated in the hearing and received notification of the  
18 outcome of the hearing. Guthrie v. Sawyer, 970 F.2d 733, 737-38 (10th Cir. 1992)  
19 (relying on similar evidence to hold that notice was adequate.) Plaintiffs’ right to due  
20 process have not been violated and Count IV of the Complaint is dismissed.

21 **D. Statute of Limitations**

22 Plaintiffs assert that the statute of limitations has expired on Defendant’s collection  
23 activities under the 26 U.S.C. § 6502. (Dkt. #1, p. 13). However, it is evident that the  
24 statute of limitations did not, and has not, expired in this case. Under § 6502, the statute  
25 of limitations on bringing a levy expires ten years after the assessment. In this case the  
26 first assessment occurred in July, 1999. (Dkt. #9, Exh. F). As a result, Defendant had  
27 until July 2009 to collect the taxes. Furthermore, the statute of limitations was suspended  
28 for approximately ten months while Plaintiffs’ collection due process hearing was

1 pending as per 26 U.S.C. § 6331(i)(5).<sup>2</sup> (Dkt. #9, Exh. F). Because of this, the relevant  
2 statute of limitation does not expire until April, 2010. Based on the 10 year limitations  
3 and its subsequent suspension, the statute of limitation has not expired, and Count VII of  
4 the Complaint is dismissed.

5 **E. 26 U.S.C. § 6751 Requirements**

6 Plaintiffs argue that Defendant did not comply with the requirements set forth in  
7 26 U.S.C. § 6751.<sup>3</sup> (Dkt. #1, pp. 13-14) (Count VII). Plaintiffs argue that the statute  
8 requires IRS employees to have written approval from their supervisor before they assess  
9 filing penalties under U.S.C. § 6702. Plaintiffs are wrong to apply § 6751 in this case.  
10 Since the penalty is automatic and for a fixed amount, approval of the assessment by a  
11 supervisor is not required. Borchardt v. C.I.R., 338 F.Supp.2d 1040, 1044 (D. Minn.  
12 2004) (internal citation omitted). Accordingly, Count VII of the Complaint is dismissed.

13 **F. 26 U.S.C. § 6331**

14 Plaintiffs contend in Count VIII of the Complaint (Dkt. #1, pp. 15-16) that the  
15 language of 26 U.S.C. § 6331 provides that the IRS cannot levy taxes because neither  
16 Plaintiff is an “officer, employee, or elected official, of the United States, the District of  
17 Columbia, or any agency or instrumentality . . . .” (citing 26 U.S.C. § 6331). However,  
18 this reading of the statute “ignores the first sentence of section 6331(a), which gives the  
19 statute its broad scope and clearly states that it applies to *all* property of *any* person liable  
20 to the IRS.”<sup>4</sup> Maisano v. Welcher, 940 F.2d 499, 502 (9th Cir.1991). The Supreme Court  
21 has said that the IRS may levy “all property and rights to property belonging to a person  
22 who ‘neglects or refuses to pay any tax or on which there is a lien . . . for the payment of  
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24 <sup>2</sup> Hearing was pending between February and November 2005. (Dkt. #9, Exh. F).

25 <sup>3</sup> 26 U.S.C. § 6751 deals with penalty assessment procedural requirements.

26 <sup>4</sup> 26 U.S.C. § 6331(a) provides in pertinent part “[i]f any person liable to pay any tax  
27 neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful  
28 for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the  
expenses of the levy) by levy upon all property and rights to property.”

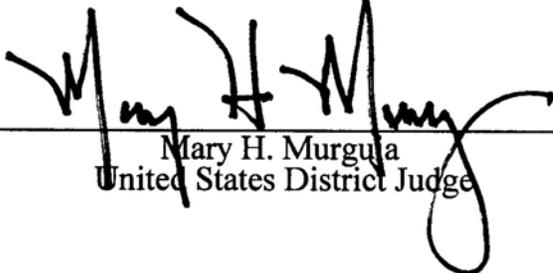
1 such tax.” G.M. Leasing Corp. v. U. S., 429 U.S. 338, 349 (1977) (quoting 26 U.S.C. §  
2 6331). Count VII of Plaintiffs’ Complaint is thus meritless and is dismissed.

3 **Accordingly,**

4 **IT IS HEREBY ORDERED** Defendant’s Motion to Dismiss is GRANTED. (Dkt.  
5 #9).

6 **IT IS FURTHER ORDERED** directing the Clerk of the Court to enter judgment  
7 accordingly.

8 DATED this 11<sup>th</sup> day of September, 2009.

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12 Mary H. Murgula  
13 United States District Judge  
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